REPORTABLE

CASE NO: SA 37/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PROGRESS KENYOKA MUNUMA	**First Appellant**
SHINE SAMULANDELA SAMULANDELA	**Second Appellant**
MANUEL MANEPELO MAKENDANO	**Third Appellant**
ALEX SINJABATA MUSHAKWA	**Fourth Appellant**
DIAMOND SAMUNZALA SALUFU	**Fifth Appellant**
HOSTER SIMASIKU NTOMBO	**Sixth Appellant**
BOSTER MUBUYAETA SAMUELE	**Seventh Appellant**
JOHN MAZILA TEMBWE	**Eighth Appellant**

and

THE STATE	**Respondent**

Coram: SHIVUTE CJ, DAMASEB DCJ, SMUTS JA, CHOMBA AJA and MOKGORO AJA

Heard: 1 July 2016

Delivered: 22 August 2016

APPEAL JUDGMENT

DAMASEB DCJ: (SHIVUTE CJ, SMUTS JA, CHOMBA AJA and MOKGORO AJA concurring)

[1] The present is an appeal, with the leave of this court, against the judgment and order of the High Court dismissing a special plea of jurisdiction in a criminal case. In the court below, the appellants challenged that court's jurisdiction on the ground that they were unlawfully made subject of its jurisdiction.

[2] The special plea in terms of s 106 (1)(*f*) of the Criminal Procedure Act 51 of 1977, reads as follows:

> '(1) On 11 November 2013, the Accused, in their reply to the State's pre-trial memorandum, gave notice to the State and the Accused intends entering a special plea of jurisdiction in that the Accused were abducted and unlawfully brought into the jurisdiction of the Honourable Court by agents and or officials of the State, and accordingly the Honourable Court must decline to permit the continuation of the prosecution of the Accused.
>
> (2) The Accused were so abducted in the Republic of Botswana and unlawfully brought into the jurisdiction of the Honourable Court by the officials of the Namibian Police, and or the Namibian Defence Force and or other agents of the Republic of Namibia, in concert with and with the full knowledge of officials of the Government of the Republic of Botswana.
>
> (3) All of the Accused did not consent to the abduction and such abduction was in violation of the laws of the Republic of Namibia, the Republic of Botswana and international law.

(4) The dates on which the Accused were so abducted and brought into the jurisdiction of the Honourable Court are as follows and corresponding with the respective Accused:

4.1	Accused 1	12 December 2003
4.2	Accused 2	12 December 2003
4.3	Accused 3	12 December 2003
4.4	Accused 4	12 December 2003
4.5	Accused 5	12 December 2003
4.6	Accused 7	20 September 2002
4.7	Accused 8	6 December 2002
4.8	Accused 9	20 September 2002

(5) The Accused will accordingly seek an order to be acquitted and be released from the trial and from the criminal charges preferred against them.'

The context

[3] The prosecution of the appellants for, amongst other offences, high treason, is a sequel to the violent events which struck Namibia in 1999. A group of people who either belonged to or were sympathetic to the Caprivi Liberation Army attacked several state installations in August 1999 at or around Katima Mulilo. The intention was clear: through a violent insurrection, to secede the then Caprivi Region (now Zambezi Region) from the rest of Namibia.

[4] Several of these people were arrested, detained and prosecuted. Some of them fled Namibia into Botswana. The appellants before this court are part of a group of Namibians who fled Namibia to Botswana in the wake of the secessionist insurrection. Whether or not they participated in the violent attacks is the subject of the prosecution now pending

before the High Court. It is to escape that prosecution that they brought the special plea of lack of jurisdiction which is the subject matter of the present appeal.

[5] All the appellants are Namibian citizens. They left Namibia and entered Botswana in the wake of the secessionist attacks in the Zambezi Region. By entering Botswana, the appellants placed themselves within the jurisdiction of Botswana – an independent sovereign nation not subject to the jurisdiction of the courts of Namibia.

The issue to be decided

[6] This court is being called upon to decide whether the Namibian Government engaged in unlawful conduct which resulted in the appellants being brought within the jurisdiction of the Namibian courts. The appellants allege that they were abducted and placed within the jurisdiction of the Namibian courts. The State maintains that it was not party to any abduction of the appellants and that they were surrendered to agents of Namibia leaving Namibia no choice but to receive them and to prosecute them for offences suspected to have been committed in this country.

The onus

[7] Where a special plea of jurisdiction is raised, the prosecution bears the onus to prove beyond reasonable doubt that a Namibian court has jurisdiction to try the accused (*R v Radebe & others* 1945 AD 590 at 603).

The essence of the dispute

[8] The case of the appellants is that at the time of their removal from Botswana to Namibia they enjoyed refugee status in Botswana accorded to them by the Botswana Government, and that they were brought to Namibia against their will. They maintain that the Botswana and Namibian Governments colluded to bring them to Namibia and that they were therefore abducted. In so doing, they assert, the Namibian Government broke international law in bringing them to Namibia and the courts of Namibia should decline jurisdiction to try them.

[9] The State argues that there was no contravention of the law of Botswana in its reception of the appellants and that if the Botswana Government violated any of its own laws in its deportation of the appellants, it cannot be imputed to the Namibian state.

The law

[10] The prosecution relies in the main on the majority judgment of the Supreme Court in *S v Mushwena & others* 2004 NR 276 (SC). Mtambanengwe AJA (with whom Chomba AJA and Gibson AJA concurred) laid down that our courts will not decline jurisdiction in respect of a person delivered to Namibian authorities by a foreign government in violation of that country's laws, if the Namibian authorities were not complicit in the foreign state's illegal conduct.

Brief facts and ratio of *Mushwena*

[11] In a special plea of jurisdiction, the 13 fugitives claimed that their apprehension and 'abduction' from Zambia and Botswana, respectively, and their subsequent transportation to Namibia, and their arrest and detention pursuant thereto, were in breach of international law, unlawful, and that they had not been properly and lawfully arraigned before a court for trial on the charge preferred against them.

[12] It was common cause that all the fugitives had left Namibia illegally and were all granted asylum in Botswana where they were accommodated at various refugee camps. It was also common cause that at various dates in 1999, except for one, the fugitives left the refugee camps illegally, and all had subsequently been apprehended at various locations and at different times by Zambian authorities. At different times subsequent to their apprehension and detention in Zambia, they were handed over to the Namibian authorities. The one fugitive was handed to the Namibian authorities by the Botswana authorities as an illegal immigrant, but in his case he voluntarily handed himself over to the authorities.

[13] In respect of the manner in which the fugitives were returned to Namibia, it was testified by immigration officers of Zambia and Botswana that they were illegal or prohibited immigrants and as a result, were deported in terms of the immigration laws of those countries. The then Chief of the Namibian Defence Force, General Martin Shali, had testified that in the immediate aftermath of the secessionist attacks he had requested the Botswana and Zambian counterparts to surrender to Namibia suspected

secessionists who fled into those countries. It was common cause though that no extradition request was made by Namibia to either Botswana or Zambia in terms of the extradition laws of Namibia or those countries.

[14] Although satisfied that the Namibian authorities had no part in the removal of the fugitives from Botswana or Zambia to Namibia, the High Court concluded that the fact that agents of Namibia had requested their surrender to Namibia, without seeking formal extradition under applicable legislation, amounted to disguised extradition which was unlawful.

[15] Mtambanengwe AJA (at 416D-E) writing for the majority and relying on English, South African, New Zealand and Zimbabwean case law, stated as follows:

> ‘[T]he court will exercise its power to decline jurisdiction where the prosecuting authorities, the police or executive authorities have been shown to have been directly or indirectly involved in a breach of international law or the law of another State or their own municipal law.’

And at 419F-G as follows:

> 'It is clear from its judgment that the court *a quo* laid a lot of store by the fact that respondents were, by "the disguised extradition", or the bypassing of the formal extradition proceedings, deprived of the benefits or safeguards embodied in Extradition Acts or treaties, and therefore of their human rights. The answer to any such argument is, first, that the Zambian or Botswana authorities did not have an obligation to wait for Namibia, or to urge Namibia, to initiate extradition proceedings to get rid of undesirable foreigners from their territory. Secondly, the Namibians did not have to refuse to receive the returned fugitives . . . let alone to instruct Zambia or Botswana how they should get rid of their unwanted visitors.’

[16] Strydom ACJ in his dissent took the view that the admitted request by Namibia to Zambia and Botswana, instead of following formal extradition procedures, was evidence of dirty hands and that the fugitives whose surrender to Namibia followed in its wake should succeed in their special plea of jurisdiction. That was so, the learned judge concluded, because the state, as litigant, should come to court with clean hands. Strydom ACJ relied (at 285–287) for that conclusion, among others, on the South African case of *S v Ebrahim* 1991 (2) SA 553 (A) and the English case of *Bennet v Horseferry Road Magistrate's Court & another* [1993] 3 All ER 138 (HL).

[17] On the contrary, Mtambanengwe AJA found that, on the facts, there was no causal link between the admitted request and the fugitives' surrender by Zambia and Botswana to Namibia (*Mushwena* at 410A-413E and 415H-J).

Comparative jurisprudence

[18] In the Zimbabwean case of *S v Beahan* 1992 (1) SA 307 (ZS) the accused, who took a special plea of jurisdiction when arraigned before the courts of Zimbabwe, was brought from Botswana into Zimbabwe to stand trial, without compliance with extradition or deportation proceedings. There was no extradition treaty between Botswana and Zimbabwe. The fugitive was arrested in Botswana by members of the Botswana Defence Force and handed over to the Botswana Police who held him in custody in that country for a number of days and thereafter handed him over to the Zimbabwean Police.

[19] In the words of Gubbay CJ (at 318a-b):

> '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 in breach of international law.' (Footnotes omitted).

[20] In *Nduli & another v Minister of Justice & others* 1978 (1) SA 893 (AD), a controversial case involving the abduction of freedom fighters, the court assumed jurisdiction where the accused before their arrest in South Africa were abducted from a foreign state by persons including two South African police officers who were not 'authorised' by the South African State. The Appellate Division held that international law did not operate to oust the court's jurisdiction because of such abduction. Rumpff CJ said at 911H-912A:

> '. . . (I)t seems clear that in terms of international law, as it exists (and not perhaps as it should be), the appellants' case would only have merited consideration if their abduction had been authorised by the Republic of South Africa . . . In the result it cannot be said that the jurisdiction of the court *a quo* was ousted according, to international law, . . .'[1]

[1] This decision has rightly been subjected to criticism by holding that the South African state could not be held responsible for the seizure in Swaziland carried out by South African Police even if said to be contrary to their superior officer. Dugard: *International Law: A South African Perspective* (3 ed, 2005) p 274 points out that the decision was 'remedied' by *S v Ebrahim* where the court imputed responsibility to the state where a person was abducted from Swaziland by "instruments" of the state, even in the absence of evidence of official authorisation for that action.

[21] The exception is if the receiving state acted unlawfully in the sense that it either violated the laws of another country or acted in breach of international law. Therefore, the court must decline jurisdiction in respect of a fugitive who was abducted with the involvement of agents of the receiving state. The same result will follow where agents of the receiving state connive with those of the refuge state to circumvent extradition laws to bring the fugitive before the courts of the receiving state. The exercise of coercive power such as an arrest by agents of the receiving state in the country of refuge is an act of international delinquency.

[22] International law does not countenance violation by one state of the territorial sovereignty of another. It is a violation of international law for a state to carry out an act of sovereignty such as an arrest in another state's territory. It does not matter that such an act is sanctioned by the country on whose sovereign domain the coercive act of arrest is being carried out because that is contrary to international law. In *S S Lotus (Fr v Turk),* 1927 P C I J (ser A) No 10 (Sept 7) in the Publications of the Permanent Court of International Justice laid down that:

> '[45] The first and foremost restriction imposed by international law upon a state is that failing the existence of a permissive rule to the contrary, it may not exercise its powers in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention.'

[23] The courts of South Africa and Zimbabwe apply the same principle. In *Ebrahim* the court declined jurisdiction because agents of the South African Government went into

Swaziland to kidnap a fugitive and returned him to South Africa where he was charged with treason. The court's ratio is recorded in the English headnote (at 555) as follows:

> '[T]he issue as to the effect of the abduction on the jurisdiction of the trial court was still governed by the Roman and Roman-Dutch common law which regarded the removal of a person from the area of jurisdiction in which he had been illegally arrested to another area as tantamount to abduction and thus constituted a serious injustice'.

[24] Similarly, in *S v Wellem* 1993 (2) SACR 18 (E) the court declined jurisdiction because the fugitives had been apprehended in Ciskei and brought to South Africa against their will. The arrests took place with the assistance of the South African Police. The accused were not informed of the nature and content of the extradition proceedings when they elected to be returned to South Africa.

[25] The Roman-Dutch approach finds support under English jurisprudence: *R v Brixton Prison (Governor), Ex parte Soblen* (1962) 3 All ER 641 at 661, (1964) 2 QB 243 at 302); *Bennet v Horseferry Road Magistrate's Court & another* [1993] All ER 138 (HL).

<u>The legal principles applicable to this case</u>

[26] The applicable legal principles can therefore be summed up as follows:

(a) The courts of Namibia will not review dealings of a sovereign state within the latter's territorial jurisdiction as they do not control the acts of a foreign sovereign;

(b) The courts of Namibia will not inquire into or require the justification of the legality of the acts of a foreign state within its territorial boundaries;

(c) What the sovereign state does by its agents within its territory is beyond the scope of the jurisdiction of Namibian courts;

(d) Namibian courts will only interfere where the officials of this country acted extra-territorially in a manner that is inconsistent with the sovereignty of the refuge country in breach of international law;

(e) The courts of Namibia will assume jurisdiction over a fugitive if he or she is returned to this country by a foreign government without any form of force or deception being practised by agents of the Namibian state;

(f) Where agents of the state of refuge without resort to extradition proceedings surrender a fugitive to Namibia for prosecution, Namibia as the receiving state is not in breach of international law since it did not perpetrate any force upon the territory of the refuge state.

The factual matrix

[27] The appellants may conveniently be placed in two groups as far as the factual matrix is concerned. The first group (first, second, third, fourth, fifth, sixth and eighth appellants) comprises individuals who were surrendered by Botswana authorities to their Namibian

counterparts at the international border between Botswana and Namibia. Of this group, sixth and eighth appellants were handed over to Namibia on 20 September 2002. First to fifth appellants were surrendered to Namibia on 12 December 2003. The other group, which for purpose of the present appeal concerns only one person (seventh appellant) comprises individuals handed over to Namibian officials on Botswana territory on 6 December 2002.

The evidence

The State

[28] Mr Nickey Panduleni Nashandi who at the time was a deputy permanent secretary in Namibia's Ministry of Foreign Affairs testified in the High Court on behalf of the prosecution. He confirmed that the Ministry of Foreign Affairs of Namibia received a letter dated 11 December 2003 from the Namibian High Commissioner to Botswana in the following terms:

> 'The Namibia 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, 12 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 yet 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.'

[29] The witness also introduced into evidence the *note verbale* from Botswana referred to by the High Commissioner, which reads 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:[2]

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 Manuel Makendano**

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 1 (c) 1 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 re-availed 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.

[2] The names in bold are of some of the appellants.

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

[30] The evidence of General Ndeitunga, the then acting Inspector General of the Namibian Police Force, was to the effect that he was not aware of any request by Namibian authorities for the deportation or surrender of first to fifth appellants from Botswana to Namibia. He confirmed under oath, however, that upon becoming aware of the surrender of certain Namibians by Botswana to Namibia, he, in writing, alerted his officers to be alive to the possibility that amongst them might be persons who are suspected of having participated in the secessionist activities which engulfed the Zambezi Region in 1999.

[31] Detective Warrant Officer Kavenauue Kombungu who as investigating officer in the suspected secessionist activities of 1999, interviewed and took warning statements of first to fifth appellants at the Ngoma Police Station in Namibia. He made clear in his evidence, which included introduction in evidence of the 'acceptance warrants' received from Botswana by Namibia that his interaction with those appellants occurred on Namibian territory. It is, in particular, the acceptance warrants originating from the Botswana authorities which demonstrate that first to fifth appellants were on their own admission considered by Botswana officials to be Namibian citizens and were being expelled from that country to their homeland allegedly for their violation of Botswana law.

[32] Mr Kombungu was emphatic that when he received first to fifth appellants from the Botswana officials, the late Detective Chief Inspector Maasdorp was not with them and

he did not see late Detective Chief Inspector Maasdorp present at the Ngoma Police Station when he recorded those appellants' warning statements.

[33] The acceptance warrants led into evidence in respect of each deported person shows his name, and contains a declaration that the named person is 'to the best of my knowledge' a Namibian citizen. It is, amongst others, addressed to an 'immigration and passport control officer' of the 'Ngoma Border Post'. It materially states as follows:

> 'The prospective Deportee whose Personal 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 [a stated date].'

[34] Sergeant Fransina Kanime, a member of the Namibia Police, testified that she was on duty on 20 September 2002 at the Ngoma Police Station located on the Namibian side of the international border between Namibia and Botswana. According to Ms Kanime, she was approached by Namibian immigration officials who were accompanied by agents of Botswana. The Botswana officials handed over sixth and eighth appellants to her on Namibian territory alleging that they were illegal immigrants in Botswana. Upon seeking guidance from her superiors, she was instructed to detain the concerned individuals until someone came to deal with their case. Ms Kanime testified that she established before detaining the concerned individuals that they were Namibian citizens. The witness made clear that she did not observe any involvement of Namibian police officials with the two appellants before she took them into custody on Namibian soil.

[35] Inspector Eimo Dumeni Popyeinawa, also a member of the Namibian Police, testified that he, on 20 September 2002, assisted by two other Namibian police officers, proceeded to Ngoma Police Station where he identified sixth and eighth appellants as persons wanted in connection with the 1999 secessionist attacks. He then arrested the two persons on suspicion of their involvement in the secession-related offences. The witness also confirmed under oath that he was present at the Ngoma Police Station on 12 December 2003 when the first to fifth appellants were arrested by Sergeant Kombungu in Namibia upon them being surrendered by Botswana authorities. Like his other colleagues, this witness was emphatic that first to fifth appellants' surrender to Namibia was not initiated by Namibian authorities.

[36] The former Regional Commander of the Namibian Police in the then Caprivi Region, Heronimus Bartholomeus Goraseb, testified that on 6 December 2002 he received a call from a Botswana official that Botswana wished to surrender some Namibian citizens to Namibia who were illegal immigrants in Botswana. He immediately took off for Botswana where he met up with his Botswana interlocutors some two kilometers into Botswana territory at some disused weighbridge in the bush. When he arrived there, a group of people, including seventh appellant, were removed from a Botswana police vehicle. They were in handcuffs. It is clear from the evidence of Mr Goraseb that the seventh appellant's liberty was restricted by the Botswana officials. The Namibian and Botswana vehicles parked back to back and the prisoners were transferred from the Botswana police vehicle into the Namibian police vehicle which was then under the control of Mr Goraseb. The evidence establishes that seventh appellant was placed in circumstances which deprived

him of his liberty: He was not free to go if he wished and was under the coercion of Mr Goraseb and the other Namibian officials on Botswana territory until brought to Namibia.

Appellants

[37] I will first set out the allegations common to all appellants based on their evidence in the court below. They were all refugees in Botswana having been granted that status by the Botswana government. They were at some point during their stay in Botswana resident at the Dukwe Refugee Camp. Thereafter, they were detained at the Francistown Security Prison and the Centre for Illegal Immigrants (CII) at Francistown, Botswana. They deny that during their stay in Botswana they breached the conditions of their stay which could have justified their deportation by the Botswana authorities. Prior to their surrender to the Namibian authorities, their refugee status was never revoked, nor were they ever brought before a court or tribunal in Botswana to have that status revoked. They add that they were not as much as questioned by the Botswana authorities on their alleged breach of the conditions of their stay in Botswana.

[38] First to fifth appellants assert that before their deportation to Namibia, they were restrained with handcuffs and leg irons. They were then taken from the CII to the 'Ngoma Border Post in Namibia'. Sixth and eighth appellants testified that they were transported in similar fashion from Botswana to Namibia.

[39] On the Botswana side of Ngoma Border Post, the appellants were taken into the Botswana immigration office. Their names were read out. The money on their persons

was then handed over to Mr Richard Kamwi Masule, a Namibian immigration officer who, it is common cause is now deceased and not in a position to challenge the allegation. They were then made to sign an acceptance warrant and thereupon driven across the international border to the Namibian side of the Ngoma Border Post. At the Namibian immigration office at Ngoma, their names were read out.

[40] When leaving Botswana they did not comply with that country's immigration formalities; and upon entering Namibia they also did not comply with Namibia's immigration laws by presenting their travel documents. They stated that they were neither arrested nor prosecuted for failing to present valid travel documents to the Namibian authorities as required by Namibian immigration laws.

Alleged involvement of agents of Namibia in the appellants' removal from Botswana

[41] The evidence of the first to fifth appellants in no way points to the involvement of agents of Namibia when they were detained and removed by Botswana officials either at Dukwe, Kutwano Police Station or at the CII. Although the first, second and fourth appellants alleged under oath that late Detective Chief Inspector Maasdorp was present at certain times on Botswana soil when they were being removed, the precise role he allegedly played is not stated and the allegation therefore defies rebuttal.

[42] The first appellant conceded that when he had the opportunity in the earlier trial before late Manyarara AJ to make the allegation he now makes against late Maasdorp, he did not do so. The same appellant also stated that late Masule and Liseho were

present at the Ngoma Immigration Office and that Masule was the one to whom the Botswana agents handed the money removed from the appellants' persons. The allegation against Masule was of course never put to State witnesses so that it could be dealt with. What role Liseho played was not stated and, again, defies rebuttal.

[43] The fifth appellant did not in any serious way implicate any agent of Namibia in connection with his removal from Botswana to Namibia and the sixth appellant did not implicate any agent of Namibia in connection with his removal from Botswana to Namibia.

[44] The eighth appellant, although he also raised a special plea of jurisdiction, never testified.

The High Court's approach

[45] The High Court concluded that the Namibian Police had neither requested the deportation of all the appellants nor interrogated them in Botswana before or during the time they were conveyed to the border between Botswana and Namibia for the purpose of their being handed over to the Namibian authorities. Therefore, the court concluded that the appellants were voluntarily surrendered without any force, deception or collusion of the Namibian government. That conclusion also included seventh appellant.

[46] The High Court adopted the dictionary definition of 'abduction' as – 'taking away, stealing, hijacking, piracy, raid, hostage, haul, catch, etc'. Based on that definition the court *a quo* found that the evidence led before it did not establish that some or all of the

appellants were unlawfully taken away from Botswana to Namibia by agents of the Namibian Government. The High Court reasoned that abduction or kidnapping is a violation of territorial sovereignty of a sovereign state but that the abduction of the appellants could not have happened as they were deported by the Botswana government of its own motion.

[47] The learned judge *a quo* followed Froneman AJ's approach in *Wellem* that the handing over and removal of fugitives by the Ciskeian and South African officials amounted to an unlawful kidnapping or abduction. That was so because the South African Police in collusion with the Ciskeian Police 'stole or hijacked or pirated' the fugitives from Ciskei violating the sovereignty of Ciskei. However, the learned judge *a quo* found that in the present matter the fugitives were deported by the Government of Botswana to Namibia without the connivance of agents of the Namibian Government. The court *a quo* found that the evidence demonstrated that no request was made by Namibia to the Government of Botswana to surrender the appellants. In the court's view, the allegation by the appellants that they saw the now deceased Detective Chief Inspector Maasdorp in Botswana fell short of establishing a causal link between Detective Maasdorp's presence in Botswana (if he was there) and the deportation or handing over of the appellants to agents of Namibia.

[48] The court *a quo* concluded that it had jurisdiction in respect of all the appellants and dismissed the special plea.

The grounds of appeal

[49] The grounds of appeal are that the High Court misdirected itself in both fact and law in concluding: (a) that the state proved beyond reasonable doubt that the court had jurisdiction; (b) that the appellants were not abducted from Botswana to Namibia through the collusion or connivance of the Governments of Botswana and Namibia; and (c) that it had jurisdiction to try the appellants.

The parties' submissions on appeal

The appellants

[50] According to Mr Tjombe for the appellants, the appeal stands to be decided on the common cause facts and that where there are disputes, nothing turns thereon. Mr Tjombe argued that the burden of proof rested on the Namibian Government to establish beyond reasonable doubt that a Namibian court had jurisdiction over the accused persons but that it failed to discharge the onus.

[51] Mr Tjombe submitted that the prosecution's evidence that it was conveyed to Namibian authorities that the appellants breached the conditions of their stay in Botswana, is inadmissible hearsay which should have been disregarded. He thus seeks the exclusion of the acceptance warrants and statements made to Namibian officials by their Botswana counterparts to the effect that the appellants were illegal immigrants in that country. Counsel also seeks exclusion of the letter received by the Namibian Government from the Government of Botswana alleging that the appellants were being expelled from Botswana for violating Botswana laws.

[52] Counsel argued that it remains uncontroverted that when the appellants entered Namibia, they were not requested to show their passports or any other travel documents to Namibian immigration officials. He submitted that the Immigration Control Act 7 of 1993 (ICA) required that they should have (a) had the permission of the Minister of Home Affairs to enter Namibia at a place other than a point of entry and (b) by presenting themselves to an immigration official at a point of entry.

[53] According to Mr Tjombe, given that the appellants, upon being removed from Botswana, were not asked to present their travel documents to Botswana immigration it is clear that Botswana authorities breached their own laws to collaborate with Namibian authorities to create the false impression that they were found on Namibian territory when the latter's agents arrested them. Mr Tjombe argued that it is indisputable that none of the appellants upon arrival had their passports endorsed by immigration officials and that their entry into Namibia would have been unlawful as they had not lawfully left Namibia and upon return should have been arrested for violating the ICA.

[54] Mr Tjombe argued that given that there exists a reciprocal legal framework between Botswana and Namibia for the extradition of persons from the one country to the other, the failure in the present case to comply with that procedure amounts to an illegality which must result in the courts of Namibia declining jurisdiction.

The State

[55] The gravamen of the State's argument is that all the appellants were delivered to the Namibian authorities by Botswana officials; that Namibia had no choice but to receive them as they are Namibian citizens; that the Botswana authorities stated that the accused had violated the conditions of their refugee status in Botswana and that they were being deported to their homeland; that Namibia did not request the appellants' deportation to Namibia; that in receiving the appellants Namibian officials did not act contrary to the wishes of Botswana authorities; that the appellants were arrested in respect of the treason-related offences on Namibian territory, and that it was the duty of Namibian law enforcement officials to investigate if any of the appellants had any involvement in the secessionist activities and to pursue charges if they did.

[56] Mr Wamambo for the respondent submitted that the evidence of the appellants who chose to testify is 'vague, contradictory, exaggerated and improbable'. He submitted that the evidence of the first to fifth appellants in no way implicates the Namibian officials in their being brought from Botswana to Namibia. He was emphatic that the evidence comes nowhere near proving their abduction by Namibian law enforcement; and that the allegation in the special plea of the involvement of the Namibian Defence Force has no factual foundation. The first to fifth appellants also do not in any way implicate late Detective Chief Inspector Maasdorp in any unlawful conduct relative to their return to Namibia.

[57] Mr Wamambo argued that the evidence also fails to establish that the Namibian authorities requested the return of the appellants to Namibia. He drew special attention to the fact that all three Namibian officials (Maasdorp, Masule and Liseho) accused by the appellants to have had a hand in their alleged abduction are deceased and therefore not able to challenge the allegations against them. In any event, counsel added, the evidence purporting to implicate Detective Chief Inspector Maasdorp does not suggest that he talked to the appellants or performed any act pointing to his involvement in the return of the appellants to Namibia.

[58] Counsel added that it is apparent from the earlier trial before the late Manyarara AJ that no suggestion was made of the unlawful conduct now being attributed to the Namibian law enforcement officers. It was rather convenient since Masule passed away for the appellants to suggest that he was the one who was handed their money by Botswana officials when they were being handed over to Namibian officials on Botswana territory. Mr Wamambo added that the first appellant in the trial before Manyarara AJ never mentioned that Detective Chief Inspector Maasdorp was present in Botswana when they were being conveyed to Namibia.

[59] Mr Wamambo submitted that the evidence as a whole shows that the appellants were returned to Namibia at the instance of Botswana authorities without the prompting of Namibian authorities. Whatever was done by Botswana authorities was their responsibility and should not be visited upon Namibian authorities as they were not

complicit therein. Namibian authorities had an obligation to receive the citizens of Namibia who were being deported back to Namibia by a foreign government.

[60] On the basis that the appellants had failed to point to any unlawful conduct on the part of Namibia in connection with their being deported to Namibia, Mr Wamambo submitted that this court must follow the judgment of the majority in *Mushwena*.

Law to facts

The seventh appellant

[61] I propose to dispose of the appeal of seventh appellant first in view of the common cause factual circumstances surrounding him which show that the Namibian Government acted unlawfully in bringing him within the jurisdiction of the Namibian courts.

[62] It is abundantly clear from the evidence of the then Regional Nampol commander in the Caprivi Region, Goraseb that the seventh appellant alongside other persons not involved in the present appeal, were taken into custody by Namibian Police on Botswana territory. It was the Namibian agents who transported them to Namibia in a fashion not dissimilar to the facts of *Wellem*.

[63] Mr Goraseb's suggestion that Namibian agents did not perform a sovereign act on Botswana territory as they only 'received' seventh appellant, is not consistent with the admission that his freedom was restricted upon him being surrendered to Namibian agents on Botswana soil. It is abundantly clear from the exchange between Mr Tjombe

and Mr Goraseb during cross-examination that whilst in the presence of Namibian agents on Botswana territory, the seventh appellant was under the coercive power of Namibian agents. That was sufficient to constitute the performance by Namibian authorities in Botswana of a sovereign act of arrest in violation of international law – as recognised in the authorities to which I already referred.

[64] It is idle to suggest under those circumstances that seventh appellant was not under arrest by agents of Namibia on the territory of Botswana. That arrest amounts to the exercise of a sovereign act by Namibia in the territory of Botswana and it matters not that it was sanctioned by the Botswana authorities.

[65] We are satisfied that the High Court misdirected itself in holding that the Namibian authorities did not act unlawfully in removing the seventh appellant from Botswana and placing him within the jurisdiction of the courts of Namibia.

[66] The State had failed in respect of seventh appellant to prove beyond reasonable doubt that the High Court had jurisdiction to try him in connection with the offences he stood charged with under the indictment to which he raised the special plea of jurisdiction. His appeal must, therefore, succeed.

The remaining appellants: Analysis

[67] I now proceed to deal with the group (first, second, third, fourth, fifth, sixth and eighth appellants) who were handed over to Namibian law enforcement officials at the Ngoma

Border Post. We are satisfied that the High Court correctly found that these appellants were received by Namibian officials on Namibian territory. What doubt might have existed whether this group of appellants was taken into custody by Namibian agents on Namibian territory is removed by the concession made by Mr Tjombe in his written heads of argument.

[68] Significantly, Mr Tjombe submitted as follows:

> 'Similarly, the Botswana officials, when they brought the appellants to Namibia, also did not present themselves or the appellants to an immigration official, and also breached Namibian domestic law.' (My emphasis).

[69] This submission is a concession that the appellants were brought into Namibia by agents of Botswana. How else can one explain the suggestion that Botswana officials violated Namibian immigration law in the way they *entered* Namibia? I am satisfied that it was established on the evidence beyond a reasonable doubt that the remaining appellants were brought on Namibian territory by agents of Botswana where they were surrendered to Namibian Government officials.

[70] The question arises, regardless of whether or not Botswana officials acted unlawfully in surrendering them to Namibia, whether Namibia acted unlawfully in the sense of conniving with Botswana officials in the remaining appellants' detention and removal to Namibia.

[71] In the light of the allegations made in the special plea, the State bore the onus to show beyond reasonable doubt that it played no part in the alleged abduction of the appellants from Botswana to Namibia and that it did not connive with the Botswana officials in their being 'unlawfully' deported from Botswana to Namibia.

Was the hearsay rule breached?

[72] Mr Tjombe's submission that the assertions by Botswana officials that the remaining appellants were illegal immigrants in Botswana and that they violated Botswana law justifying their expulsion from Botswana constitutes inadmissible hearsay, stands to be rejected.

[73] According to *Phipson on Evidence* (1982) 16-02:

> 'an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted.' (See also *Cross on Evidence* 6 ed (1985) 38.)

[74] As was stated by Watermeyer JA in *R v Miller & another* 1939 AD 106 at 119:

> '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 (ie 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 be tested only 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 inquiry.'

(Also see *S v Brumpton* 1976 (3) SA 236 (T); *S v De Conceicao & another* 1978 (4) SA 186 (T).)

[75] The hearsay rule is not offended if a statement by a person who is not a witness is repeated in court as proof of the fact that it was made: *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd* 1953 (3) SA 343 (W) and *Ratten v R* [1972] AC 338 (PC). Similarly, evidence that a person whose conduct is in issue was given certain instructions is admissible because the fact that instructions were given is relevant to how he is likely to have behaved, irrespective of the truth or falsity of any statements of fact which the instruction contained: *R v Miller & another* 1939 AD 106 at 119 and *R v Boardman en 'n ander* 1959 (4) SA 457 (T).

[76] The evidence objected to (*vide* the *note verbale* and the acceptance warrants suggesting the appellants were illegal immigrants in Botswana) is relevant, not as the truth of the assertions therein made, but to explain why Namibian officials did what they did. It certainly negatives the suggested inference that agents of Namibia acted with an improper motive in receiving the remaining appellants and that they were complicit with Botswana officials in the latter's conduct in relation to those appellants.

Did agents of Namibia commit an act of international delinquency?

[77] The high watermark of the alleged collusion between Botswana and Namibian officials at the time the appellants were being conveyed by Botswana authorities to Namibia, is the alleged association of three Namibian agents with their Botswana

counterparts. Those allegations were directed at late Detective Chief Inspector Maasdorp, and police officers Richard Masule and Osbert Liseho.

[78] The alleged involvement of those deceased officials was strenuously denied by the State's witnesses who were involved in the reception of the appellants upon their surrender by the Botswana law enforcement officials. Besides that denial - which the court *a quo* had no reason to reject - the allegation is undermined by four considerations. The first is that the remaining appellants failed to put these allegations to State witnesses so that they could have the opportunity to contradict them. The *dictum* by Chomba AJA in *Ugab Terrace Lodge CC v Damaraland Builders CC*, Case No SA 51/2011 delivered on 25 July 2014 is apposite:

> '[22] It is an established principle of evidence that if a party is testifying to a matter of fact on which his opponent has a different version, the opponent has a duty, when that party is under cross-examination, to put to him such different version so that that party has a chance to concede or disagree. In other words, there is a duty to cross-examine a witness on any aspects on which there is a dispute. The rationale of the principle is that if it is intended to argue that the evidence of the witness on that aspect should be rejected, he should be cross-examined so as to afford him an opportunity of answering to points supposedly unfavorable to him.' (Citations omitted).

[79] The second consideration is that the individuals against whom imputations of impropriety are being made have since died and are not able to defend themselves. Mr Tjombe agreed that the evidence implicating them has, therefore, to be approached with caution. By way of comparison, it is to guard against the potential of opportunistic claims that the common law recognises the need for caution when a court considers claims

against deceased estates (*Wood v Estate Thompson & another* 1949 (1) SA 607 (N) and *The Thomas v Times Book Co Ltd* [1966] 2 All ER 241).

[80] The third consideration is that the allegation was not made during the first trial which took place while the implicated persons were still alive. It seems opportunistic to make such allegations when the implicated persons cannot gainsay them and points to it being an afterthought.

[81] Fourthly, that the appellants seek to embellish their version to show official misconduct on the part of the Namibian Government is buttressed by what clearly is a baseless allegation that the Namibian Defence Force had a hand in their removal from Botswana to Namibia. There is not a shred of evidence on the record to support such an allegation so prominently made in the special plea.

[82] We are satisfied that the High Court correctly found that agents of the Namibian State did not have any part in the Government of Botswana's removal of the remaining appellants from Botswana to Namibia.

Alleged non-compliance with immigration law

[83] In a rearguard posture, Mr Tjombe argued that the allegation of collusion is buttressed by the manner of entry of the appellants into Namibia in violation of Namibian immigration law by the Namibian authorities. The argument goes that the obvious non-

compliance by the Namibian authorities with ss 7[3] and 9[4] of the ICA shows that they had been expecting the return of the appellants and had no desire to comply with this country's immigration law.

[84] In the first place, the argument loses sight of the fact that these were Namibian citizens being deported by a foreign country. It is trite that under international law, a State has the power to deport an alien from its territory. In the words of Denning MR in *R v Brixton Prison (Governor), Ex parte Soblen* at 660E:

> 'It seems clear . . . that by international law any country is entitled to expel an alien if his presence is for any reason obnoxious to it; and as incidental to this right, it can arrest him, detain him, and put him on board a ship bound for his own country.'

[85] The fundamental problem with Mr Tjombe's submission is the assumption that Namibia made the request for the surrender of the appellants by Botswana authorities. The State had established beyond reasonable doubt that it did not make such a request. I am persuaded by the State's argument that since no such request was made and the Botswana authorities acted on their own, Namibia was obliged to receive its citizens who were being expelled by a foreign government.

[3] Requiring that a person entering Namibia must present themselves to an immigration official at a port of entry.
[4] Requiring that an immigration official must endorse on a valid travel document a permission to enter.

[86] Objectively seen from the perspective of the Namibian authorities, the Botswana Government was perfectly within its rights in surrendering the remaining appellants to Namibia – their homeland.

[87] It really is of no moment that Namibian immigration officials upon the appellants' return did not enforce the ICA. That failure (if it can be called that) certainly does not lead to the inference that Namibian agents were complicit with their Botswana counterparts in their expulsion from Botswana and their surrender to Namibia's law enforcement agents. Namibia was obliged to receive its citizens regardless of: (a) the unlawful conduct of Botswana authorities in expelling them from that country; and (b) whether they had valid documents to enter Namibia.

[88] The Namibian authorities' lack of enthusiasm to prosecute the appellants for the alleged violation of the ICA upon their surrender to Namibia, in my view, does not constitute any prejudice to the appellants.

[89] The failure to comply with a foreign state's extradition legislation in securing the return of a fugitive offender to Namibia can only attract the disapproval of our courts if it is shown that the agents of the Namibian state directly or indirectly participated in circumventing the strictures of extradition procedures stipulated in such legislation to secure the presence in Namibia of a wanted fugitive. That will not arise where a fugitive is placed under the coercive power of Namibia by a foreign government without the solicitation, subterfuge, deceit or connivance of Namibian authorities.

[90] The line of authority represented by *Ebrahim* and *Wellem* does not apply to the facts of the present case, in that the record does not show (a) that Namibia solicited Botswana for the return of the appellants; and (b) that Namibia, in collusion with Botswana authorities, violated the reciprocal extradition laws between the two nation states. Those cases are distinguishable because there the law enforcement agencies of the receiving state were guilty of illegal conduct.

[91] The absence in the present case of solicitation by Namibia to Botswana for the surrender of the remaining appellants removes the concern expressed by Strydom ACJ in his dissent in *Mushwena* that the state, as a litigant, must come to court with clean hands.

[92] We are satisfied that the Namibian Government was obliged under international law to receive the remaining appellants, regardless of whether in the manner they exited their homeland they had violated immigration law. Nothing really turns on the fact that the Namibian authorities chose not to charge the accused with a breach of this country's immigration law. How could they possibly do that considering that the appellants' return to Namibia was not out of their volition as is apparent on the face of the acceptance warrant which in effect was the deportation order. In any event, I fail to see what right of theirs was violated in them not being charged with such violation.[5]

[5] A similar approach was adopted by the Zimbabwe Supreme Court in *Beahan above* at 320c-f.

Disposal

[93] We come to the conclusion that the seventh appellant's appeal must succeed but that in respect of the remaining appellants the State had proved beyond reasonable doubt that the High Court has jurisdiction to try them in that:

(a) they were brought within the jurisdiction of Namibia without the solicitation of the Namibian Government;

(b) agents of the Namibian Government did not enter Botswana territory to restrict their freedom and return them to Namibia;

(c) the Namibian Government had an obligation to accept them back to their homeland regardless of the manner of exit from and re-entry into Namibia;

(d) they were handed over to agents of Namibia on Namibian soil without their surrender being triggered by any unlawful conduct by the Namibian Government.

[94] It was common cause between the parties that if the State failed to discharge the burden of proof that the court has jurisdiction, the proper order to be made is a permanent stay of prosecution which will have the effect that the accused may not be prosecuted again on any of the charges on which they were indicted in the present prosecution. That is the order which the High Court should have made in respect of the seventh appellant.

The order

[95] It is accordingly ordered that:

1. The appeal of the seventh appellant succeeds and in respect of him the order of the High Court is set aside and substituted for the following order:

   'The accused, Mr Boster Mubuyaeta Samuele's special plea in terms of s 106 (1)(*f*) of the Criminal Procedure Act 51 of 1977 succeeds, and there is hereby ordered a permanent stay of prosecution against him in respect of the offences preferred against him on the present indictment'.

2. The appeal of the first, second, third, fourth, fifth, sixth and eighth appellants (respectively, Progress Kenyoka Mununa, Shine Samulandela Samulandela, Manuel Manepelo Makendano, Alex Sinjabata Mushakwa, Diamond Samunzala Salufu, Hoster Simasiku Ntombo and John Mazila Tembwe) is dismissed; and in respect of them the matter is remitted to the High Court for them to stand trial on the indictments brought against them.

_____

DAMASEB DCJ

_____
SHIVUTE CJ

_____
SMUTS JA

_____
CHOMBA AJA

_____
MOKGORO AJA

APPEARANCES

APPELLANTS:	N Tjombe
	Instructed by Director of Legal Aid
RESPONDENT:	N M Wamambo
	For the State