



**CASE NO: CC 44/08**

**IN THE HIGH COURT OF NAMIBIA**

**In the matter between:**

**THE STATE**

**APPLICANT/APPELLANT**

**And**

**SIMON NAMA GOABAB  
ACCUSED**

**1<sup>ST</sup> RESPONDENT/1<sup>ST</sup>**

**ABRAHAM JOHN GEORGE**

**2<sup>ND</sup> RESPONDENT/2<sup>ND</sup> ACCUSED**

***CORAM:* TOMMASI J**

Heard on: 18 AUGUST 2010

Delivered on: 18 AUGUST 2010

Reasons released on: 22 JUNE 2012

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**REASONS FOR GRANTING APPLICANT LEAVE TO APPEAL:**

**TOMMASI J:** [1] The Court granted the applicant leave to appeal against this Court's judgment handed down on 12 August 2010 against the discharge of both respondents in terms of section 174 of the Criminal Procedure Act 51 of 1977 and what follows are the reasons.

[2] The two respondents herein were charged with three counts of having contravened section 43(1) of the Anti-Corruption Act, 2003 (Act 8 of 2003) in that 1<sup>st</sup> and 2<sup>nd</sup> respondents had corruptly used their office or position for gratification to: (1) rent a vehicle with registration number N82959 W; (2) rent a vehicle with registration number DDS937 FSW; and that 1<sup>st</sup> respondent corruptly used his office or position for gratification in respect of using a motor vehicle with registration no GRN343. The respondents were also facing alternative charges. At the end of the State's case the Court discharged the first respondent on the three main counts and the second respondent on the first and second main counts in terms of the provisions of section 174 of the Criminal Procedure Act, 51 of 1977. The Court refused to grant an application for discharge on the alternative charges.

[3] The applicant raised 28 grounds of appeal against the Court's discharge and I don't intend to deal with each one individually. Counsel for the applicant submitted that the Court erred or misdirected itself when it discharged the respondents in terms of section 174 of the Criminal Procedure

Act, 51 of 1977 when it found that (1) there was no evidence that the accused committed the offence referred to in the charge or (2) any offence of which he may be convicted on.

[4] The application was not opposed. Counsel for the applicant submitted in argument that the decision to discharge the accused was an interlocutory order given the fact that the respondents are still facing the alternative charges.

[5] I respectfully differ with this submission. The refusal of discharge is an interlocutory order. The granting thereof however is a final judgment dispositive of the matter on the main count. The decision to discharge in respect of the main counts however effectively terminated the proceedings in respect thereof and the Prosecutor-General is required in terms of the provisions of section 316(1) to lodge the appeal within a period of fourteen days of the acquittal.

[6] It is now settled law that the Prosecutor-General may appeal against the granting of an application for discharge in terms of section 174 of the Criminal Procedure Act, 51 of 1977.<sup>1</sup>

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<sup>1</sup>S v TEEK 2009 (1) NR 127 (SC)

[7] I am therefore of the view that the matter is a judgment as envisaged by section 14(1) of the Supreme Court Act, 15 of 1990.

[8] Section 316A(1) provides that the Prosecutor-General may appeal against any decision given in favour of an accused in a criminal case in the High Court. Whether or not this was a judgment in favour of the accused was not addressed by counsel for the State. A person convicted of having contravened section 43 of the Anti-Corruption Act, 8 of 2003 is liable to a fine not exceeding N\$500 000 or to imprisonment for a term not exceeding 25 years, or to both such fine and such imprisonment.<sup>2</sup> The alternative charges, seen against the stiff maximum sentences provided for in respect of the main charges, constitute, under these circumstances, lesser offences. In *S v Zoko 1983 (1) SA 871 (N)* Didcott J<sup>3</sup> stated that:

*“In deciding to acquit the accused person of the greater offence, the Court makes a decision in his favour.”*

The discharge of the respondents herein, in my view, constitutes a decision in favour of the respondents and is thus appealable.

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<sup>2</sup> Section 49 of the Anti-Corruption Act, 8 of 2003

<sup>3</sup> At page 875, H

[9] It is well established that leave to appeal should be granted where there are reasonable prospects of success.

[10] All the grounds of appeal essentially relate to the Court having incorrectly interpreted section 43 of the Anti-Corruption Act, 8 of 2003. In *S v Teek, supra* the Court held that:

*“the statute affording the discretion may entrust the determination of the jurisdictional fact itself to the opinion of the repository of that discretion: in this event the question was not whether objectively speaking the fact or state of affairs existed or not; a higher tribunal could only interfere if the repository of the discretion, in deciding that the prerequisite facts or state of affairs existed, acted mala fide or from ulterior motive or failed to apply his or her mind.” [my emphasis]*

[11] No allegations were made by the applicant that the Court acted *mala fide* or from ulterior motive. Counsel for the applicant however submitted that the Court had not applied its mind when it interpreted the definitions and provision of section 43 of the Anti-Corruption Act, 8 of 2003. He submitted that the Court, in concluding what the intention was of the legislature, failed to consider: the golden rule of interpretation of statutes by giving the words of the statute its literal meaning; the address of Dr Albert Kawana motivating the acceptance of the Anti-Corruption Bill in the National Assembly, and the United Nations Convention against Corruption adopted on 31 October 2003 to which Namibia is a signatory. He further submitted that the Court applied South African law. The South African statute was referred

to in the judgment and noted by way of comparison. Counsel for the applicant however presented argument of similar legislation in other jurisdictions which, by way of comparison, would have assisted the Court in the exercise of its discretion. The judgment of this Court did not address these issues and it is indicative of the fact that it was not considered. I am in agreement with counsel for the applicant that, in order for the Court to ascertain the intention of the legislator, it would have been crucial for the Court, in the exercise its discretion, to have had regard to these issues.

[12] If the words of the statute i.e the definitions read with the provisions of section 43 of the Anti-Corruption Act, 8 of 2003 are given their literal meaning, it would follow logically that there would be evidence upon which a reasonable court may convict. Having said this, there is merit in the argument by the applicant that it cannot be said that the Court applied its mind properly when granting the discharge in terms of section 174 of the Criminal Procedure Act, 51 of 1977. This forms the central issue raised in almost all of the grounds. I am thus of the view that there are reasonable prospects of success and that a different Court may come to a different decision on all those grounds challenging the Court's interpretation of the statute.

[13] A further ground raised by the applicant was that the Court failed to apply its mind by granting a discharge on the main charges and without considering the fact that the respondents may be convicted on the alternative charges. Section 174 provides that:

*If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."*

The literal meaning of the words contained in this section, in my view, refers to competent verdicts on the offence the accused is charged with. In *S v MAGXWALISA AND OTHERS 1984 (2) SA 314 (N) PAGE J* at page 316, G- H made the following remark:

*"Some of the charges in respect of which the application has been made, stand alone; others have been framed in the alternative to charges in respect of which no application for discharge had been made. Counsel are agreed, however, and in my view correctly, that even in this latter situation the Court would be entitled to grant a discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977, if it was of the opinion that there was no evidence that the accused committed the offence covered by the alternative charge."*

[14] The judgment of this Court however does not deal with this aspect and it cannot under these circumstances be said that the Court properly applied its mind in respect hereof.

[15] The Court, for these reasons, granted the applicant leave to appeal.

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**Tommasi J**

Appearance for the parties:

For the applicant:

Office of the Prosecutor-General

For 1<sup>st</sup> Respondent:

Mr L Mururua

Murorua & Associates

For 2<sup>nd</sup> Respondent

Mr Mostert