



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING ON THE APPLICATION TO RELEASE APPLICANTS ONE AND TWO
FROM PROSECUTION IN TERMS OF ARTICLE 12 OF THE CONSTITUTION**

CASE NO.: CC 24/2012

In the matter between:

**JEREMIA VAN NIEKERK
MELANIE VAN NIEKERK**

**FIRST APPLICANT
SECOND APPLICANT**

and

THE STATE

RESPONDENT

Neutral citation: *Van Niekerk v S* (CC 24/2012)[2017] NAHCMD 273 (27 September 2017)

Coram: SIBOLEKA J

Heard on: 08 September 2017

Delivered on: 27 September 2017

Flynote: Criminal law: Article 12 application – prayer – the release of the applicants from prosecution in terms of article 12 of the Constitution – test – a

violation of the applicant's fundamental right to a fair trial – such – absent – no such rights have been violated in any way from the pre-trial memorandum proceedings, answers thereto; the placing of the prosecution case before court up to the closure thereof.

Summary: An invalid search warrant titled “to all policemen” duly signed by the Magistrate, Luderitz was used by employees of the Bank of Namibia, Namfisa and members of the police to access the applicants' residence at E43 – 13th Avenue Oranjemund. Documents were seized, investigations resulted in the complainants coming forward with contracts they have entered into with the applicants. They made police statements as to how they lost their monies through the applicants investment business. Both the invalid search warrant and all documents seized thereon were thrown out of court in a s 174 of Act 51 of 1977 ruling which also turned down the applicants bid for a discharge. Trial has started a long way back and the prosecution has since closed its case on 2nd December 2016.

Held: The applicants' rights to a fair trial in terms of Article 12 of the Constitution have not been violated at all.

Held: The application to release the applicants from the prosecution is dismissed.

ORDER

In the result I make the following order:

1. The application to release the applicants from the prosecution on this matter is dismissed.
2. In view of the fact that the prosecution case has already been closed on the 2nd of December 2016, the applicants are ordered forthwith to make an election about what they intend to do in terms of section 151 of the

Criminal Procedure Act 51 of 1977.

3. The applicants are further ordered to adhere to the contents of the following exhibits which were already handed in to court and form part of the record of proceedings:
 - a. The State's pre-trial memorandum – exhibit C1
 - b. Applicant nr. 1's reply – exhibit C3
 - c. Applicant nr. 2's reply – exhibit C4.
4. The applicants have been and are still out on bail from the start of the proceedings on this matter. It is therefore my considered view that there is more than enough time for them to prepare their case without any delays so that the matter should proceed to finality on 12 October 2017.

JUDGMENT

SIBOLEKA J

[1] The basis of the application and the prayer being sought: According to the applicants counsel, the crux of this application is that seeing that the search warrant was declared invalid the possibility exists that there could have been some documents unknown to the accused and their counsel which were seized and not returned which would have been beneficial to the appropriate preparation of their defence case. If this court finds that what is stated above has in fact happened. It is the applicants prayer that they should be released from prosecution and or the court should direct that their prosecution on this matter be stopped once and for all.

Introductory background on the matter

The main trial

[2] The three accused stand preferred on the following charges of the indictment:

- a) Count 1 to 256: Fraud
- b) First alternative: Theft;
- c) Second alternative: Theft read with s 100 of the Criminal Procedure Act, Act 51 of 1977.
- d) Counts 257 to 512: Contravening s 5 read with ss 1, 6, 7, 9 and 72 of the Banking Institutions Act, Act 2 of 1998 – Prohibition on conducting of Banking Business By Unauthorized Persons.

[3] The summary of substantial facts in terms of section 144(3)(a) of the Criminal Procedure Act 51 of 1977 are as follows: The three accused operated an illegal pyramid scheme in Oranjemund during the period February 2004 to August 2006. During the above mentioned period the three accused had a micro-lending business called West Coast Financial Aid CC registered with the Ministry of Trade and Industry on the 2nd of April 2004 with registration number CC/2004/0946. Accused 1 and 3 were registered as the sole members of this closed corporation with a 50% membership each, while accused 2 was indicated as being the Principal Officer (the person chiefly in charge of the business of a micro-lender). On the 19th of April 2005 accused nr. 2 applied for reservation of name for another micro-lender under the name Mia's micro-lending. This business was however never registered as a micro-lender by Namfisa.

[4] Under the auspices of these businesses the accused solicited, procured or attempted to procure large amounts of cash deposits from members of the public and offered in return implausibly high returns on the sums of money so "invested". At all relevant times the above businesses were operated from the residence of accused nr. two and three (who are legally married) situated at E43-13th Avenue Oranjemund. The accused acting in consort and with a common purpose, directly or indirectly solicited, produced or attempted to procure large

amounts of cash deposits by making the following misrepresentation to their “potential investors”: That the money they “invested” would be lend out to clients borrowing money from the micro-lending businesses mentioned. Further that they (“the investors”) would receive interest on the invested amount (ranging between 7 and 15% per month). This interest was going to be paid out from the 30% interest charged on the amounts of money lend out by the micro-lending business/(s). When the accused so made these misrepresentations they well knew that they were not allowed to receive cash deposits from the public because they were not a banking institution. Further that they would not be able to pay out interest (ranging from between 7 and 15% per month) on the amounts “invested” and that they did not intend to lend out the “invested” money, but intended to and used it for their own gain. Furthermore that West Coast Financial Aid CC had loan disbursements of less than N\$800 000.00 per annum. As a result of the above misrepresentation/s several “investors”, who in turn recruited other persons, were induced to invest substantial amounts of money in their business.

[5] The accused collected a total amount of N\$11 458 372.24 either in cash or via electronic fund transfers or cheques from the said “investors”. Most of the money was handed to the accused persons in cash; however some amounts were deposited into the accused persons’ personal bank accounts and some into the bank accounts of West Coast Financial Aid CC.

[6] Only a select few of these investors received the promised interest on their capital and none of them received back the capital amounts which they invested with the accused.

[7] The accused did not meet the prerequisite for conducting “banking business” in terms of section 9 of The Banking Institutions Act, Act 2 of 1998 (which is defined as a business that consists of the regular receiving of funds from the public; and the using of such funds either in whole, in part or together

with other funds, for the account and at the risk of the person conducting the business for loans or investments) in that they were not incorporated as a Public Company under the Companies Act.

[8] The accused took control of the monies belonging to the investors. They dealt with it in the manner they deemed fit as opposed to the manner in which they had promised. Which manner resulted in the investors' money being depleted.

[9] The accused were not entitled to deal with the amount of N\$11 458 372.24 in the way they did and enriched themselves at the expense of the persons who "invested" money with them.

[10] The prosecutions pre-trial memorandum compiled in terms of The High Court Practice Directive Nr. 3 of 2001 as amended by The Revised Consolidated Practice Directive of February 2009 dated: 10 September 2012. The reply thereto by the two applicants through their counsel Mr. L. J. Karsten dated: 15 November 2013.

[11] In her reply the first applicant indicated that she did not intend to disclose the basis of her defence at that stage. She further stated that she intended to testify in her defence, should that be necessary and that she was of the intention to call witnesses. She indicated she would require the service of an interpreter from English to Afrikaans and vice versa. The first applicant estimated the duration of her case to be not less than five days. She already indicated in her reply that she does not plead guilty to any of the charges preferred against her.

[12] The second applicant also confirmed receipt of disclosure. He indicated in his reply, he did not intend to plead guilty. The number of witnesses he would call would depend on which witnesses the prosecution would call. He stated that he would require the services of an Afrikaans interpreter. He estimated the duration

of his case to be five days.

[13] In the above reply both applicants then proceeded to furnish answers to the prosecution allegations. After the above replies were received, the trial itself started entailing the calling to the witness's stand of ± 85 prosecution witnesses. The cross-examination of all these witnesses by the applicants counsel followed. As it usually happens to any other counsel during a trial, permission was granted to the applicants counsel at various stages of the proceedings to enable him to take instructions from the applicants during the whole process of cross-examination of the prosecution witnesses, up to the close of the latter's case.

[14] The above reply related to the prosecution memo in my view was well thought and reasoned. It shows that a clear and credible preparation of the trial of this matter was accomplished to its logical conclusion. It follows from the above that the allegation violations of Article 12 of the Constitution preventing a fair and appropriate preparation of the trial on this matter is credibly displaced and cannot be allowed to stand.

[15] The above pre-trial processes is the traditional way each criminal matter has to go through before the start of the actual hearing itself and this matter was not an exception.

[16] I will now discuss the applicants "concise heads of arguments in respect of a right to a fair trial". The application is one to apply for the release of applicants in terms of Article 12(1)(e) rights: As I have detailed the background of this matter, there were no irregularities in the pre-trial processes that the applicants went through. Article 12 was also part of the applicants request to be discharged at the close of the State's case in terms of Section 174 which was dismissed. There is nothing that this court has to enforce in favour of the applicants other than to finalize the trial itself, because Article 12 of the Constitution does not even apply. The applicants are merely facing allegations of a criminal nature as

contained in the indictment. The matter is therefore by law ordinarily subject to be heard by one Judge and not two or a full bench as suggested by the applicants.

[17] The Constitution is a living instrument. It is well established that the constitution must be interpreted wide and purposively to give proper effect thereto: There is no interpretation of a constitutional nature of any kind that is required here. The matter at hand is simply a straight forward criminal trial that has to be finalized within reasonable time as required by article 12(1)(b) of the Constitution.

[18] Chapter 3 makes provision for Human rights and Freedoms and thus those rights are guaranteed rights. Once interfered with, the court as upholder of the Constitution must step in. In this instance if the court finds that the applicants Article 12 rights were interfered with, they should be released from prosecution: Once it is found that an accused was deprived of his/her Article 12 rights during the trial, the preceding investigation and disclosure process, he/she must be released. The test to be applied by the honourable court is the normal civil test to wit a finding on a balance of probabilities. The question therefore is whether the Article 12 rights were infringed on a 51% or more basis. If so, the court must intervene by releasing the applicants. Given the complicity of this matter, the time lapse from arrest to trial, the infringement is evident. The court as the protector of the constitutional **must** jealously protect Chapter 3 rights including Article 12 rights: The only rights that were found to have been violated during s 174 bid for a discharge, related the search warrant which was appropriately invalidated and all exhibits that were seized on the strength thereof were declared not acceptable as evidence in court. This remedy was already accorded to the applicants in their failed discharge bid. There is furthermore no other violations that this court finds here entitling the applicants to a release from Criminal prosecution, nothing whatsoever. The prosecution proceeded with the calling of its witnesses (complainants) based on the contracts they have signed with the applicants as well as the police statements which they furnished in support of their case on the

matter.

[19] The main reason why it is submitted that Article 12 rights were infringed in this instance, is that all property and/or documents were seized in terms of a search warrant.

- a) This search warrant was declared invalid.
- b) Uncertainly exist about what property was seized as more than one inventory exist, the second one only came to light during the end of the state's case. Disclosure was also made at the whim of the State and clearly not a full disclosure.

[20] This argument has been appropriately displaced as follows by the prosecution:

'The state disclosed all of the information which it intended to use (and in fact used) during the trial. Certain of the business records of the accused were indeed not disclosed because of the voluminous nature of the evidence as well as the fact that the state did not intend to use it at the trial, not because it was deemed exculpatory but simply because it was deemed irrelevant. Furthermore the accused was always aware that it was in the possession of the Namibian police and the applicants' counsel was invited to peruse same.'

[21] There was no improper delay in bringing this application. At the instance of the state, the applicants were only arraigned in the High Court in 2012. The incidents occurred during 2006. The main matter was recently postponed to 4 September 2017. The application was filed for the said date. Even if there was an improper delay the applicants Article 12 rights cannot be denied. Once there is a breach, it is permanent and cannot be rectified in retrospect. An earlier filing would not have expedited the matter. The court **must** now intervene in the interest of justice to uphold the constitution:

[22] If the prosecution had prolonged/delayed or taken long to place its case before Court, the applicants would easily have brought an application for their release in terms of article 12(1)(b) of The Constitution (fair trial) which reads:

'(b) A trial referred to in sub-article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.'

[23] To distill the submission to the essence, applicants article 12 were denied/infringed, **even if innocently** done, entitling Applicants to relief as prayed for:

[24] I agree with the applicants contention that there was no improper delay in bringing this application per se, because every litigant has a right to enforce his/her rights whenever she detects that a wrong doing has been done to her. It is however my considered view that a reading of the applicants' concise heads of arguments in respect of a right to a fair trial, discussed above shows that the rational is the same as the one that was advanced in the applicants failed bid to secure their release at the close of the State's case in terms of s 174 of the Criminal Procedure Act 51 of 1977.

[25] The applicants counsel referred this court to the following authorities: In *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another*¹ the appellants were placed in chains after escaping from lawful custody. The Supreme Court per Strydom, Silungwe and Levy found the action to have been humiliating, degrading and accordingly unconstitutional. Further the Supreme Court agreed that in general to determine whether there was an infringement of Art. 8(2)(b) such a determination related to a value judgment based on the current values of the Namibian people.

¹ *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another.*

[26] In *S v Ganeb*² the constitutionality of s 309(4)(a) read with s 305 of the Criminal Procedure Act 51 of 1977 required unrepresented convictees of the Lower Court who are in prison to obtain a judge's certificate for leave to appeal to the High Court. The requirement was found to be a violation of article 10 of the Constitution which guaranteed equality before the law and article 12 which entrenches the right to a fair trial. The court further found that even though article 12 does not specifically refer to the right of appeal and review, the same was clearly included in the right to a fair trial which was not only limited to the court of first instance.

[27] The two above authorities referred to this court by the applicants counsel on this matter are distinguishable from the matter at hand. The reason being that this court is conducting criminal proceedings against the applicants to whom allegations of fraud, first alternative; Theft; and a contravention of section 5 read with sections 1, 6, 7, 9 and 72 of The Banking Institutions Act 2 of 1998, Prohibition on conducting of Banking Business by unauthorized person have been preferred to them by the Prosecution. The applicants have been duly indicted by the Prosecution on the strength of 83 complainants who alleged that they have lost their capital and other related income as per contract they have signed with the applicants on behalf of their company. Copies of the alleged contracts and letters of agreement have already been handed in by the complainants when they took the witness's state placing on record their side of the story during the prosecution case. This process is not a violation of any of Namibia's laws at all.

[28] Any citizen who feels aggrieved by the conduct of another person towards him is entitled to furnish/file a statement with the police so that the alleged wrong doing can be thoroughly investigated with a view to prosecute the alleged suspects if a prima facie case in the contemplation of the Prosecution has been legally established.

² *S v Ganeb* 2001 NR 194J.

From what I have alluded to above it follows that there were no violations of the applicants' rights in terms of article 12 of The Constitution entitling them to be released from prosecution on this matter.

[29] In the result I make the following order:

1. The application to release the applicants from the prosecution on this matter is dismissed.
2. In view of the fact that the prosecution case has already been closed on the 2nd of December 2016, the applicants are ordered forthwith to make an election about what they intend to do in terms of section 151 of the Criminal Procedure Act 51 of 1977.
3. The applicants are further ordered to adhere to the contents of the following exhibits which were already handed in to court and form part of the record of proceedings:
 - a. The State's pre-trial memorandum – exhibit C1
 - b. Applicant nr. 1's reply – exhibit C3
 - c. Applicant nr. 2's reply – exhibit C4.
4. The applicants have been and are still out on bail from the start of the proceedings on this matter. It is therefore my considered view that there is more than enough time for them to prepare their case without any delays so that the matter should proceed to finality on 12 October 2017.

A M SIBOLEKA
Judge

APPEARANCES:

FIRST AND SECOND APPLICANT: Mr. C Mostert
Directorate of Legal Aid, Windhoek

RESPONDENT: Ms. I Husselmann
Office of the Prosecutor-General,
Windhoek