

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

- I 18/2014** Prosecutor-General & 2 Others // O'Brien Sinkolela Mwananyambe
- I 3957/2013** Prosecutor-General & 2 Others // Maketo Wilson Mutumuswana
- I 104/2014** Prosecutor-General & 2 Others // Phelem Mboozu Mutuwangele
- I 3908/2013** Prosecutor-General & 2 Others // Mundume Thaddeus Sibonwa
- I 4215/2013** Prosecutor-General & 2 Others // Gilbert Kasiyana Poshowe
- I 116/2014** Prosecutor-General & 2 Others // Ernest Salufu Samunzala
- I 100/2014** Prosecutor-General & 2 Others // Joseph Kabuyan
- I 4333/2013** Prosecutor-General & 2 Others // Kalipa Charles Samboma
- I 103/2014** Prosecutor-General & 2 Others // John Tibiso Masake
- I 17/2014** Prosecutor-General & 2 Others // Boswell Adams Muyumbano
- I 15/2014** Prosecutor-General & 2 Others // Genese John Kabotana
- I 59/2014** Prosecutor-General & 2 Others // Joseph Omo Mufuhi
- I 58/2014** Prosecutor-General & 2 Others // Stephen Kandela Mashando
- I 40/2014** Prosecutor-General & 2 Others // Victor Tumoni Lunyandile
- I 3428/2014** Prosecutor-General & 2 Others // Max Simon Mubita
- I 4216/2013** Prosecutor-General & 2 Others // Kisiko Twaimango Sakusheka
- I 4334/2014** Prosecutor-General & 2 Others // Vascoh Inambao Lyonga

I 16/2014 Prosecutor-General & 2 Others // Richard Masupa Mungulike
I 39/2014 Prosecutor-General & 2 Others // Ernest Lolisa Lifasi
I 41/2014 Prosecutor-General & 2 Others // Frederick Kabatondwa Lutuhezi

Neutral citation: *The Prosecutor-General v Mwananyambe* (I 18/2014) [2017] NAHCMD 48 (24 February 2017)

CORAM: ANGULA, DJP

Heard: 24 October 2016

Delivered: 24 February 2017

Flynote: Practice – Applications – Stay of Proceedings – An application for stay of civil proceedings pending the finalisation of an appeal to the Supreme Court – The High Court has inherent jurisdiction to stay civil proceedings pending the outcome of criminal proceedings – Requirements restated - Exceptional circumstances must be present for the Court to grant such an order – Prejudice to the opposing party is a consideration - Application dismissed with costs.

Summary: The applicant, being the Prosecutor-General, sought an order for leave to stay the respondents' civil claims pending the finalization of the State's application for leave to appeal to the Supreme Court against the acquittals of the respondents. Following their acquittal, the respondents brought damages claims against the applicants claiming damages for the alleged malicious prosecution, alternatively for the alleged violation of their constitutional rights.

Applicant alleging that the filing of the application for leave to appeal together with the application for condonation has the effect that the criminal proceedings against the respondents have not terminated in their favour, therefore one of the elements of the respondents' cause of action for malicious persecution against the applicant and her co-applicants was absent.

Two main issues arose: Firstly, whether there are currently before the court criminal proceedings on going or pending against the respondents and whether the filing by the Prosecutor-General of the applications for condonation for the late filing for leave to appeal and the application for leave to appeal against the respondents' acquittals have the effect of reviving or reinstating the criminal proceedings against the respondents.

Secondly, whether the civil claims by the respondents against the applicants may continue while the applicant's applications for condonation for late filing of the appeal and the application for leave to appeal against the acquittal of the respondents are pending.

Held that – there are no criminal proceedings pending before court; that an application for condonation constitutes a preliminary step to the application for leave to appeal; and that the application for condonation has no effect of reviving or reinstating criminal proceedings.

Held that - applicant failed to make out a case that exceptional circumstance exists which oblige this court to exercise its inherent jurisdiction to grant the stay of the ongoing civil proceedings by the respondents. Furthermore that she failed to make out a case that she will be prejudiced if the stay is not granted.

Held that – it is more probable that the respondents are likely to suffer prejudice if the stay of their claims is granted. Application dismissed with costs.

ORDER

1. The application is dismissed.

2. The applicant is ordered to pay the respondents' costs who are not represented on the instructions of the Director of Legal Aid, such costs to include the costs of one instructing Counsel and one instructed Counsel.

JUDGMENT

ANGULA, DJP:

Introduction

[1] I have before me an application by the Prosecutor-General of Namibia ("the applicant") in which she seeks an order to stay the proceedings brought by the respondents against amongst others the Prosecutor-General herself, the Minister of Safety and Security and the Government of the Republic of Namibia. Even though the Minister of Safety and Security and the Government of the Republic of Namibia have been cited as parties to the proceedings, no affidavits were filed on their behalf. Accordingly, in this judgment, I will use "the applicant" in reference to the Prosecutor-General unless the context clearly indicates otherwise.

[2] The respondents were all accused persons in what has come to be known as the Caprivi Treason Trial. The Respondents were acquitted on 11 February 2013 pursuant to their application for discharge in terms of section 174 of the Criminal Procedure Act, No 51 of 1977, ("the CPA").

[3] Following their acquittal, the respondents brought damages claims against the applicants claiming damages for the alleged malicious prosecution, alternatively for the alleged violation of their constitutional rights. The pleadings in those cases have closed and the cases have been postponed for status hearing.

[4] The application is opposed by the respondents.

[5] The applicant is represented by Mr Namandje on the instructions of the Government Attorney. Some of the respondents are represented by Mr Corbett SC assisted by Mr Hengari on instructions of Kangueehi & Kavendji Inc, whilst the remainder of respondents are represented by Mr Muluti from Muluti & Partners. Counsel filed comprehensive heads of argument and the court wishes to thank them for their industry.

Applicant's case

[6] The applicant states in her founding affidavit that she brought this application for leave to stay the respondents' civil claims pending the finalization of the State's application for leave to appeal to the Supreme Court against the acquittal of the respondents and all other criminal appellate processes that the State may pursue, which may include a petition to the Chief Justice in terms of the rules of the Supreme Court, should the State fail in this court with its application for leave to appeal.

[7] It is the applicant's case that the main considerations which motivated her applications are that the criminal proceedings against the respondents have not been finalised in that she has applied for leave to appeal to the Supreme Court, which application may be granted by this court; and that if leave is declined by this court she will petition the Chief Justice. The applicant further alleges that one of the elements of a cause of action in which a plaintiff claims damages based on alleged malicious prosecution is to allege and prove that his/her prosecution has terminated in his/her favour. The applicant says that in view of the fact that an application for leave to appeal has been filed, it cannot be said that the prosecution has terminated in favour of the respondents. Therefore she contends the claims for damages brought by the respondents do not disclose causes of actions. The applicant further points out that as matters stand she could successfully raise an exception to the respondents' claim on

the basis that the particulars of claim of the respondents do not disclose a cause of action. The applicant states further that the alternative claim based on the alleged infringement of the respondents' constitutional rights can only be determined after the criminal proceedings have been finalised.

[8] The applicant says further that it would be convenient and appropriate to stay the respondents' civil claims against the applicants so as not to interfere with the criminal process that has yet not been completed; and that to allow the civil claims to proceed would essentially open the doors for those cases to prejudice the outcome of the criminal proceedings if leave to appeal is ultimately granted. Furthermore that it would be fair, practical, sensible and appropriate to stay the civil claims in that if the applicant were to obtain leave to appeal it would be incompatible with judicial comity to have this court in the meantime determine the parties' rights in the civil matters when the criminal matters on the same facts will be heard in the Supreme Court, subsequently.

[9] The applicant further argues that judicial time and resources would be optimally managed and utilized if the application for stay is granted. The applicant further submits that should the civil proceedings proceed in the meantime and judgment is delivered, the nature and status of that judgment may be negatively impacted upon if the application for leave is later granted. The applicant further argues that if the State were to obtain leave to appeal against the respondents and if the acquittals were to be set aside by the Supreme Court, any judgment in the respondents' favour by this court would be *brutum fulmen* – a judgment which has no legal effect.

The Respondents' opposition to the application.

[10] Each respondent filed an opposing affidavit. They make common cause with each other regarding the reasons for opposition. Their opposition can be briefly summarized as follows:

10.1 There are no criminal proceedings pending before court against the respondents until such time both applications by the applicants, that is, the application for condonation for the late filing of the application for leave to appeal and the application for leave to appeal itself, have been granted. For that reason, the respondents contend that the application for leave to stay is premature.

10.2 The applicant's application for leave to appeal is not *bona fide* in view of the fact that the applicant has been aware of the respondents' claims since February 2013 and it is not known how long it will take for the applications, for condonation and for leave to appeal to be finalized; therefore the respondents' right to an expeditious trial would be severely infringed upon if the application for leave to stay is granted.

10.3 According to the respondents, the applicant has no prospect of success with respect to the application for condonation for the late filing of the application for leave to appeal. In this respect the respondents point out that the application for condonation has been brought more than three years since the respondents were discharged

10.4 It is the respondents' further case that the delay in bringing this application is not explained, given the fact the parties have gone through all the steps of exchanging pleadings and mediation. Now that the matters are ripe for trial, the applicant inexplicably brings an application for leave to stay the adjudication of their claims. The respondents further point out that a great deal of time and resources, including financial, have been

expended by them in advancing the matters to finality. The respondents contend further that they are entitled to finality of litigation within a reasonable time.

10.5 The respondents further contend that the applicant has been extraordinarily derelict in compliance with the rules of the court in that she ought to have filed the application for leave to appeal within 14 days after the judgment of the court in favour of the respondents was delivered; that the application for leave to appeal is brought more than three years from the date the respondents were acquitted; that the application to stay amounts to an abuse of the court process in that if the applicant was serious about being granted leave to appeal she would not have waited for such a long time before launching the application to stay and that in so far as the applicant appears to apply for an indefinite stay of the respondents' claims such an act amounts to vexatious litigation on the part of the applicant.

Applicant's reply

[11] In her replying affidavit the applicant states that the application for condonation and the application for leave to appeal have been filed at the same time and that the matter has been postponed to 8 March 2017 for a status hearing. She denies that the application for leave to appeal is not *bona fide*. The applicant points out further that it would be inappropriate to deal with the reasons for condonation and prospects of success of the application for leave to appeal in this application and that those aspects are better left to the criminal court which is to consider and deal with.

[12] The applicant further denies that this application is an abuse of court process. She explains that this application became necessary once she had decided to lodge the condonation application and leave to appeal in terms of section 316A of the CPA; and

that the application is based on the legal footing that the malicious proceedings cannot be proceeded with where the criminal proceedings have not been concluded.

[13] The applicant further denies that this application has been brought late. In this respect she points out that the application for leave to appeal was filed on 20 June 2016; that the claims for malicious prosecution were set down for mediation between June to August 2016; and that her legal practitioner raised the issue of stay of the proceedings at the status hearing on 18 August 2016

Issues for determination

[14] The issues for determination in this matter are firstly whether there are currently before the court criminal proceedings on going or pending against the respondents and whether the filing by the Prosecutor-General of the application for leave to appeal against the respondents' acquittals has an effect that criminal proceedings against the respondents are not concluded and therefore the said proceedings did not terminate in their favour. The second issue has been aptly formulated by the applicant in her replying affidavit and that is: "*whether the civil claims by the respondents against the applicants may continue while the applicant's applications for condonation for late filing of the appeal and for leave to appeal against the acquittal of the respondents, in terms of section 316 of the CPA are pending*".

Applicable legal principles

[15] With regard to the first question, the legal position was explained by Damaseb JP in the matter of *Akuake v Jansen Van Rensburg*¹ as follows:

¹ 2009 (1) NR 403 (HC)

“[3] *To sustain a claim based on malicious criminal proceedings the plaintiff must allege and prove:*

- (i) that the defendant actually instigated or instituted the criminal proceedings;*
- (ii) without reasonable and probable cause; and that*
- (iii) it was actuated by an indirect or improper motive (malice) and;*
- (iv) that the proceedings were terminated in his favour; and that (my underlining for emphasis)*
- (v) he suffered loss and damage.”*

[16] Regarding the second issue, namely the power of the court to stay proceedings Mr Muluti referred the court to a useful South African judgment by Smith J in the matter of *Michael Randell v The Cape Law Society*² where the learned judge summarized the legal principles governing application for leave to stay as follows:

‘[25] The applicable legal principles in my view can then be summarised as follows:

- (a) Our courts have a discretion to suspend civil proceedings where there are criminal proceedings pending in respect of the same issues:*
- (b) Each case must be decided in the light of the particular circumstances and the competing interests in the case;*
- (c) In exercising its discretion the court will have regard to inter-alia the following factors:*
 - (i) the extent to which the person’s right to a fair trial might be implicated if the civil proceedings are allowed to proceed prior to the criminal proceedings;*

² Case Number 264/11 delivered on 27 October 2011

- (ii) *the interests of the plaintiff in dealing expeditiously with a litigation or any particular aspect thereof;*
 - (iii) *the potential prejudice to the plaintiff if the proceedings are delayed;*
 - (iv) *the interests of persons not involved in the litigation; and*
 - (v) *the interests of the public in the pending civil and criminal litigation*
- (d) *The court must be satisfied that there is a danger that the accused might be prejudiced in the conduct of his defence in the criminal matter if the civil case is allowed to proceed before the finalisation of the criminal case against him."*

The parties' respective submissions and merits considered

[17] Mr. Namandje for the applicants submits that the mere filing of the application for leave to appeal in terms of section 316 A of the CPA coupled with the application for condonation "*re-instate in itself the criminal proceedings against the respondents as contemplated by sections of the CPA*". The respondents on the other hand argue that there is no appeal and therefore there is no continuation of the criminal proceedings until the application for condonation has been granted. I agree with the respondents' submission. In the matter of *Mouton v Goaseb*³, Masuku J had to consider the application for leave to stay eviction proceedings on the ground that there were pending proceedings before the Supreme Court. In the course of considering the application and before dismissing it the learned judge expressed himself as follows;

"What will be before the Supreme Court in due course, will be applications for condonation and reinstatement of the appeal and these, in my view are not proceedings pending before the Supreme Court. It is only upon the applications being granted and the appeal reinstated that one can say without diffidence that there is a civil matter pending before the Supreme Court and which may arguably

³ (14215-2011) [2015] NAMHCMD 257 (28 October 2015) para 20.

have the staying effect on proceedings that be presently serving before this court”.

[18] The above pronouncement is no doubt applicable to the current application. As one of my colleagues would say: The applicant is, so to speak, knocking at the court’s door. She is outside the portal of the court; she has not yet been allowed to enter. With her application for condonation she is seeking for an indulgence from court. Only once she has been granted admittance either by this court or by the Chief Justice pursuant to a petition that it can be said that the matter is pending before court. No authority was cited to the court by counsel in support of the contention that the mere filing an application for condonation together with her application for leave to appeal automatically reinstates the criminal proceedings. If the applicant’s contention were correct, one would be compelled to ask a question: What is then the purpose of the application for condonation if the criminal proceedings have already automatically been reinstated?

[19] In my view the phrase ‘*criminal proceedings*’ does not include the application for condonation. Stripped to its bones, what is before court is an application for condonation. Strictly speaking the application for leave to appeal is not yet before court. The papers for the application for leave to appeal might be before court but that is only for the convenience and for practical reasons because in considering the application for condonation, the court must at the same time consider the issue of the prospects of success which is normally contained in the papers for the application for leave to appeal.⁴

[20] In my view the application for condonation is a prelude or a preliminary step to the application for leave to appeal. Furthermore, in my view, the condonation

⁴ See; *Petrus v Roman Catholic Church and Another* A127/2005 [2012] NAHC (14 December 2012)

application cannot have the effect of automatically reinstating criminal proceedings before court. It is only once the condonation application has been granted that the application for leave to appeal would be placed before court. This is clear from the authorities and shares legal common sense. I may mention that from the authorities I was able to access, it would appear that an application for leave to appeal may qualify as “a criminal proceedings”. For the purpose of this application and in light of the view I take with regard to the application for condonation, I do not need to make a finding with regard to the status of the application for leave to appeal i.e. whether it is a criminal proceeding or not.

[21] Taking into consideration the foregoing, I am of the considered view that there are presently no ‘criminal proceedings’ pending before court. Furthermore, no criminal proceedings were reinstated by the filing of the application for leave to appeal. What is currently before court is an application for condonation for the late filing of the application for leave to appeal. The application for leave to appeal is not presently before court. The application for leave to appeal will properly be before court for consideration only once and if the court has granted condonation to the applicant for her late filing of her application for leave to appeal. In the meantime the *status quo* which came into being on 11 February 2013 when the criminal proceedings were terminated in favour of the respondents remains in place. This remains so until the appeal by the applicant has been upheld in favour of the applicant.

[22] I now move to consider the second question that is whether or not the civil claims by the respondents against the applicant may continue while the applicant’s application for condonation for late filing of the appeal and for leave to appeal against the acquittal of the respondents, in terms of section 316 of the CPA is pending.

[23] The legal principles which are at play when the court is considering the whether or not it should exercise its discretion to order stay of civil proceedings have been referred above in the matter of *Michael Randell v The Cape Law Society (supra)*. No doubt, a court has jurisdiction to stay civil proceedings where there are criminal proceedings pending on the same issue. It has further been held that “*the court has a judicial discretion, which must be sparingly exercised on strong grounds, with great caution and in exceptional circumstances*”⁵.

[24] It would appear to me that in most cases, applications for stay of proceedings are made in respect of civil proceedings where both criminal as well as civil proceedings are based on the same facts.⁶ In such cases, the main purpose for the stay of civil proceedings is to protect the integrity of the criminal justice system and to avoid any prejudice against the accused. I should hastily add that this consideration is not at the forefront of the present application. The respondents were acquitted at the end of a lengthy trial. And as I have found earlier in this judgment, there are presently no pending criminal proceedings against the respondents.

[25] An application for stay of civil proceedings pending a hearing of an appeal to the Supreme Court was considered by the court in the matter of *Mouton v Goaseb (supra)* where the court aptly summarised the factors the court ought to take in consideration when considering an application for stay of civil proceedings. The court stated as follows at par [13]:

“It thus becomes clear that applications for stay of proceedings are not granted lightly and merely for the asking. It would seem that exceptional circumstances must be proved to be extant before the court may resort to this measure. I would think this is because once legal proceedings are initiated, it is expected that they will be dealt with speedily and brought to finality because tied in them are rights and interests of parties, which it is in the public interest to bring to finality without

⁵ Kalipi v Hochobeb 2014 (1) NR 90

⁶ Kalipi supra at page 99

undue delay. Applications for stay have the innate consequence of holding the decisions and the rights and interests of the parties in abeyance. It is for that reason that these applications are granted sparingly. It would appear to me, in line with the overriding principles of judicial case management, the bar for meeting the requirements for stay of proceedings is even higher as the application impacts on the completion of the case, time expended on the application itself (not to mention the time to be waited during the time when the stay operates if successful) and obviously, the issue of costs”.

[26] Against the background of the legal principles outlined above, I then turn to consider the facts of the present application. In the context of the consideration of potential prejudice to the respondents if the proceedings are delayed, coupled with the interests of the respondents in dealing expeditiously with the proceedings it is submitted on behalf of the respondents, that the applicant has many hurdles to overcome which will take time. In this respect, it is pointed out that if application for condonation is refused, or if the condonation is granted and the leave in the event the appeal is refused, then the applicant has to petition the Chief Justice. Mr. Namandje differs with the respondents’ reasoning in this regard. According to him, the application for condonation for the late filing of the application for leave will be heard at the same time with the merits of the application for leave to appeal. In support of this submission counsel referred to remarks by the Supreme Court in the *Ondjava Construction CC and Others v HAW Retailers t/a Ark Trading* matter.⁷ The position or procedure as set in the *Ondjava* matter is correct. It is the practical application of the principle which poses a challenge.

[27] In my view there is a difference between the theory and practice. The difference comes in how the court in practice deals with the two applications. My understanding of the procedure is that, even though the two applications might have been filed together they are separately but sequentially considered by the court: the condonation

⁷ *Ondjava Construction CC and Others v HAW Retailers t/a Ark Trading* 2010 NR 286 (SC)

application is considered first and only if such application is favourably considered and granted that the court will move to consider the application for leave to appeal. In considering the reason for the delay for the late filing of the application for leave to appeal the court has to also consider the prospect of success, which in essence, is part of the application for leave to appeal.

[28] To demonstrate the court's approach it might be helpful to refer to some of pronouncements by the courts. In the matter of *Moraliswani v Malima*⁸ the attorney for the appellant explained that he was under the impression that the petition for condonation for the late filing of the appeal would be heard simultaneously with the appeal itself. The appeal court (at page 8 E-F) pointed out that the attorney's understanding was a misconception. The appeal court then pointed out that there was no way in which the petition for condonation could be heard simultaneously with the appeal itself; that at best the parties' arguments on the petition for condonation and particularly their contentions on the petitioner's prospects of success, could have been treated as constituting also arguments on appeal if condonation were to be granted.

[29] In the matter of *S v Nakale*⁹, the Supreme Court reaffirmed the principle of our law that where an appeal has been noted to the High Court the court does not consider the merits of the appeal other than in the context of the application for condonation; that the court only decides and refuses the application for condonation for the lateness of the appeal. In the event the application for condonation is refused, an appellant is entitled to appeal to the Supreme Court as of right.

[30] It follows therefore from the above authorities that the two applications are, all things being equal, not heard simultaneously.

⁸ 1989 (4) SA 1

⁹ 2011 (2) NR 599.

[31] The respondents have indicated that they will oppose both the applicant's applications for condonation and for leave to appeal. Under such circumstances, it would appear that the possible scenario with regard to the route the process of condonation and leave to appeal will take, as sketched by the respondents, is on the optimistic. In my view, the more realistic process the matter may take is the one set out in the *Nakale* judgment namely: if the application for condonation is refused the applicant will have the right to appeal as of right to the Supreme Court against the decision refusing application for condonation. If the Supreme Court upholds the appeal against the refusal of the application for condonation it will remit the matter to the High Court for the latter court to consider the merits. If leave is granted then the appeal goes back to the Supreme Court. If however leave is refused then the appellant will have to petition the Chief Justice. Only if the petition succeeds the appeal will ultimately be heard. The Supreme Court will take some time to consider and thereafter deliver its judgment.

[32] Taking into consideration the time the appeal process is likely, based on this court's experience with the pace at which cases move on the rolls of both this court as well as the Supreme Court, to stretch over a period of two to three years.

[33] I am therefore of the considered view that the granting of the application for stay at this stage before leave to appeal is considered and granted alternatively the appeal is heard, will not only be premature but will severely prejudice the adjudication of the parties' rights. In addition, if the civil cases in these matter are stayed it will cause a congestion on the court's roll contrary to this court's bench disposal policy.

[34] The applicant alleges that she will suffer prejudice should the civil claims proceed while the appeal is pending. Unfortunately the applicant did not spell out exactly what

prejudice she will suffer. The court in the *Kalipi* the matter (*supra*) referred with approval to the judgment of Nicholas J in the matter of *Fisheries Development Corporation of SA (Pty) Ltd v Chairman, Wine and Spirit Board and Other*¹⁰ where it was stated that where an application for stay is made on the grounds of prejudice, such prejudice and harm must not be '*problematical, hypothetical and speculative*'. Those considerations apply in the present application. This court is not in position to speculate or imagine what prejudice the applicant will suffer. The court will only order a stay in order to prevent an injustice taking place but will only do so provided the applicant can show that there is a real danger and not an imaginary or speculative one.

[35] It would appear to me that it is more probable that the respondents are likely to suffer prejudice if the stay of their claims is granted. Their right to be compensated for alleged malicious prosecution would be suspended for indefinite period until the appeal proceedings are finalized and in the event the appeal is dismissed. Given the applicants determination to proceed against the respondents as demonstrated by both the decision to appeal as well as by this application for stay, I think it is fair to say if the respondents were to succeed with their claims for damages against the applicant it is highly probable that the applicant will appeal against the court's judgment awarding damages to the respondents. I am of the firm view that it is much too early to order a stay of the respondents' civil claims. In my estimation as indicated earlier herein, the appeal proceedings will take a considerably long time before they are is finalised.

[36] To demonstrate the severe prejudice likely to be suffered by the respondents I note this court per Christian AJ, 2 on February 2017 delivered a judgment for malicious prosecution in favour of a plaintiff. Significantly the plaintiff in that case a former co-accused with the respondents in this matter and was discharged at the same stage as the present respondents. I think it is fair to say that the outcome of that case created legitimated expectations on the part of the present respondents. Objectively viewed it

¹⁰ 1999 (3) SA 832 (C)

would not appear to be fair to stay the present respondents' proceedings while the proceeding of their former co-accused are allowed to proceed. It begs the question why the applicant did not at any stage seek leave to stay the proceedings in those matters in which she is one of the defendants. This ambivalence and, dare I say, inconsistent conducts on the part of the applicant is a great concern to this court and I need not say more at this stage.

[37] It is also important not lose sight of the fact both proceedings, the criminal case as well as the civil claims are under judicial case management of this court. The court is directly controlling and monitoring the process. In the exercise of its judicial oversight the court is in position, at an appropriate time, to order the stay of proceedings, should it in its wisdom considers it necessary and in the interests of justice without a request or a formal application from any of the parties.

[38] Having considered all the relevant factors I am not satisfied that the applicant has made out a case that exceptional circumstances exist to move this court to exercise its inherent jurisdiction to grant the stay of the ongoing civil proceedings by the respondents against the applicant and her co-applicants. Accordingly the civil proceedings shall continue. Should the court, at any time in the course of both proceedings, civil and criminal, consider it necessary and in the interests of justice to stay the proceedings, I have no doubt the court shall *mero motu* order the stay of the civil proceedings.

Costs

[39] Mr. Corbett in his heads of argument asked for an order of costs on the normal scale, whilst Mr Muluti asked for a punitive order of costs. As I understand Mr Muluti, his motivation for a punitive order of costs was based on the alleged *mala fides* conduct

of the applicant by bringing the application for leave to appeal after three years from the date the respondents were acquitted; that such conduct is vexatious and amounts to an abuse of the court process. These arguments were linked to the lateness of bringing the application leave to appeal, the absence of a proper explanation for the lateness of filing the condonation as well as the alleged absence of the prospects of success. I took the view that those issues were not for this court to consider or to decide. It follows therefore this court has no basis upon which it can make a punitive order of costs.

[40] Regarding the normal order of costs the applicant pointed out that the respondents who are represented on the instructions of the Director of Legal Aid are not entitled to an order of costs.

[41] In respect of those respondents who are entitled to a costs order, I do not see any reason why the normal consequence should not apply namely the costs follow the results. I do not consider the complexity of this matter to have required the services of two instructed counsel.

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

1. The application is dismissed.
2. The applicant is ordered to pay the respondents' costs who are not represented on the instructions of the Director of Legal Aid, such costs to include the costs of one instructing Counsel and one instructed Counsel.

H Angula
Deputy Judge President

APPEARANCES:

APPLICANTS:

Mr Namandje

Instructed by Office of Government Attorney

1ST, 3RD, 6TH, 7TH, 9TH, 10TH, 11TH, 12TH,

13TH, 14TH, 18TH, 19TH & 20TH RESPONDENTS:

Mr Corbett

(With him Mr Hengari)

Instructed by Kavendjii & Kanguuehi Inc.

2ND, 4TH, 5TH, 8TH, 16TH & 17TH RESPONDENTS:

Mr Muluti

Muluti & Partners