

REPUBLIC OF NAMIBIA



REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 02/2014

In the matter between:

THE STATE

and

IGNATIUS SHIDUMIFA KELLY NGHIXULIFWA

ACCUSED NO 1

ANNA NDOROMA

ACCUSED NO 2

HAFENI NGINAMWAAMI

ACCUSED NO 3

Neutral citation: *S v Nghixulifwa* (CC 02/2014) [2018] NAHCMD 326 (17 October 2018)

Coram: LIEBENBERG J

Heard: 13 September 2018

Delivered: 17 October 2018

Flynote: Criminal Procedure – Indictment and charges – Objection to indictment in terms of s 85 of CPA – Accused persons entitled to raise objections – Merit of objection raised dependent on the offence itself and extent of evidence State capable of producing.

Criminal Procedure – Indictment and charges – Objection to indictment – Whether Road Construction Company is a public body – Question whether entity a public body – No simple definition or clear test – All relevant factors to be considered – Including (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest – None of these factors necessarily determinative – Court must exercise own discretion considering relative weight of factors in context – Court held State to lead evidence to establish these facts.

Criminal Procedure – Indictment and charges – Objection to indictment – In the alternative – That section 43(2) of the Anti-Corruption Act 8 of 2003 is unconstitutional – Court holding that constitutional challenge has to be done through substantive application – Application must be brought by notice of motion served on all interested parties.

Criminal Procedure – Indictment and charges – Objection to indictment – Defence sought amendment by deleting the insertion of s 332(5) of the Criminal Procedure Act 51 of 1977 in indictment – In terms of s 332(5) the State may choose to prosecute director(s) or the corporate body jointly or severally – Accused persons are not prejudiced by inclusion of s 332(5) in indictment.

Summary: Accused no 1 raised various objections to eight counts indicted. In respect of counts 1,5,6,9 and 10 the accused sought that each of those counts be quashed on the ground that accused no 1 is not a public official and neither is the RCC a public body. In the alternative to the main objections raised, the accused sought an order declaring that the State cannot rely on section 43(2) of the Anti-Corruption Act 8 of 2003 because it was unconstitutional. In respect of the other set of counts (counts 2, 7 and 11) the accused persons sought an order for the amendment of the indictment by deleting the insertion of s 332(5) of Act 51 of 1977 because the section only

allows prosecution of directors when the corporate body is prosecuted as well. In this instance no corporate body is being prosecuted.

Held, that, accused persons are entitled to raise their objections before any evidence is presented, moreover, when it is contended that the charge does not disclose an offence.

Held, further that, it is difficult to ascertain whether an entity is a public body as there is no simple definition and clear test the court could apply, but what is required of the court is to consider the relevant factors and to 'exercise its discretion considering their relative weight in the context'.

Held, further that, in order for the court to give weight to the relevant factors in context, it would require the presentation of *viva voce* evidence.

Held, further that, a court should only decide the constitutional challenge once all interested parties are afforded the opportunity to intervene.

Held, furthermore, by the inclusion of the section 332(5) of Act 51 of 1977 the accused persons are not required to make any significant changes to their defence, neither would they be prejudiced.

ORDER

The application made in terms of sections 85 and 86 of the Criminal Procedure Act 51 of 1977 in respect of counts 1, 2,5,6,7,9,10 and 11, in the main and alternative, is refused.

RULING
(*Objection to charges*)

LIEBENBERG J:

The objections

[1] On the 13th of September 2018 accused no 1, in terms of s 85 of the Criminal Procedure Act 51 of 1977 (the Act), raised various objections to eight of the 11 counts indicted. In respect of one set of counts (counts 1, 6, 9 and 10 plus count 5) the principal relief sought is that each of these counts be quashed; *alternatively*, that it be declared that the State may not rely on the provisions of s 43(2) in order to seek the conviction of accused no 1 under s 43(1) and 45(a) of the Anti-Corruption Act 8 of 2003 (the ACA). In respect of the other set of counts (counts 2, 7 and 11), the relief sought is an amendment to the indictment by deleting the inclusion of s 332(5) of the Act from the said charges. Only accused no 1 is charged with contraventions under s 43(1) while all the accused are charged under s 45(a) of the ACA.

[2] Central to the objection raised by accused no 1 are allegations in the indictment that during the commission of the alleged offences he was employed as the Chief Executive Officer (CEO) of the Roads Contractor Company (the RCC); that through his actions or omissions he contravened s 13(3) of the Roads Contracting Company Act, 1999, (the RCC Act)¹; that the RCC is a *public body* as defined in s 32 of the ACA, and that accused no 1 was a *public officer* as defined in the same section of the ACA. It was submitted that the principal objections to counts 1, 6, 9 and 10 are not technical in nature but goes to the heart of the offence charged therein, hence the prayer to quash these counts.

¹ Act 14 of 1999.

[3] The objection raised in respect of count 5 hinges on the principal objections raised to counts 1, 6, 9 and 10 in that the alleged gratification received relates to a contravention of s 43(1) of the ACA. Consequently, it was contended, count 5 equally falls to be quashed.

[4] Finally, the grounds of objection relating to counts 2, 7 and 11 (and the alternatives thereto) essentially concern the inclusion of s 332(5) of the CPA in the indictment, in circumstances where it is not alleged that accused no 1 was a director or servant of a corporate body liable to prosecution. Moreover, where it is not alleged that the company itself, the RCC, is liable to prosecution. It is further contended that the inclusion of the said section is misplaced, unlawful and irregular and falls to be deleted. The mechanism to do so, it was argued, is for the court to invoke the provisions of s 86 of the CPA and order that the indictment be amended to address the concerns raised by accused no 1.

[5] It was only after the notice to object to the indictment was filed on 4 September 2018 by accused no 1, that accused no's 2 and 3 decided to follow suit and sought leave of the court to be exempted from filing a notice as required by s 85(1) of the CPA. Whereas the matter was postponed and set down for hearing the following week, the court dispensed with such notice. The heads of argument filed by accused no's 2 and 3 were therefore prepared in support and in solidarity with the notice filed by accused no 1.

[6] Regarding the objections raised by accused no 2 it was said that she does so on the basis that the allegations she is facing are entirely linked to those relating to accused no's 1 and 3, respectively. Accused no's 2 and 3 are however not 'entirely linked' to accused no 1, as they are only linked to him in respect of counts 2, 5 and 7. In turn, the grounds relied on by accused no 2 are virtually the same as that raised by accused no 1 and need not be restated. Though the argument advanced in support thereof is slightly different, the accused persons essentially seek the same relief.

[7] As with accused no 2, the same grounds identified and raised by accused no 1 were relied on by accused no 3 in the heads of argument, which will be discussed in more detail below.

The State's opposition

[8] The State's counter argument is that the challenge to the relevant charges was brought prematurely and that the State should be permitted to prove the allegations contained in the indictment. For instance, in order for the court to decide whether the RCC is a public body as alleged, it has to hear evidence. Support for counsel's contention is to be found in the matter of *S v Conradie and Another*² where a similar challenge was brought. The defence however held a different view and respectfully submitted that the *Conradie* case was wrongly decided. I will revert to this case in more detail later.

[9] In any event, the State's stance remains that the RCC is a public body as is evident from the RCC Act, and the memorandum and articles of association submitted on behalf of the accused. I pause to observe that these documents were unilaterally handed up during argument by Mr *Soni*, counsel for accused no 1. As regards the constitutional challenge to s 43(2) of the ACA, it was argued that the said section, as yet, has not been subjected to a constitutionality test and therefore remains valid until ruled otherwise by a competent court. Furthermore, neither is this court the correct forum in which the constitutionality of the section is to be decided. Lastly, in respect of the inclusion of s 332(5) of the CPA in the indictment it is the State's view that proving the liability or otherwise of the accused persons under this section will be a matter of evidence and that evidence will be led showing that the accused persons had acted with common purpose when using corporate bodies to conclude fraudulent transactions.

Sections 84, 85, 86 and 88 of the CPA

² 2016 (2) NR 438 (HC).

[10] Section 84 requires of the State to set forth in the charge the essential allegations and reads as follows –

‘(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.’

(Emphasis provided)

[11] Though the section makes plain what should be contained in the charge, I find the commentary of *Hiemstra’s Criminal Procedure* at 14-9 illuminating when stating that ‘The heart and soul of a charge is that it has to inform the accused of the case the state wants to advance against him or her’.³ Though this is what fairness requires, the charge should not be quashed as a result of an overly technical approach. Substance is the important consideration as even an essential element of the charge can be corrected during the trial by way of evidence or on application, as provided for in sections 86 and 88 of the CPA. The effect thereof is however only to correct a defective charge and not to substitute it with another offence.

[12] The first objection is brought under s 85 and is intended to show that the charges identified do not disclose an offence. This objection is primarily based on the approach followed in the Full Bench decision of *S v Nathaniel and Others*⁴ where an objection was raised in terms of s 85 on grounds that the charge, as amplified by the further particulars, did not disclose an offence as envisaged by the Act under which the accused were indicted. In

³ See *S v Hugo* 1976(4) SA 536 (A).

⁴ 1987(2) SA 225 (SWA).

consideration of the objection the court interpreted (already at this early stage) the section under which the accused were charged and when read with the documents submitted by the State as further particulars, concluded that the indictment did not disclose an offence. As a result, the majority of the court found, on the facts of the case, that the charge could not be remedied and had to be quashed. It is in view thereof that the defence in the present instance implored the court to adopt the same approach. That is, for the court to interpret the words *public body* and *public officer* as defined in the ACA, and pronounce itself on whether the State will be able to prove the relevant charges against the accused persons. If the court were to come to the same conclusion as in *Nathaniel*, the effect would be that the charges must accordingly be quashed without the hearing of evidence. It was further submitted that it would only be fair to the accused to decide the legality of the charges at this stage, instead of subjecting them to a trial where they are to defend themselves against charges that are not only materially defective, but which do not disclose an offence.

[13] Section 86 gives the court a discretion to order that a charge be amended where defective for the want of any essential averment therein; or where an averment in the charge is at variance with the evidence adduced in proof of such averment; or where words or particulars that ought to have been inserted in the charge have been omitted or *vice versa*. As correctly submitted on behalf of accused no 1, the court in *S v Ramgobin and Others*⁵ pointed out that it should be noted that the court's power is not confined to amendments or defects as set out in s 85, but that the court's power to amend is extended by s 86 to amend 'any error in the charge'. This may be done at any time before judgment.

[14] Section 88, in turn, governs the procedure where a charge is defective for want of an averment which is an essential ingredient of the offence. Where the defect is not brought to the attention of the court, it will be cured by evidence at the trial proving the matter that should have been averred. In view of the extent of the objection raised and it having been brought to the court's

⁵ 1986(1) SA 68 (NPD) at 74A-B.

attention prior to the commencement of the trial, this section finds no application to the present facts.

[15] I am, from what is stated hereinbefore, satisfied that in this instance the accused persons are indeed entitled to raise their objections before any evidence is presented, moreover, when it is contended that the charge does not disclose an offence. Whether the objection so raised has merit will be decided by a consideration of the offence charged, the nature and extent of evidence the State is capable of producing, and whether it ultimately would assist the court in deciding the issue at hand. If not, the accused would be entitled to have the charges quashed.

The quashing of charges

[16] In support of the objection raised that the charges under s 43(1) do not disclose a defence, the court is implored to interpret the meaning of a *public body* and a *public officer* as defined in s 32, read with s 43, of the ACA. The mainstay of the objection is the State's bold assertion that the RCC is a public body without alleging in the indictment under which of the sub-paragraphs of the definition the RCC falls. Furthermore, as for accused no 1 having been a public officer as alleged, this is based on the fact that he was the CEO of the RCC, which does not *per se* justify the conclusion that he was a public officer.

[17] Fortified by the court's reasoning in *Nathaniel (supra)* at 232C-D that it was essential to analyse the charge sheet *vis-à-vis* the Act in order to decide whether or not the alleged offence indicted actually constitute the offence created by the said Act, the defence implored the court to follow the same approach and to consider the ambit of each of the expressions *public body* and *public officer* as defined in s 32 of the ACA.

[18] The tests and criteria to be used as well as authority on the approach to be followed when interpreting statutes were equally referred to. It was argued that the test was objective and to ascertain the requirements set out in s 32 to wit: How the RCC came into existence; its legal status; whether it

exercises any power or perform any duty in terms of the Namibian Constitution; or whether it exercises a public power or performs a public function in terms of any law or under common law. In its analysis of the requirements, it was concluded that the RCC is not a public body and therefore accused no 1 was not a public officer for the purposes of s 32 of the ACA. In par 44 of Mr *Soni's* heads of argument it is stated that 'if the State contends otherwise in respect of the foregoing matters, it is for the State to furnish such proof'. (Emphasis provided) That is exactly what the State is saying: Afford us the opportunity to prove the allegations made in the indictment.

[19] What is required of the court, as regards the objection raised in respect of s 43, is to decide, at face value, the status of the RCC and that of accused no 1 at the relevant time. This exercise would require an assessment of the allegations made in the disputed charge and, based on the definition of a public body and public officer as set out in s 32, decide whether or not it constitutes an offence. By so doing and without the benefit of hearing evidence, is the court not divested of the opportunity to consider the full spectrum of facts that would assist in the determination of the objection raised? Moreover, where the requirements (as set out the preceding paragraph) must objectively be determined by looking at the RCC's legal status, its powers, duties and performances. It is my considered view that to expect of the court, in answering the question raised, to read and consider the memorandum and articles of association of the RCC, would be improper. Unlike the *Nathaniel* case, it is not before court as further particulars furnished by the State – it was handed up during argument and should therefore be disregarded for purposes of deciding the question at hand.

[20] In its quest to distinguish between policy matters and the implementation of legislation, the court in *Permanent Secretary of the Ministry of Finance and Others v Ward*⁶ referred with approval to the matter of *Chirwa*

⁶ 2009 (1) NR 314 (SC).

*v Transnet Limited and Others*⁷ where the court in deciding whether a function or duty was public or not, stated the following at par 186 –

'[186] Determining whether a power or function is public is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors, including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context. (See also *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) (2005 (10) BCLR 931; [2005] 3 All SA 33).)'

(Emphasis provided)

[21] As stated, there is no simple definition and clear test the court could apply, but what is required of the court is to 'exercise its discretion *considering their relative weight in the context*' (referring to the relevant factors). It seems to me that in order for the court to give weight to the relevant factors 'in context', would require the presentation of *viva voce* evidence. Without hearing evidence as to the nature and extent of the relevant factors listed above, the court would be required to exercise its discretion solely on the particulars of the charge and the definition in s 32 of the Act. This approach is likely to constitute what the court in *Conradie (supra)* referred to as 'an ill-advised and probably hazardous course for this court, based only on the useful and probably relevant documents submitted on behalf of the first accused to then determine the matter to finality without having afforded the state its basic and procedural right to lead evidence at its disposal in proof of the allegations it has made against the said accused'. I respectfully endorse these sentiments.

[22] As regards those counts where the accused persons are charged in contravention of sections 43(1) and 45(a) of the ACA, I am satisfied that the charges, as formulated in the indictment, sufficiently inform the accused

⁷ 2008 (3) BCLR 251 (CC).

persons of the case they have to meet. Though the accused are entitled to obtain details of the facts to be proved, it does not mean that the State is under any duty to show how these facts will be proved.⁸ Whether the State in the end would be able to prove the offence alleged to have been committed by the accused persons on these sections, must be decided at the appropriate stage namely, after the tendering of evidence by both sides.

[23] In the result, as far as it concerns the objection raised in terms of s 85 of the CPA that the indictment, in respect of the charges complained of, does not disclose an offence, I find the objection without substance.

Constitutional challenge to s 43(2)

[24] As stated before, the accused persons raised an alternative objection to the counts indicted under s 43(2) on the basis that the State's reliance thereon violates accused no 1's rights under Articles 7 and 12 of the Constitution in that he is required to furnish proof of what is set out in s 43(2) of the ACA. Accused no 1 therefore contends that any reference in the indictment thereto renders it constitutionally invalid.

[25] Though accused no 3 shared the same sentiments expressed by Accused no 1, his contentions, however, were not further developed during oral arguments envisaged in the heads of argument. Accused no 2 did not join issue on this ground.

[26] Contrary thereto, counsel for the State argued that when one challenges a constitutional provision, it should be done by way of a substantive application.

[27] The question for determination, at this juncture, is whether this court is competent to adjudicate on the constitutional challenge raised by accused no 1.

⁸ *State v Kelly Nghixulifa and Three Others*, Case No. CC 02/2004 (unreported) delivered on 20.11.2015.

[28] The relevant part of section 43(2) reads –

‘(2) For the purposes of subsection (1), proof that a public officer in a public body has made a decision or taken action in relation to any matter in which the public officer, or any relative or associate of his or her has an interest, whether directly or indirectly, is, in the absence of evidence to the contrary which raises reasonable doubt, sufficient evidence that the public officer has corruptly used his or her office or position in the public body in order to obtain a gratification.’

[29] Article 25(2) of the Constitution states that persons who alleged that their fundamental rights have been infringed can approach a *competent court*. By virtue of art 80(2) the High Court has original jurisdiction to adjudicate upon all matters involving the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder. Hence, this court is therefore a competent court as envisaged by the Constitution.

[30] The next question which then emanates from this discussion is whether the court, at this stage, should adjudicate on the constitutionality of s 43(2) as part of an application made in terms s 85 of the CPA, to quash the charges.

[31] In this regard it would be apposite to cite the case of *S v Sheehama*⁹ where Hannah J unequivocally held that the ideal approach to be followed when lodging a constitutional challenge during criminal proceedings is by way of a substantive application, to be supported by a founding affidavit and allowing the respondent(s) an opportunity to answer. The court held as follows-

‘In my opinion, the Sub-Article contemplates a direct approach to a competent court. Such approach will normally be by way of application and there will then be present all the practical advantages which accompany such a procedure. The aggrieved person who, of course, will bear the burden of establishing his claim that a fundamental right or freedom has been infringed or threatened sets out his evidence

⁹ 2001 NR 281 (HC).

in his founding affidavit. No question of ambush arises. The respondent, who in the circumstances of the present case would be the Prosecutor-General, is then afforded the opportunity to answer and any interested party afforded the opportunity to intervene.¹⁰

[32] In addition, the Supreme Court in *Minister of Home Affairs v Majiedt*¹¹ *obiter dictum* held that 'in an action in which it is intended to call upon a trial court to make an order pursuant to art 25(1)(a) and (b) of the Constitution, it is prudent to cite the Attorney-General...'¹²

[33] Therefore, in the premises, and after due consideration of submissions made in favour of and against the court to invoke its powers to decide the constitutionality of s 43(2), it is my considered opinion that a court should only decide the constitutional challenge once all interested parties, such as the Prosecutor-General, Attorney-General; the Director-General of the Anti-Corruption Commission, and any other interested party, are afforded the opportunity to intervene. I am therefore *ad idem* with the State's submissions on this point.

[34] For the foregoing reasons, the court declines the request to decide the constitutionality of s 43(2) of the ACA and they may, if they so wish, bring a substantive application in that regard.

Objection to counts 2, 7 and 11

[35] Accused one's further objection to counts 2, 7 and 11 (and the alternatives thereto) is that s 332(5) of Act 51 of 1977 only finds application when a corporate body is prosecuted. Whereas it is not alleged that accused was a director or servant of a corporate body (the RCC) and the latter being liable for prosecution, it is therefore contended that any reference to the said section in the counts mentioned is misplaced. Hence, an order is sought to direct the State to amend the indictment accordingly. This is based on the

¹⁰ Ibid 285E-F.

¹¹ 2007 (2) NR 472 (SC).

¹² Ibid 480 at para 11.

accused persons' right to be served with an indictment that is free of any errors.

[36] The State, on the contrary, argued that accused no 1 was not charged alone but together with accused no's 2 and 3. Moreover, if one has regard to the fact that accused no 3 was charged, in the alternative, as a director of a company. Furthermore, counsel submitted that the State will lead evidence to prove that accused no 1, together with the other accused persons acted with common purpose to use the corporate bodies to conclude fraudulent transaction. Hence the State's reliance on s 332(5) of the Act.

[37] A further objection was raised against the constitutionality of s 332(5) of the CPA in which it is contended that the said section offends certain rights of the accused persons as enshrined in the Constitution.

[38] I shall first deal with the constitutional argument advanced by the defense. Section 332(5) reads –

'(5) When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall he liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor. What the section contemplates is that directors of a company may be charged jointly with the company.'

[39] Though this section has been found to be unconstitutional in South Africa,¹³ the very same subsection has survived the constitutional test in *Attorney-General of Namibia v Minister of Justice and Others*¹⁴ where the court found that s 332(5) was not unconstitutional. The objection raised herein has therefore already been decided by the Supreme Court and requires no

¹³ See *S v Erasmus and Others* 1997 (1) SACR 379 (CC).

¹⁴ 2013 (3) NR 806 (SC).

further consideration. The submissions advanced on behalf of the accused persons' is thus without merit.

[40] Turning to the desirability or otherwise to incorporate s 332(5) in the charges complained of, the learned author in the authoritative work of *Hiemstra's Criminal Procedure*¹⁵ comments that the State may charge a director personally, without charging the corporate body itself. The author opines that this may be deduced from the wording of the subsection. Additionally, the author goes on to state that the word 'director' has a wide meaning and it includes persons who manage or control the corporate body.¹⁶

[41] In the context of the present charges it would appear to me that, at face value, the State has reason to invoke the provisions of s 332(5) of the CPA and may rely on the ambit of the subsection in the trial. In the circumstances, I am neither convinced that by the inclusion of the said section, the accused persons are required to make any significant changes to their defence, or that they would be prejudiced as a result thereof.

[42] In the premises, I am of the considered view that the following order is appropriate:

The application made in terms of sections 85 and 86 of the Criminal Procedure Act 51 of 1977, in the main and alternative, in respect of counts 1, 2,5,6,7,9,10 and 11 is refused.

JC LIEBENBERG
JUDGE

¹⁵ At p 33-7.

¹⁶ Ibid p 33-9.

APPEARANCES:

STATE

H lipinge
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Windhoek.

ACCUSED NO 1

V Soni

Instructed by Adv S.S Makando Chambers,
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ACCUSED NO 2

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