

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON APPLICATION FOR PRODUCTION OF RECORD

HC-MD-CIV-MOT-REV-2017/00355

In the matter between:

LAURENSIUS JULIUS

APPLICANT

and

**THE PROSECUTOR-GENERAL OF THE REPUBLIC
OF NAMIBIA**

RESPONDENT

Neutral Citation: *Julius v The Prosecutor-General of the Republic of Namibia*
(2017/00355) [2018] NAHCMD 75 (29 March 2018)

CORAM: MASUKU J
Heard on: 13 March 2018
Delivered on: 29 March 2018

Flynote: Civil Procedure – Review – Rule 76 - production of record in review proceedings – pending criminal case in the Magistrate’s Court – applicant charged in terms of Prevention of Organized Crimes Act – procedure of production of record

governed by Rule 76 – Record in this case constituting “docket” – record only to be produced after the finalisation of investigations in criminal proceedings.

Summary: The applicant brought an application for the review of the Prosecutor-General's decision to prosecute him. In this matter, the applicant launched an interlocutory application for the production of the record proceedings in respect of the Prosecutor-General's decision aforesaid. The application is opposed and the respondent avers that the record to be produced is in actual fact the “docket”, which is still under investigation and with the police. The issue the court had to consider was whether the record of proceedings should be produced in light of the fact that investigations were still pending.

Held that: The present application resorts under the provisions of Rule 76(8) and not Rule 28(9) as submitted by respondent. This is so because the record sought to be produced has not been so produced by the respondent. Rule 28(9) generally applies to action proceedings where discovery of documents is in issue.

Further Held that: The production of the record of proceedings at this juncture, where investigations have not been finalised, is premature as it may compromise the investigations, but may be allowed at a future date and once investigations are completed. The court took special cognizance of the nature of the record, and particularly the sensitive stage at which the investigations are at the moment, as alleged in the respondent's unchallenged affidavit.

Held that: The decision to prosecute is choate once the investigations have been concluded and evidence is available to justify an arrest may not be enough for a decision to prosecute as a host of possibilities may arise on the finalisation of investigations, including dropping of charges, if necessary.

Held further that: the decision to allow the State time to further investigations should not be regarded as a licence to the State to drag their feet and occasion damage to the applicant's rights and interests.

ORDER

1. The application for the release of the record of proceedings by the respondent at this juncture, is hereby refused.
2. The costs are ordered to follow the event.
3. The interlocutory application for the release of the record is removed from the roll and is regarded as finalised.
4. The matter is postponed to 19 April 2018 at 8h30 for a status hearing.

RULING

MASUKU J:

Introduction

[1] Presently serving before this court is an opposed application for review and in terms of which the applicant, who is charged together with others not party to this application, seeks an order from this court essentially reviewing and setting aside a decision taken by the respondent or her assignee, to prosecute the applicant in terms of the provisions of s. 6 as read with ss. 1, 7, 8 and 11 of the Prevention of Organised

Crimes Act¹. The applicant also seeks an order for costs in the event the application is opposed. As I have stated above, this application is vigorously opposed by the respondent.

Issue for determination

[2] The primary issue for determination in this ruling is whether the respondent should, at this juncture, produce the record of proceedings and on which the decision to prosecute was supposedly made. In this regard, it is common cause that the court, per Usiku J, issued an order in chambers, dated 7 December 2017, in the following terms:

- '1. The case is postponed to 08/02/2018 at 08:30 for Status hearing.
2. Respondent is directed to file the record of proceedings/decision sought to be reviewed, on or before 14 December 2017, or show cause on or before 14 December 2017 why such record cannot be filed in the circumstances.'

[3] In response to the order issued above, the respondent, through Mr. Edios Edmund Maroneddze, the Deputy Prosecutor-General, filed an affidavit, stating reasons why the record should not be produced, as required in part, by the order stated above. It was submitted by the applicant in argument that an issue of contempt of court arises, full regard had to the tenor of the order quoted above. That is not, however, in issue for determination at present and this is an issue the applicant was not keen to presently pursue.

Bases for objecting to the production of the record

[4] In his opposing affidavit, Mr. Maroneddze, raised a number of issues and on the bases of which he claims it would not be proper to furnish the applicant with the record.

¹ Act 29 of 2004.

I deal with the bases raised by the respondent below, for objecting to the production of the record, *viz*:

- (a) this court has no jurisdiction to issue the order requested for the reason that the criminal trial is pending as the matter is pending before the Magistrate's Court in Windhoek. In this regard, it was contended that whatever order this court would issue in relation to this matter, would amount to interference with the lower court's exercise of its jurisdiction. The further point made in this regard, is that the matter was postponed to 22 June 2018 to allow time for further investigations;
- (b) if the applicant is of the view that there is no or sufficient nexus between him and the offences preferred against him, the proper forum where this issue can be properly raised and decided, is the trial court where this matter remains pending;
- (c) the presiding officer and the applicant's co-accused have not been cited in this application, yet they have an interest in whatever order this court may make. Particular mention is also made of the fact that the applicant, in his application, the applicant shifts the blame to his clients, his co-accused. It would be unfair in the circumstances, it is further submitted, to release the docket to the applicant without his co-accused having been joined in the proceedings;
- (d) that the decision to prosecute, which is a constitutional function, is not reviewable. It is contended in this regard, that if the applicant has any basis to challenge the decision, that be done in terms of the provisions of the Criminal Procedure Act;²
- (e) that the 'record' which is sought to be availed to the applicant, in this application, is, in actual fact, the docket which is still under investigation, resulting in the postponement of the matter to 22 June 2018 as aforesaid. It is contended that the applicant is not entitled to the docket at this stage of investigations as its

² Act 51 of 1977.

production at this stage may lead to interference with the investigation process still underway.

The applicant's response

[5] In response to the foregoing, the applicant, in his replying affidavit, alleged that the respondent has committed contempt of the court's aforesaid order but is not, at this moment, desirous of instituting contempt proceedings as these would be costly to him. The applicant, in the main, states that the respondent's position on the disclosure of the record, seems to second-guess the order and secondly that the reasons advanced, would be tenable at the hearing of the review proper, and not at this stage. It was accordingly submitted that the respondent had failed to advance reasons in law as to why the record should not be availed to the applicant. It was, for those reasons stated that the court should, in the circumstances, grant the application without further ado.

[6] The applicant further contended that the other parties, whom the respondent alleges have a direct and substantial interest in the order sought, have no interest in the relief presently sought. It was however, averred that should the court be otherwise inclined, an appropriate ruling will be requested from the court in that regard and in terms of which these parties could be joined. The applicant further denied that the release of the record would lead to any interference with the investigation process as alleged by the respondent.

Process of elimination – reviewability of the decision to prosecute

[7] I find it appropriate, at this very nascent juncture, and by way of elimination, to weed out issues that need not be dealt with at this point. I do this notwithstanding that Mr. Marondedze, in his wisdom, found them fit to be raised in his affidavit in opposition to the present application to avail the record.

[8] The main issue relates to the reviewability of the respondent's decision to prosecute the applicant. I hold the firm view that this is the very decision that this court may, ultimately be called upon to decide. It is therefore not appropriate to deal with this momentous question at this stage. I will accordingly spare my breath and reserve it for what I consider to be live issues for the present moment, and not for the hereafter, when the main question is ultimately ready to serve for determination.

Determination

[9] In dealing with the issues that are ripe and awaiting determination at the present moment, it is important to point out that one issue that seemed to loom large, from a reading of the parties' heads of argument, relates to the issue of discovery and what law should be followed given the process involved. Divergent views have been proffered in this regard and this is an issue that the court may, all things being equal, have to deal with.

[10] Before I can deal with these and other issues for determination, I find it appropriate to point out that regardless of the divergent views and postures adopted by the protagonists regarding most of the issues in contention, there are at the least, two important issues upon which unanimity, although not reached, a determination can be made, based on the respondent's version, which it appears the applicant is not able to deny. This is consistent with what is referred to as the *Plascons Evan's*³ rule in civil procedure.

[11] The first is that the criminal proceedings were postponed by the Windhoek Magistrates Court with the consent of all the parties, to 22 June 2018. This was to allow further investigations into the charges preferred to be pursued. That, in my view, is a matter that I can regard as settled. I say so in view of the fact that that was the reason advanced and on the basis of which the Magistrate's Court postponed the matter to 22 June, as aforesaid. No issue is raised about the correctness of the respondent's

³ *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty)* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A), 1984 (3) SA 620 (21 May 1984).

position that the investigations in that matter have not been concluded. In this regard, Mr. Maroneddze, an officer of the court, has stated on oath that this is the correct position and I cannot, in the circumstances, particularly in the absence of anything suggesting the contrary, discard or debunk his evidence without ceremony. I therefore hold this for a fact.

[12] The second issue, relates to the 'record' which is sought to be produced in this application. The applicant, in his replying affidavit, did not contest the correctness of Mr. Maroneddze's assertion in this regard that the said record is in fact the docket. In the heads of argument, the applicant, for the first time asserts that this is a matter within the peculiar knowledge of the respondent and to which he is not privy. Mr. Maroneddze, an officer of the court, has, again stated on oath that this is the position. Owing to the fact that he has stated so, I have no basis upon which I can find otherwise on this issue. It would be a sad day, if not doomsday itself, when officers of this court would make statements on oath in cases where dust is being deliberately thrown into the court's eyes to blur the court's vision and determination of the truth.

[13] In view of the foregoing, I am of the considered view that this court is entitled to proceed from the premise that the reason for the matter being postponed to 22 June 2018 in the Windhoek Magistrate's Court, was because of the investigations not having been concluded. The court seized with the criminal proceedings, was persuaded that it was fitting in the circumstances, to postpone the matter for that reason and the applicant, it would seem, did not challenge the legality of that position. I can also safely state that the record sought to be availed to the applicant is in fact the docket opened by the police in this matter and it is undeniable that when the decision to prosecute is eventually given practical effect to, this is the dossier that will be relied on therefor.

[14] There is no denying the fact that the applicant would be entitled to discovery of the 'record of proceedings' as this constitutes the very documents to which the court can have regard in deciding the question whether the application for review is properly made. In this connection, the applicant referred to the case of *Democratic Alliance v*

The Acting National Director of Prosecutions,⁴ where the court expressed itself in the following language:

‘. . . without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant’s right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.’

[15] I have no qualms whatsoever, regarding the correctness of the statement of the law by the Supreme Court of Appeal. It accords with my own views as undeniably correct. Even in this jurisdiction, it is settled law that an accused person should be availed the facilities that would enable him or her, to properly mount his or her defence to the charges preferred. In my view, however, the question for determination presently, is whether this is the proper time for the applicant to call for the record, which as I have held, is the docket. I ask this question in the further light of what is the undeniable position, as accepted by the trial court, namely, that the matter is still being investigated further by the relevant State functionaries.

[16] It has emerged in argument, that if the said record were to be availed to the applicant at this point in time, before the conclusion of the investigations, a serious damage may be occasioned to the interests of the prosecution, and by the extension, the wider public, in that crucial information, which may still be the subject of continuing investigations, may be prematurely disclosed, thus sounding a death knell to the applicant’s case. An example was in this regard made of cases where there may be whistle-blowers or vulnerable witnesses, who if known before the conclusion of investigations and may be before they have committed themselves to testify for the State, the interference with investigations may ensue and result in the crumbling of the State’s case.

[17] Another possibility is that certain people may be incriminated in the documents contained in the docket but may not, have been arrested at present. If the possibly

⁴ [2012] 2 All SA 345 (SCA) at para 37.

incriminating information is prematurely disclosed to them, they may be alerted and flee from the jurisdiction or even tamper with or spirit away the incriminating evidence, if not also interfere with the witnesses. The possibilities are many and varied to be exhaustively considered.

[18] It is also important in my considered view, to mention that in these matters, it must be appreciated that within limits of reason, the State should be allowed to the liberty to properly and fully investigate matters until a time when they have gathered the evidence they deem necessary. The finalization of investigations, in my view, has a positive effect, not just for the State but also for an accused person. I say so for the reason that in many instances, and I can take judicial notice of this notorious fact, decisions are made to arrest suspects based on the available evidence at the time of arrest.

[19] In saying this, the court must not be understood to be encouraging the pernicious practice of 'arrest now, and investigate later.' It must, however, be accepted as a reality of life that crimes are not the same nor their seriousness, complexity and insidiousness. With white-collar crime in particular, there may be leads followed, which suggest that an arrest is justified but for reasons of complexity, it may be necessary, within the limits of reasonableness, to afford the State time to conduct and finalise its further investigations. In the meantime, and as investigations continue, it may be necessary for the trial court to place conditions that will ensure that interference with investigations, evidence and potential witnesses is avoided.

[20] Depending on the intricate nature of the offence alleged, it may be necessary to engage in the gathering of further evidence, which may, in some cases, even include the investigators travelling to other countries to gather evidence and interview witnesses. Once the evidence is in, and investigations have been concluded, a few possibilities may arise. First, the State, with the available evidence, may decide to go ahead and prosecute the accused person or persons. Second, the prosecution may decide that although there was sufficient basis to charge the accused and effect an

arrest, after gathering the evidence, the accused may have been exculpated and a decision may then be made not to pursue the charges but stop the prosecution altogether.

[21] There is a third possibility as well and it is this – the State may, after a careful consideration of the case and the evidence available, decide, as happens in other cases, to call the applicant as a witness for the prosecution, subject of course to the indemnities that attach to a previously accused person being called as State witness. It may also be possible, after the evidence-gathering, to amend the charges previously preferred. There is a further possibility that once the investigations have been concluded, the respondent may, depending on the evidence available, amend the charge sheet by adding further accused persons.

[22] It would appear to me, in view of all the foregoing, that this stage has not yet been reached in the instant case. Even if a decision to prosecute has been taken by the respondent, it is not yet cast in stone – as the law of Medes and the Persians, as it were. The respondent has a duty to review the evidence available once the investigations are concluded.

[23] The complaint before court, as I understand, is not one regarding an alleged egregious delay by the respondent in prosecuting the applicant. That is a case in terms of which appropriate relief may be sought from the relevant court in terms of the appropriate legal provisions.

[24] It would be dangerous, in my view, for this court, at this stage, to issue orders that may seem to interfere with the processes already underway in the Magistrate's Court. In this regard, as intimated earlier, once investigations are closed, the Magistrate's Court will best placed to make appropriate orders regarding the future conduct of the matter and the applicant may, at that point, make a case for the production of the record, which as it presently seems, is not ready for production as the investigations are still underway.

[25] From a close consideration of the respondent's case, it would seem that the applicant is not being denied the record as it were but the respondent is saying there is a necessary delay that must require the applicant to be patient before he can receive the portions of the record that may not be covered by the rules of privilege. In other words, and put in simple terms, the applicant's request is temporarily delayed but not altogether denied. It is only fair, in my view to do so for the reasons of fairness both to the applicant and the respondent.

[26] In this regard, Mr. Ndlovu, in his able argument, referred this court to *Van der Merwe v National Director of Public Prosecutions and Others*,⁵ where the court reasoned as follows, regarding the question of fairness to the protagonists:

'Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires that fairness to the public as represented by the State. This does not mean that the accused's rights should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provisions is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenuous legal stratagems, or to encourage preliminary litigation – a pervasive feature of white collar crime cases in this country. To the contrary, courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be aware that persons facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to their conviction and "any new procedure can offer opportunities to obstruction and delay. One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution."

[27] I am of the view that the above quotation largely summarises the proper balancing act that the court should ideally employ between the sometimes discordant rights and interests of the parties, with the end to ensure that fairness to both sides is, as far as is possible, attained and maintained. I do not, however, have reason to believe that the applicant is engaging in the pernicious conduct ascribed by the learned Judges

⁵ (373/09) [2010] ZASCA 129; [2011] 1 All AS 600 (SCA).

in the latter parts of the judgment quoted above, to accused persons charged with white collar crimes in South Africa.

[28] The applicant, in my assessment, and I will give him the benefit of the doubt to which he is entitled, is seeking access to the record, which, as I have found, is not yet ready to be given to him for circumstances mentioned by the respondent and endorsed by the court in this judgment. If the applicant later enters and drives on the lane of travel aptly described by the judges, a condign admonition and rebuke will be issued by this court and without apology.

[29] There is an argument that was raised by the respondents objecting to the granting of the relief sought by the applicant. This argument related to the question of non-joinder, it being submitted that other parties who have an interest in this matter have not been joined to the proceedings, including the applicant's co-accused and the police. I do not wish to pursue this matter any further but to point out that the police, at the least, should have been cited in this matter as they are the ones who are carrying out the investigations and from present indications, have the 'record' sought to be produced in their custody. This is evident from the affidavit of Mr. Marondedze.

[30] In view of the conclusion that I have reached in this matter, I do not find it necessary nor desirable, to deal with the other issues raised by the parties regardless of how captivating and stimulating they may be to the legal mind. I am of the considered view that the State should, within the limits of reasonableness, be allowed the freedom to finalise its investigations and to make the final decision whether or not to prosecute the applicant.

Procedural issue relating to discovery of the record

[31] The parties were at pains to cancel each other out in argument regarding the pigeonhole, in which the application for the production of the record in this matter properly resorts. The applicant submitted, and with much force and authority, that the

application was moved in terms of the provisions of rule 76, which indisputably applies in matters where a record of proceedings is sought to be produced in relation to proceedings for review.

[32] The respondent, in contrary argument, submitted that this matter does not, properly considered, resort under the provisions of rule 76 relied on by the applicant, but rather, under the provisions of rule 76 (8), where the record sought to be produced has not been so produced and the court has to give directions in relation thereto according to rule 76 (8). The respondent, on the other hand further argued that with the record of proceedings not having been produced, the parties should resort to the provisions of rule 28 (9), which provide the following:

'If any party believes that the reason given by the other party as to why any document, analogue or digital recording is protected from discovery is not sufficient, that party may apply in terms of Rule 32(4) to the managing judge for an order that such document be discovered.'

[33] In para 5 of the heads of argument, dealing with procedural argument, the applicant contended that in the apparent resort to the provisions of rule 28, the respondent fell into serious error. The respondent, after citing the provisions of rule 76(3) (b), read with rule 76(6) and 78(7) and 76(8), submitted as follows at para 6.3 of her heads of argument:

'6.1 It is clear that Rule 76(8), read with Rules 76(6) and 76(7), does (*sic*) not apply to production of the record, but governs the procedure to be followed in situations where after the record has been produced, the applicant believes there are other documents in (*sic*) possession of the respondent which the applicant would like to be discovered.'

[34] I am in full agreement with the applicant in his submission on this score. In the instant case, the applicant is applying for the review of the respondent's decision to prosecute him and this is done within the purview of the provisions of rule 76. As will have been apparent above, certain reasons are advanced by the respondent as to why it cannot, at this juncture, provide the record sought. If the respondent had produced the

record as required in terms of rule 76(2)(b) but the applicant, after such discovery, formed the view that the respondent had not discovered all the documents which form part of the record that she should by law have, there is still a remedy provided by rule 76.

[35] In this regard, I am of the firm conviction that the applicant in that situation, has enough ammunition, within the armoury and confines of the rule, to deal with the deficiency perceived. The applicant may call upon the respondent to comply, in line with the provisions of rule 76(6), (7) and (8). In my view, there is no need to resort, as the respondent contends, to the provisions of rule 28. That rule is dug from a totally different quarry from rule 76, and generally applies to action proceedings and not to applications for review, where a fully-fledged, functional and complete regime for discovery of relevant and permissible documents is provided for, leaving no conceivable situation for resort under rule 28.

[36] Unless there is no specific provision in the rule dealing with review proceedings, I am of the considered firm view, that resort to the rule dealing with ordinary actions and the discovery process thereto anent should be avoided. These apply to totally different scenarios and must generally speaking, be kept separate and distinct. To consign the two in some kind of matrimony, would result in the birth of a still-born child that belongs to neither family, in my considered view. Confusion only would reign.

[37] In the premises, I am of the view that the applicant is eminently correct in his submission that the respondent is barking the wrong tree by resorting to the provisions of rule 28 in the instant case. There is nothing required in this review matter, at least from what I can decipher, that cannot be fully supplied under the provisions of the specific rule dealing with review. I accordingly have no option but to find for the applicant in this regard, and to correspondingly find against the respondent. The latter's contentions find no support from the provisions of the rules in my considered view.

Conclusion

[38] In view of my conclusions on the main issue, I am of the considered opinion that the applicant is not entitled to the record at the present moment, as he is acutely aware, as stated in the lower court, that investigations await conclusion. In doing so, I must state without equivocation, that this stance must not be perceived as a *carte blanche* licence by this court to the respondent and the investigation functionaries to drag their feet. Indicting a person with crime has obvious negative connotations and implications. It is therefore in the interests of all concerned, the accused, the State and indeed the public that the matter should be brought to court sooner for trial or, as the case may well be, for a final and informed decision whether or not to prosecute, where appropriate, to be made, before a lot of damage is occasioned.

Disposal

[39] In the premises, I am of the considered view that although the applicant's application for the production may, under different circumstances, be allowed and at a future date, regard had to the nature of the record sought to be produced, and particularly the sensitive stage at which the investigations are at the moment, from the respondent's unchallenged affidavit, together with the harm attendant to the production of the record at this juncture, I am of the considered view that the application for the production should, at this stage, fail.

Order

[40] In view of the foregoing, I accordingly issue the following order:

1. The application for the production of the record of proceedings by the respondent at this juncture, is hereby refused.
2. The costs are ordered to follow the event.

5. The interlocutory application for the release of the record is removed from the roll and is regarded as finalised.
6. The matter is postponed to 19 April 2018 at 8h30 for a status hearing.

TS Masuku
Judge

APPEARANCE:

APPLICANT

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RESPONDENT

M Ndlovu

of the office of the Government Attorney, Windhoek