



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

In the matter between:

Case no: HC-MD-CIV-MOT-REV-2019/00108

MARCUS THOMAS

APPLICANT

and

DIRECTORATE OF LEGAL AID

FIRST RESPONDENT

OFFICE OF THE PROSECUTOR GENERAL

SECOND RESPONDENT

MINISTER OF JUSTICE

THIRD RESPONDENT

Neutral citation: *Thomas v Directorate of Legal Aid* (HC-MD-CIV-MOT-REV-2019/00108) [2019] NAHCMD 120 (11 April 2019)

Coram: GEIER J

Heard: 10 & 11 April 2019

Delivered: 11 April 2019

Released on: 26 April 2019

Flynote: Court — Jurisdiction — High Court — High Court divided into civil and criminal stream — In circumstances where the applicant had brought an urgent application in the High Court before a Judge sitting in the civil stream for an order

interdicting the Prosecutor- General from continuing his criminal prosecution pending the outcome of a review, which criminal proceedings were ongoing before another Judge in the Main Division of the High Court sitting in the criminal stream, and where that Judge had recently refused a stay of prosecution pending the outcome of the intended review– the Court in the civil stream before whom the urgent application was pending *meru motu* raised the question whether or not the civil court should assume jurisdiction in the circumstances and the parties were thus directed to address this issue with reference to the Full Bench decision of *S v Strowitzki* 1994 NR 265 (HC).

In deciding whether or not a civil court of equal standing should assume jurisdiction in circumstances where also related criminal proceedings were pending it was held that it was firstly relevant to determine and analyse into which category of case the matter falls.

In this regard it was confirmed that here it is not the form of the procedure used which matters so much as the nature and substance of the application itself and that it is without significance that the applicable onus of proof, for instance, was one that is applicable to civil matters or that the relief was an interdict, a form of relief that belongs to civil proceedings, or that the relief sought was a stay of prosecution, a form of relief recognized in both civil and criminal proceedings.

It was held further that the crucial question to be asked is what the purpose is, or was, for which the application is/was brought:

(a) If the answer to that question is that the purpose is to obtain relief against- or in criminal proceedings, then in substance, such application was of a criminal nature and not civil. The converse can obviously also apply.

(b) The fact that the right to a fair trial is enshrined in the Constitution is of no relevance. The right involves many things. It cannot be said that every time a judge sitting at first instance in a criminal trial has to rule on one of these matters or any other involving a fair trial, that, suddenly, the proceedings are converted from criminal to civil. In such circumstances the proceedings remain criminal.

(c) Article 25(2) of the Namibian Constitution provides that aggrieved persons who claim that a fundamental right or freedom has been infringed or is threatened, shall be entitled to approach a competent court to enforce or protect such rights. Sub-article (3) empowers a competent court then to make all such orders that are necessary and appropriate in the circumstances of the case. The High Court is a competent court empowered to deal also with constitutional matters in terms of Article 80(2) of the Constitution. The High Court is thus a court which can interpret, implement and uphold the Constitution and the rights and freedoms conferred by it. In such circumstances it matters not that the High Court is divided into a criminal and a civil stream, as all the Judges, sitting as Judges of the High Court, are clothed with same- and all powers that are conferred on them by the Constitution, regardless of whether or not they serve in the civil or criminal stream.

In casu there was no doubt that the urgent application brought to the civil court arose from the pending criminal proceedings and the cause therefore arose in the context of such criminal proceedings

It was held further that the purpose for the bringing of the urgent application in the civil court was to obtain relief in the pending criminal trial.

It was held further that in this context it was irrelevant for determining into which category of case the application before the court fell - and thus for purposes of determining the court's jurisdiction - that the interdictory and review relief sought by the applicant was civil in nature, when the crucial question to be asked was, what was the purpose of the bringing of the application ie, whether or not, in substance, it was criminal or civil in nature.

It was in the circumstances and on the facts before the court held that the urgent application before the civil court was and remained in substance criminal in nature

In any event it was held further that 'leapfrogging' between different courts and the phenomenon of 'forum shopping' was to be discouraged as this was clearly undesirable, because it may result in conflicting decisions made by Judges, of equal standing, in the same court – and - where thus it had to be of further significance that a situation of *res judicata* could also easily arise.

The court accordingly refused to assume jurisdiction in the matter as a result of which it dismissed the application with costs

Summary: The facts appear from the judgment.

ORDER

1. The application is dismissed with costs.
2. The matter is removed from the roll and regarded as finalised.

JUDGMENT

GEIER J:

[1] The applicant in this matter is facing criminal proceedings, together with his co-accused, Mr Kevin Townsend, which proceedings are currently ongoing under case CC 19/2013, in the High Court, before Mr Justice Liebenberg.

[2] While such proceedings are still pending, the applicant has now approached this court, on an urgent basis, for an order in which he seeks to temporarily interdict the Office of the Prosecutor-General from continuing his criminal prosecution in High Court case CC 19/2013.

[3] In this regard, he asks the court to initially grant him a temporary interdict, which temporary interdict he then wishes to have made final.

[4] In addition he seeks to review or set aside a decision by the Director of Legal Aid to permanently cancel any and all form of legal representation and assistance in favour of the applicant in all matters pertaining to criminal case CC 19/2013.

[5] Here he asks the court to declare the first respondent's decision inconsistent with the provision of Articles 12 and 18 of the Namibian Constitution and he seeks reasons for the director's decision to discontinue legal aid to him.

[6] Finally he also claims an award of constitutional damages.

[7] At the outset the applicant states that '*... criminal case CC 19/2013 - in which (I) he is an accused - is inextricably linked to this (his) application before this court...*'.

THE APPLICANTS CASE

[8] The purpose of the application serving currently before the court - and more particularly its link to the pending criminal trial before Liebenberg J - was then formulated by the applicant, in his quest to make out a case for urgency, as follows:

'10. The criminal case CC 19/2013 in which I am an accused is inextricably linked to this application before Court.

11. The history of events in this matter have led to a convergence of multiple factors that form the nucleus of the indisputable urgency of the matter now before Court.

They are briefly listed as follows:

1.) The apparition of the dramatically detrimental developments in concern from the First Respondent concerning all matters of legal representation and/or assistance pertaining to my current High Court Criminal Matter CC 19/2013. (See Annexure A-Termination Letter from The Office of the Directorate of Legal Aid)

2.) The inexplicable intransigence, blatant refusal, and/or dismissal of all my attempts to obtain a mutually appropriate subsequent position for both sides in this matter.

(See Annexure B-Applicants' reply Correspondence to Annexure A)

(See Annexure C-the Office of the Directorate of Legal Aids' Inadequate Reply)

(See Annexure D-Applicants' Letter of Demand)

3.) The deployment and subsequent depletion of all efforts available to me to personally

achieve a mutually acceptable out of Court resolution to the matter with the First Respondent due to the total failure of the previously stated.

4.) On 11 February 2019 the Honorable Judge Liebenberg summarily dismissed my request to pause the trial process pending the resolution of my legal representation issues with the First Respondent. The case has been postponed to 15 April 2019 provisionally for trial.

5.) The progression of the impending continuation of the commencement of the initial trial phase proceedings in matter CC 19/2013 in combination with my complete absence of legal representation currently

The formal placement and subsequent arbitrary dismissal of this grievance by the current presiding judicial officer of CC 19/2013 proceedings- for which I intend to launch a formal Recusal Application of the current presiding judicial officer on behalf of- has culminated in the absolute exhaustion of all other potential means, platforms, and available avenues of recourse to me.

(See Annexure E-Legal Aid CC19/2013 Interlocutory Application)

(See Annexure F-CC19/2013 Court Records)

(See Annexure G-CC 19/2013 Recusal Application)

6.) If the criminal trial proceeds in its current state I will be forced to continue unrepresented without adequate legal representation owing to the unfair unilateral decision of the First Respondent.

7.) This application for interim relief is inherently urgent because if the First Respondent decides to appoint a legal representative to assist me during the aforesaid trial proceedings he/she will still need adequate time to prepare for the trial provisionally scheduled for 15 April 2019.

8.) The main application herein may only be finalized after the scheduled trial commencement of 15 April 2019.

9.) These in tandem with the Unconstitutional and presently continued targeted practices of deliberate discrimination and oppression by the Namibian Police force, the Windhoek Serious Crimes unit, and further enforced by the administration of the Windhoek Correctional Facility which I am currently incarcerated in have achieved their intended purpose of impeding and wholly obstructing my ability to exercise my fundamental Constitutional right of

the seeking of Remedies in Law through the pursuit of Due Process as is sought now.
(See Annexure H-Namibian Police Letter + Filed Unanswered Grievances)

10.) This has accordingly forced the filling of this application herein before Court on its urgent basis and furthermore necessitated the imperative of the Courts' immediate granting of the Interim Relief prayed for herein.

11.) I will be afforded no substantive redress unless the matter is heard on the above Urgent basis. If the Urgent Interim Relief Is not granted by the Honorable Court the Second Respondent will simply proceed with criminal prosecution trial proceedings for all practical purposes uncontested whilst I am unrepresented.

12.) If my application now before Court is moved to the normal Court role without the operation of the interim relief it will for the abovementioned reasons reduce this application and any subsequent pronouncement thereupon to a mere negligible exercise in academia and in doing so both asphyxiate and invalidate the efficacy of any form of adjudication on the Urgent application currently before it.

13.) The above would be both and egregious and futile misappropriation of this Honorable Courts time and incongruent with the fundamental intent of this Constitutional pursuit both in purpose and principle.

14.) The culmination of the above therein form the fundamental precepts and core validating tenants of the unassailable Urgency of this matter. I have exhausted all practical avenues to resolve the matter before I came to this Court for interim relief.

15.) The First Respondent unfairly infringed on my right to legal representation through a State funded lawyer and the Second Respondent poses an imminent threat to continue to further violate such right in continuing with the criminal trial proceedings without me having adequate legal representation.

16.) The violated and threatened right pertains to my Constitutional right to a Fair Trial and Just Administrative justice enshrined under articles 12 and 18 of the Namibian Constitution.

17.) Without the Urgent intervention of this Court the First and Second Respondents shall continue to infringe my right to be represented during trial without adequate legal representation. It is not the trial criminal trial judge who prosecutes my case but the Second

Respondent and on that basis I request the Court to interdict the Second Respondent to pause them from continuing to presently prosecute the case until my legal representation issues are resolved through the main application herein.

18.) Without the operation of the interim relief my main application herein shall be of a mere academic nature.'

[9] He explained further that he received a letter, dated 30 July 2018, in which he was informed of the decision to terminate all further form of legal assistance due to '*unattainable instructions*', which, so I read between the lines, were allegedly furnished by the applicant to various legal practitioners, over time, and which instructions then had caused such legal practitioners to lay down their respective mandates. The applicant then goes on to deal with each legal practitioner that was assigned to him during the criminal trial and the circumstances under which each such legal practitioner then withdrew. With reference to this he then denied that he ever gave '*unattainable instructions*'.

[10] I assume that Mr Justice Liebenberg was informed of the decision to discontinue legal aid to the applicant, as the learned judge, apparently, in subsequent proceedings, in closing remarks, expressed his view that the applicant should possibly be afforded a second opportunity to approach the directorate for purposes of reconsidering their decision to terminate legal aid to the applicant.

[11] No response was apparently received from the Director of Legal Aid in spite of two subsequent letters that had been written in this regard to the Directorate.

[12] The applicant then alleges that the criminal court lacks the requisite standing in law, to on its own account intervene in - what he calls 'independent administrative decisions', taken by first respondent dated 30 July 2018 - and that – accordingly - he was forced to institute judicial review proceedings in the appropriate platform, 'as ultimate guidance on the matter could only be obtained through either legislative review' – or - as would be sought in this regard – through 'the ultimate pronouncement of the civil courts on this matter'.

[13] The applicant then went on to deal with his constitutional right to legal representation in the pending criminal proceedings and the consequences for him should he remain unrepresented in the criminal trial.

[14] He then narrates his quest in the criminal court to obtain more time to resolve the legal representation issue as follows:

'53.) On 12 February 2019 I made a formal interlocutory application in the criminal court containing the abovementioned amongst other factually backed metrics of the matter substantiating the merits and request for more time to resolve my legal representation issues with First Respondent. The criminal court subsequently dismissed my application within minutes.

(See Annexure E-Legal Aid interlocutory Application)

(See Annexure F-Court Records)'

[15] In underscoring the need and the necessity to be legally represented, he went on to also sketch the circumstances and manner in which his bail application was heard and eventually rescheduled.

[16] The applicant submits further:

'71.) The various appointed counsel for the matter could not be reasonably expected to keep their diaries open indefinitely for an unknown date urgently requested last year.

72.) In the interim my legal representation and all aspects thereto are subject to and wholly dependent upon the lawful service and provisions of the First Respondent.

73.) Until afforded recourse to procure alternative means to the aforementioned my Namibian Constitutional Article 12 and 18 Rights to a Fair trial, Legal representation, and the Fair Administration of Justice cannot and will not be ensured as Constitutionally entitled.

74.) This constitutes the necessity of my need of the First Respondents' services in the current circumstances and the Constitutionally vital need of the Courts' granting of the Interim Relief prayed for herein and the comprehensive resolution of this matter at hand prior to the continuation of matters in case CC 19/2013'

[17] In the context of dealing with the grounds for his review he again states, in no unclear terms, that it was apparent ‘... that I need a legal practitioner to assist me in the criminal proceedings CC 19/2013’.

[18] He then asserts that the unfair decision taken by the Director of Legal Aid constitutes an ‘existential and incontrovertible assault on his rights to a fair trial, legal representation and administrative action’.

[19] Importantly and in the context of “the exhaustion of all avenues and recourse” he then went on to conclude that attempts to address this matter *“in the current platform in concern CC 19/2013 have failed”*.

[20] He explains further why he considers that the office of the Prosecutor-General should be interdicted from continuing with his prosecution. He motivates the need for this relief as follows - and I quote:

‘95.) I have a great alacrity to conclude and exonerate myself through the proceedings of CC19/2013 of all the allegations levelled against me provided the assurance of the adherence to the expected Constitutional protections I seek in earnest to ensure now.

96.) Without adherence to these enshrined Constitutional constructs I will not be afforded a Fair opportunity of adequate defense or appropriate redress to the allegation levelled against me.

97.) Therein the legitimacy of the grievance, merits, and urgent necessity of the Courts’ granting of the interim relief and the resolution prayed for in this application herein are clearly laid out.

98.) This grievance is inextricable from my ability to preserve my Constitutional Rights. It is impossible to ensure the protections of the latter without the ultimate resolution of the former.

99.) For the Second Respondent in this matter to attempt/advocate the forced continuation of their role in CC19/2013 proceedings despite the above listed herein would be an unethical and willful pursuit of unconstitutional practices on their behalf.

100.) I recognize that the Second Respondent, derives their powers and legitimacy from the provisions of article 88 of the Namibian constitution complemented by section 2(1) of the criminal procedure act 51/1977. It appears therefore, at least on face value that the Second Respondent can prosecute a case in any court where they deem fit to do so.

101.) As a primary point of digression, I submit that the Bill of Rights under the Namibian Constitution are not always self-executing or self-explanatory and thus need to be interpreted authoritatively by the judiciary in order to give a clear expression to the values it seeks to nurture.

102.) It is my understanding that the primary function of the Second Respondent is not merely to ensure the conviction and harsh sentences of accused persons but rather to ensure that such results are achieved within a Due Process which fully acknowledge the Constitutional rights of an accused person at every critical stage during pre-trial proceedings.

103.) For the Second Respondent to forcibly proceed with matters in CC19/2013 in the present circumstances would not only be:

- 1.) A breach of their fiduciary responsibilities under article 12 and 18 of the Namibian Constitution.
- 2.) An egregious, inappropriate abuse of the power/authority entrusted to them But also a gross and deliberate violation of the ethical standards and Constitutional Rights they are sworn to represent and uphold comprising a flagrant dereliction of the duties expected of them as representatives of a Democratic Institution of such high regard and reputability.'

[21] The applicant concludes his application with a plea for *'the focus on the adjudication of the present grievance and not to turn the application into a mini trial of case CC 19/2013'*. He submits further - and again I quote:

'114.) For the matter in concern to continue in its present form while I am unrepresented would do so at a substance injustice to my Constitutionally entitled Rights.

115.) As to allow the Second Respondent to continue while the other party is unrepresented, especially a party with my afore stated background wholly absent of any legal training would for all practical purposes permit the former party/Second Respondent to continue uncontested without opposition.

116.) Doing so would comprise a gross undisputed violation of my Namibian Constitutional Article 12 and 18 Rights to a Fair Trial and the Fair Administration of Justice.'

[22] He then asks:

'120.) The Court to temporarily interdict the Second Respondent, from continuing criminal prosecution in High Court case CC 19/2013 with immediate effect pending the finalization of the main application herein.

121.) The Court to issue a return date for the Second Respondent to show cause why the temporary interdict should not be made final.

122.) If the temporary interdict is not granted immediately and/or postponed for the purposes of a Respondent reply the Second Respondent will in the interim proceed with the continuation of prosecution in matter CC19/2013 currently scheduled for April 15 whilst I am presently unrepresented and cause me to suffer extreme and potentially irreversible prejudice in doing so while this Urgent application currently before this Honorable Court awaits their contemplated response.'

123.) Reviewing, correcting or setting aside the decision of the First Respondent to permanently cancel any and all form of legal representation and/or assistance in favor of the Applicant in all matters pertaining to the criminal case CC19/2013.

124.) The Court to declare the decision of the First Respondent as referred to above, inconsistent with the provisions of Article 12 and 18 of the Namibian Constitution and thus Ultra Vires, unfair, invalid, and Unconstitutional.

125.) The Court to compel the First Respondent to Provide Applicant with the adequate written reasons explaining the cancellation of Legal Aid instructions.

126.) First Respondent to pay Applicant N\$200 000 in general and/or Constitutional damages'

THE RESPONDENTS' CASE

[23] The respondents, under cover of a Rule 66(1)(c) Notice, raised a plethora of legal objections in response to this application. These objections ranged from the

aspect of the lack of urgency, the applicant's failure to comply with Rule 8(1) of the Rules of court, the incorrect citation of the first and second respondents and the consequences thereof on this application as the applicant had cited non-existent juristic entities, over to the applicant's failure to comply with Rule 76, to the point that the interdictory relief claimed was not competent resulting from the alleged failure of the applicant to satisfy the requirements for such relief, to finally the raising of the special plea of *res judicata*.

[24] At the commencement of the hearing which had been scheduled for 10 April 2019 the court, *meru moto*, raised with the parties the question whether or not, in the circumstances and context in which this application had been brought, before a judge sitting in the civil stream, the court should assume jurisdiction to hear this matter.

[25] For purposes of affording the parties the opportunity to consider this aspect and also the possible impact thereon by the Full Bench decision, delivered in *S v Strowitzki* 1994 NR 265 HC¹, the court first stood the matter down in order to make printed copies of the referred to judgment available to all parties - and thereafter - and upon the request of the applicant - granted an order - reflecting the point to be addressed - postponing the case to the next day. This was obviously done in order to afford the parties the opportunity to consider the possible impact of the referred to judgment on this matter, alerting them, at the same time, that they would be required to address the court on this issue.

The applicant's submissions

[26] At the resumption of the hearing this morning the applicant made a number of points. He firstly pointed out that the *Strowitzki* judgment, to which he had been referred, was distinguishable. His case was for an interim interdict pending the outcome of a review and that this case therefore was not an appeal. The case serving before the court did also not entail a stand-alone application for a permanent stay of prosecution, as the interdict in this case sought flowed from the review which he was seeking and which case, if it would not have been linked to a temporary interdict, would have become moot.

¹ Also reported in : 1995 (2) SA 525 and 1995 (1) SACR 414.

[27] He secondly submitted that there was no question that the court did not have jurisdiction and that this case was also distinguishable on that basis from the *Strowitzki* matter. He however, fairly conceded at the same time that he was, in principle at least, seeking a temporary stay of the criminal proceedings and that the application serving before the court therefore contained elements of criminal proceedings.

[28] He argued that the court should look at the purpose of the sought stay which was to ensure that the review relief would not become moot.

[29] With reference to *Namoloh v Prosecutor-General of Namibia* (HC-MD-CIV-MOT-GEN-2017/00404) [2019] NAHCMD 65 (29 January 2019), he pointed out that this court had just recently assumed jurisdiction in a criminal matter, when it granted a permanent stay of prosecution in that case. This case thus proved that the court has jurisdiction.

Submissions on behalf of the respondents

[30] Mr Khupe who appeared for the respondents commenced argument by submitting that the matter was essentially a criminal one, in which the civil court would have no jurisdiction and that this was particularly so if one would look at the substance of the case.

[31] He pointed out that Mr Justice Liebenberg, as recently as 11 February 2019, had dealt with- and ruled on an application brought before him by the applicant to stay the criminal proceedings, pending the bringing of civil proceedings in order to compel legal aid to provide the applicant with legal representation during his criminal trial and where Liebenberg J had, after giving his reasons, dismissed the application and directed the prosecution to proceed with the presentation of evidence.

[32] Mr Khupe went on to point out that the possibility could arise in such circumstances that this court, sitting as a civil court, could grant orders which could- or would conflict with Judge Liebenberg's orders/rulings. He submitted thus that a situation could arise that this court's orders would not be enforceable in the criminal

proceedings pending before Liebenberg J, as this court has no appellate or review jurisdiction in respect of the pending criminal proceedings and where the status of possible conflicting orders would be the same. This undesirable situation, so the argument went further, proved the point that the court should decline to assume jurisdiction.

[33] He submitted further that *Namoloh*'s case was distinguishable - and - in the context of dealing with this aspect - agreed with what the court had also put to the applicant during argument that such distinction was founded in the circumstances, where the proceedings against Mr Namoloh were still pending, in the lower court, and where the lower court - as per the Supreme Court judgment given in *S v Myburgh* 2008 (2) NR 592 (SC) - could not have granted a permanent stay of prosecution, by virtue of such court's lesser powers, and where a permanent stay in terms of Article 21(1)(b) could only have been obtained in a competent court, as described in Article 80 (2) of the Constitution, being the High Court.²

[34] Mr Khupe also referred to numerous other cases which, according to him, proved the point that the constitutional issues arising from the right to legal representation were- and could be competently dealt with by the criminal courts. He referred the court for instance to *S v Kasanga* 2006(1) NR at 348 HC.

[35] He concluded by submitting that *Strowitzki* reinforced the conclusion that the applicant has brought the application in the wrong court, that the civil courts had no jurisdiction in such matters and that the applicant's case should fall at this first hurdle with the result that the application should be dismissed.

[36] In reply the applicant merely indicated that his initial submissions continued to stand and he closed argument by emphasizing again that, in his view, this court has jurisdiction.

Undisputed background considerations

[37] In the considering of the arguments exchanged I believe that the following points should immediately be made:

² See : *S v Myburgh* 2008 (2) NR 592 (SC) at 623H to 624E.

- (a) Yes, it is correct that the *Strowitzki* case can be distinguished from the current matter, as it dealt with an irregularly brought appeal. I will deal with the *Strowitzki* case in greater detail below.
- (b) It is also correct that the relief sought in this case is different to that sought in *Strowitzki*.
- (c) It is correct that this court did grant a permanent stay of prosecution recently in *Namoloh's* case.
- (d) It is also common cause that Liebenberg J, as recently as 11 February 2019, refused the application of the applicant to stay the criminal trial pending the civil proceedings, which the applicant signaled he wanted to bring.
- (e) It is also correct that if the court would entertain this application, conflicting orders could emanate from two judges of equal standing.
- (f) It is so that the criminal courts have- and can effectively deal with issues arising before them arising out of the right to legal representation.

The analysis of *Strowitzki's* case and the impact of the Full Bench judgment on this matter

[38] In the further consideration of the question raised by the court, as subsequently addressed by the parties with reference to the *Strowitzki* case, it should firstly be mentioned that I recognize that the Full Bench - Hannah J writing for the court, in his judgment - in which Strydom JP and Teek J concurred - dealt with the question of whether or not the court had jurisdiction to entertain an appeal against a decision of O'Linn J refusing the appellant's application to permanently stay criminal proceedings. Although emanating from a decision made in criminal proceedings, the appeal that had been brought in *Strowitzki* was noted in terms of Section 18 (2) (a)(i) of the High Court Act 1990, which was of course the avenue of appeal from a judgment or order of a single judge of the High Court, sitting as a court of first instance in civil proceedings and in respect of which no leave to appeal was required and, in response to which, the prosecution, had then raised a point *in*

limine, that the court had no jurisdiction to hear the appeal in circumstances where the decision against which the appeal lay was not a decision made in civil proceedings, but was a decision made in a criminal matter, where the avenue for an appeal was prescribed by Section 316 of the Criminal Procedure Act 1977.

[39] After conceding that if the provisions of the Criminal Procedure Act would properly apply, the appeal, in *Strowitzki*, would be irregular and should be struck from the roll, counsel for the appellant nevertheless attempted to argue that the provisions of the Criminal Procedure Act should not apply. These arguments were then summed up by the court as follows:

'The first argument is that the relief sought in the application was based on the provisions of art 12 of the Constitution and the provisions of the Criminal Procedure Act should not apply to 'constitutional applications' of this nature. Although the application was brought against the background of pending criminal proceedings its form and nature was, in essence, civil. To insist on the application of the provisions of the Criminal Procedure Act in such a case would limit the wide and liberal interpretation to be applied to art 25(2) and (3) of the Constitution.

The second argument is that where an application deals with the fundamental rights of an individual the courts should lean towards granting the individual an automatic right of appeal if his application should fail.

The third argument is based on art 80(2) of the Constitution which provides that:

'The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. . . .'

The argument is that this subarticle provides for three categories of case, civil, criminal and constitutional; and that the appellant's case falls into the third category which must be regarded as *sui generis*. As no procedure exists to govern an appeal against a decision made in such an application the Court should formulate its own procedure and such procedure should allow an appeal as of right.

The fourth argument is to the effect that s 316 of the Criminal Procedure Act places an accused person in an unequal position vis-à-vis the State when it comes to an appeal. In terms of s 316A, inserted in the Act by s 4 of the Criminal Procedure Amendment Act 26 of 1993:

'(1) The Prosecutor-General . . . may appeal against any decision given in favour of an accused in a criminal case in the High Court . . . to the Supreme Court.

(2) The provisions of s 316 in respect of an application or appeal by an accused referred to in that section shall apply mutatis mutandis with reference to an appeal in terms of ss (1).'

Counsel contends that the State would therefore have had the right to appeal had the application been decided in favour of the appellant and it is unfair that the appellant should have no corresponding right. Such inequality offends against art 12(1)(a) which entitles an individual to a fair hearing and offends against that part of art 12(1)(e) which requires that all persons shall be afforded adequate facilities for the presentation of their defence during their trial. In order to give effect to these constitutional rights the appellant should be afforded locus standi to appeal against the decision of O'Linn J to refuse his application.

The last argument, and this is a very bald summary of it, is that this Court should adopt a pragmatic approach to the appealability of decisions made at an interlocutory stage where constitutional questions are involved, taking into account on the one hand the inconvenience and cost of a piecemeal approach and on the other the danger of denying justice by delay.³

[40] In the context of disposing of these arguments and on his route to find- and motivate the reasons for his ultimate conclusion that, in the circumstances of that appeal, the point *in limine* pertaining to the court's jurisdiction was a good one, which had to be upheld, Hannah J made certain significant findings which I believe are most instructive to the question raised by the court in this instance. These are:

(d) That the clear effect of Article 80(2) of the Namibian Constitution is that when hearing and adjudicating upon civil disputes and criminal prosecutions, the High Court can also adjudicate upon matters which involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms which it guarantees.⁴

(e) Constitutional rights and freedoms are often referred to as civil rights, but this means no more than that they are the personal rights of the individual citizen. It does not mean that they fall to be dealt with exclusively by way of civil proceedings.⁵

(f) The fact is that constitutional rights and freedoms can and do arise in different settings. Sometime the setting is of a civil nature and sometimes it is of a criminal nature.⁶

³ *S v Strowitzki* 1994 NR 265 (HC) at 268H to 269G.

⁴ *S v Strowitzki op cit* at 272D.

⁵ *S v Strowitzki op cit* at 272G.

⁶ *S v Strowitzki op cit* at 272H.

(g) In determining into which category a case or matter falls, it is not the form of the procedure used which matters so much as the nature and substance of the application itself. In this context it was further held by the full bench that it is without significance that the applicable onus of proof, for instance, was one that is applicable to civil matters or that the relief was an interdict, a form of relief that belongs to civil proceedings, or that the relief sought was a stay of prosecution, a form of relief recognized in both civil and criminal proceedings.⁷

(h) That the crucial question to be asked is what the purpose is, or was, for which an application is/was brought.⁸

(i) If the answer to that question is that the purpose is to obtain relief against- or in criminal proceedings, on, for instance, the ground that applicant's pending trial would be rendered unfair then, in substance, such application was of a criminal nature and not civil.⁹ The converse can obviously also apply.

(j) The fact that the right to a fair trial is enshrined in the Constitution is of no relevance. The right involves many things. It cannot be said that everytime a judge sitting at first instance in a criminal trial has to rule on one of these matters or any other involving a fair trial, that, suddenly, the proceedings are converted from criminal to civil. In such circumstances the proceedings remain criminal.¹⁰

(k) Article 25(2) provides that aggrieved persons who claim that a fundamental right or freedom has been infringed or is threatened, shall be entitled to approach a competent court to enforce or protect such rights. Sub-article (3) empowers a competent court then to make all such orders that are necessary and appropriate in the circumstances of the case.

[41] Against this backdrop it must further be observed that:

a) The High Court is a competent court empowered to deal also with

⁷ *S v Strowitzki op cit* at 272H to 273C.

⁸ *S v Strowitzki op cit* at 273C.

⁹ *S v Strowitzki op cit* at 273C to D.

¹⁰ *S v Strowitzki op cit* at 273D to G.

constitutional matters in terms of Article 80(2) of the Constitution.

b) The High Court is thus a court which can interpret, implement and uphold the Constitution and the rights and freedoms conferred by it.

c) It matters not that the High Court is divided into a criminal and a civil stream, as it is beyond doubt in this regard, that all the Judges sitting as Judges of the High Court are clothed with same- and all powers that are conferred on them by the Constitution, regardless of whether or not they serve in the civil or criminal stream.

d) Accordingly it follows that Mr Justice Liebenberg - and for that matter any other judge sitting in the criminal stream - has the all powers and jurisdiction conferred on him or her by Article 80(2), which powers include the powers to also hear constitutional matters in terms of the Article 25(2) and to grant relief consequent thereto in terms of Article 25(3).

Resolution

[42] When one then turns and considers these relevant aspects and applies them to the facts of this case, it must firstly be observed, that there can be no doubt that the application now serving before this court - before a judge in the civil stream - a judge with the same competence and powers as Judge Liebenberg, sitting in the criminal stream - and where in such circumstances the Judges in the civil and criminal stream have no appeal- or review jurisdiction over each other - arises from - and must be seen in the context and setting of the criminal proceedings pending in case CC 19/2013 currently serving before Liebenberg J, which case must also be seen as the origin to this application.

[43] Secondly, and in the context where the applicant claims that the decision to discontinue the grant of legal aid to him, which decision according to him infringes his right to legal representation in terms of Article 12(1)(e), which withholding, in turn, infringes on his rights to a fair criminal trial, granted in terms of Article 12(1)(a), on the basis of which he then seeks to review the decision to discontinue the grant of legal aid to him, together with interdictory relief, seeking to interdict the prosecution

from continuing his criminal prosecution at the same time - the purpose of the application is clearly disclosed.

[44] That purpose is obviously to obtain relief in his pending criminal trial. Where else could the review of a decision to discontinue legal aid be of relevance and which review, if successful, would ensure the continuation of legal representation to him in the criminal trial. Similarly the interdictory relief sought - and if granted - would afford relief to the applicant in the pending criminal trial, which interdict is thus, without a shadow of doubt, intended to bring to a halt his criminal prosecution, at least on a temporary basis.

[45] Thirdly, and surely it will by now have become clear that it is, in the context of determining into which category this case falls, irrelevant that the applicant seeks interdictory and review relief, all civil remedies, when the crucial question to be asked is really for what purpose this application was brought, in order to identify its real nature and substance. i.e. whether or not, in substance, this application is of a criminal nature or of a civil nature.

[46] From the self-declared purpose alone, for which this application was brought, it becomes clear already, in my view, that, in substance, this application is- and remains criminal in nature.

[47] Justice Liebenberg serves as a Judge in the High Court of Namibia and he is thus free to exercise the powers conferred upon a competent court by Article 80(2) of the Constitution and thus on him. He is the Judge seized with the criminal proceedings pending in case CC 19/2013. He is thus clearly empowered to grant interdictory and review relief, like any other judge of the same standing, particularly if such relief arises- and is clearly only relevant to the criminal proceedings serving before him. The fact that such relief, in substance, then is of a criminal nature, determines then also in which court such relief must be sought.

[48] In such circumstances and for these reasons I therefore decline to exercise my civil jurisdiction to entertain this application.

Ancillary reasons

[49] Argument on this matter has of course exposed further supportive grounds cementing such conclusion. The trial judge - before whom a trial unfolds - and particularly in the circumstances of a lengthy trial - is of course- and obviously - in any event better equipped to deal with all issues and the intricacies pertaining to that particular case, if and when they arise, in the course of such trial.

[50] The 'leapfrogging' between different courts and the phenomenon of 'forum shopping' must for that reason already be discouraged. In any event such situation is also clearly undesirable, because it may result in conflicting decisions made by Judges, of equal standing, in the same court.

[51] In any event, it is further of significance here that a situation of *res judicata* can also easily arise, as can be ascertained from Judge Liebenberg's rulings made on 31 July 2018 and on 11 February 2019 and where the learned Judge in his ruling of July 2018 informed the applicant that a last opportunity would be afforded to him by the postponement granted to 11 February 2019 to sort the issues pertaining to his legal representation and that the trial would proceed in February 2019 with or without legal representation to the applicant.

[52] It has already been mentioned that the applicant then sought a stay of the criminal proceedings in the criminal court in February 2019 pending his intended institution of civil proceedings, which application was also refused by Liebenberg J and where the prosecution was then ordered to commence with the presentation of evidence.

[53] It does not take much to fathom that should the civil court now grant an order interdicting the prosecution of the applicant pending the outcome of his review the applicant would really have achieved an order essentially postponing his trial - an order which would be in conflict with Judge Liebenberg's ruling of 31 July 2018 - and which interdict would, if granted, also result in an order granting effectively also a temporary stay of prosecution - again in conflict with judge Liebenberg's order of 11 February 2019. Surely such a situation should not be countenanced. It is plainly undesirable.

[54] These findings then in the final equation also obviate the need to deal with the other points raised on behalf of the respondents' in their Rule 66(1)(c) Notice and the applicant's case on the merits.

[55] In the result:

1. The application is dismissed with costs.
2. The matter is removed from the roll and is regarded as finalised.

H GEIER
Judge

APPEARANCES

APPLICANT:

In Person

RESPONDENTS:

M Khupe

Government Attorney, Windhoek