REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 19/2013

In the matter between:

KEVIN DONNELTOWNSEND **APPLICANT**

and

THE STATE **FIRST RESPONDENT**
MARCUS KEVIN THOMAS **SECOND RESPONDENT**

Neutral citation: *The State v Thomas* (CC 19/2013) [2019] NAHCMD 381 (01 October 2019)

Coram: LIEBENBERG, J
Heard: 20 September 2019
Delivered: 01 October 2019

Flynote: Criminal Procedure – Application for separation of trials in terms of s 157(2) of Criminal Procedural Act 51 of 1977 – Substantial possibility of prejudice required – Court having discretion to grant or refuse application – Accused persons indicted with having acted in common purposes –

Compelling to try accused persons together as court shall have all facts before it when finally called upon to decide their guilt

ORDER

The application for a separation of trials is dismissed.

JUDGMENT

(Application for Leave to Appeal)

LIEBENBERG, J

[1] This is an application for the separation of trials brought in terms of s 157(2) of the Criminal Procedure Act 51 of 1977 (the CPA). The application has been instituted by accused no 2, the applicant. The application has not been opposed by accused no 1, the second respondent, but only by the state, the first respondent.

[2] However, for purposes of convenience I shall refer to the parties as in the criminal proceedings, namely the state and accused no 1 and 2.

[3] Counsel for accused no 2, *Mr Siyomunji*, indicated that the basis of bringing the application is premised on the fact that accused no 1 lodged an application for leave to appeal against the court's dismissal of his recusal application on 18th September 2019 and therefore stalled the continuation of the trial whilst accused no 2 has indicated at the beginning of the court session that he was ready to proceed.

[4] A court has a discretion in terms of a section 157(2) of the CPA whether to order a separation of trials, however, this discretion must be exercised judiciously. The section reads as follows:

> 'Where two or more persons are charged jointly, whether with the same offence or with the different offences, the court may at any time during the trial, upon the application of the prosecutor or of any accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused.'

[5] The law is settled with regards to applications of this nature. One of the general principles is that a multiplicity of proceedings should as far as possible be avoided, as a duplication of trials waste resources and time to the detriment of the interest of society.[1] It is generally accepted to be in the interest of the administration of justice that persons charged together with the same count, should be tried together (See *R v Bagas*[2] at 441F). Accused persons should thus be tried together as far as it is reasonably possible, especially when charged with common purpose so that the court can have all the evidence before it. This will place the court in a better position as to determine guilt and the respective degrees of each accused's blameworthiness.[3]

[6] In support of an application of this nature, accused no 2 is required to prove on a balance of probabilities that he would suffer prejudice if a joint trial takes place. This, in turn, is set off by the court against prejudice to the other party or parties if the application is allowed.[4] In regards to the requirement of prejudice, a mere possibility of prejudice is insufficient; there should be a substantial possibility of prejudice.

[7] Mr *Siyomunji* indicated that the prejudice accused no 2 will suffer is of a financial nature; secondly it would infringe his right to be tried within a reasonable time as contemplated by Article 12 of the Constitution. Accused no 2 contended that he has been prepared for trial since 15 April 2019, but because of accused no 1 constantly bringing numerous applications, accused

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[1] A Kruger Hiemstra's Criminal Procedure at 22-36.
[2] 1952 (1) SA 437 (A).
[3] *R v McMillan* 1958 (3) SA 800 (EDL); *R v Kritzinger* 1952 (4) SA 651 (W) at 654.
[4] (Unreported Judgment) *The State v Calvin Liseli Malumo and Others* CC 32/2001.

no 2’s trial is compromised. Mention was also made of a family member who had travelled ‘all the way from the USA to witness the continuation of trial and see the case move forward, but all was in vain as yet again the trial could not proceed because of the Applications that Second Respondent keeps making’.

[8] Ms *Verhoef*, counsel for the state, argued to the contrary and gave an exposition of instances where postponements were necessitated by accused no 2 individually and where in conjunction with accused no 1. I do not deem it necessary to summarise each of these instances identified by the state. At the outset and at the last moment accused no 2’s erstwhile lawyer, Mr Uanivi, filed an affidavit in which he explained that he was instructed by the accused to withdraw as counsel as there were conflicting instructions given. This caused the loss of 19 trial days. The state further contends that when accused no 1 brought numerous applications, accused no 2 sat idle and in not a single instance opposed any of the applications. In fact, there are several instances during the trial when accused no 2 joined forces with his co-accused in these applications. When accused no 1 challenged the findings made by the psychiatrists, counsel for accused no 2 placed on record that although these reports did not concern their position, they were opposing the findings made in the report. Subsequent thereto, accused no 2 filed an affidavit dated 22 May 2017 stating that he supports the grounds relied on and prayers of accused no 1 in his application for the presiding judge’s recusal. A further 27 trial days were lost as a result of the recusal application.

[9] During a further set down for two weeks, Mr *Siyomunji* filed a medical certificate explaining his unavailability for the first week, while accused no 2 was not at court for the second week due to a medical condition suffered from. On 23 July 2018 accused no 2 (in person) filed an application to stay proceedings pending the finalisation of a civil application instituted by him while counsel for accused no 1 on the same date withdrew for reason that he was conflicted as regards one of the state witnesses.

[10] On 11 February 2019 after the court refused an application for further postponement made by accused no 1, the evidence of the state’s second

witness was finalised which stood down since 2014. Immediately thereafter Mr *Siyomunji* informed the court that accused no 2 has terminated his services there and then. Prior thereto there had been no indication to counsel of his client's intention. The reason given by accused no 2 was that it was 'due to the latest development'. Accused no 2, who for the past five years had been represented by Legal Aid instructed counsel, informed the court that he would instruct private counsel. Surprisingly, with the next appearance Mr *Siyomunji* again represented the accused, but now on private instruction. On the court's question whether he was satisfied with his counsel's service, he answered in the affirmative. This begs the question why he terminated his mandate in the first place, to which Mr *Siyomunji* responded saying that it was the accused's right to instruct private counsel. Though true, it defeats logic what difference it would make to the service his counsel is to render when paid privately, opposed to having been paid by Legal Aid. However, what this change brought about is that accused no 2 now wants to see progress in finalising the trial.

[11] The current application by accused no 2 was prompted by accused no 1's application for leave to appeal. Whilst no longer supporting any further applications by accused no 1, it is now the position of accused no 2 that he stands 'neutral' thereto as it is accused no 1's right to bring the application. It was further said that accused no 2 will be ready to continue with the trial on the next trial date.

[12] From the foregoing it seems inescapable to reach the conclusion that ever since this matter proceeded to trial, there has been a concerted effort between the accused to delay the trial. This is indeed a factor to be taken into consideration when considering the current application. As contended by the state, from the time the trial commenced on 29 September 2014 up to 18 September 2019 when bringing this application, accused no 2 did not assert his right to be tried within a reasonable time. This the accused countered by saying that 'as far back as 15/4/ 2019' he was ready for trial. Mr *Ipumbu* then came on board and was granted time to prepare for the trial which were to continue but instead, accused no 1 launched another application for the

recusal of the presiding judge. No evidence has been led since February 2019.

[13] With regards to the question of prejudice, counsel for the state indicated that the state will be prejudiced if a separation is granted. This would mean that if successful, proceedings were to start afresh in respect of accused no 1 before another judge and bring about further delay in finalising the matter. It was further reasoned that witnesses' memories fade while there is a risk of computer generated evidence that may become lost due to its deletion after a period of time and that the state already had to make specific arrangements with one service provider to avoid that happening.

[14] In respect of the charges preferred against the accused persons, they are indicted on all charges for having acted with common purpose. As stated earlier, it is not in the interest of the administration of justice that persons charged together with the same counts, moreover, when alleged to have acted with common purpose, are tried separately. Given the history of the present case, in my view, there should be exceptional circumstances justifying a separation of trials before such order be made.

[15] As shown above, in the majority of instances the delays in continuing with the trial could be attributed to accused no 1. However, at previous stages accused no 2 never opposed the applications brought by accused no 1, neither did he deem it necessary to make an application to have his trial separated. Thus, accused no 2 cannot cry foul that his rights to a fair trial are infringed as he all along was idle. It should also be noted that financial prejudice cannot be equated to real prejudice. His financial prejudice seems only to have arisen since his decision to change from a Legal Aid instruction to a private instruction; though retaining the same counsel.

[16] What ultimately must be considered is whether it would be in the interests of justice that the accused persons be tried separately for the reasons advanced by accused no 2.

[17] In view of the foregoing, I have come to the conclusion that accused no 2 has failed to show on a balance of probabilities that he will suffer probable prejudice in a joint trial. Furthermore, it would be in the interest of the administration of justice to deal with the continued applications brought by accused expeditiously when they arise in order to avoid any further unnecessary delays and to finalise the trial within the periods of set down. Additionally, there is a real possibility that there exists a conflict between the accused persons (having separate legal representatives from the outset) in which instance it is even more compelling to try them together as the court would have all the facts before it when finally called upon to decide their guilt or otherwise.

[18] In the result, it is ordered that the application for a separation of trials is dismissed.

JC LIEBENBERG

JUDGE

APPEARANCES

APPLICANT	M Siyomunji Siyomunji Law Chambers, Windhoek
FIRST RESPONDENT	A Verhoef Of the Office of the Prosecutor-General, Windhoek.
SECOND RESPONDENT	T Ipumbu Titus Ipumbu Legal Practitioners, Windhoek.