

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

In the matter between:

Case no: HC-MD-CIV-MOT-GEN-2017/00404

MARIEN NGOUABI NAMOLOH

APPLICANT

and

PROSECUTOR-GENERAL OF NAMIBIA

FIRST RESPONDENT

THE MAGISTRATE OF KATUTURA

MAGISTRATE COURT

SECOND RESPONDENT

THE INSPECTOR-GENERAL: NAMIBIAN POLICE

THIRD RESPONDENT

Neutral citation: *Namoloh v Prosecutor-General of Namibia* (HC-MD-CIV-MOT-GEN-2017/00404) [2019] NAHCMD 65 (29 January 2019)

Coram: GEIER J

Heard: 29 January 2019

Delivered: 29 January 2019

Released: 27 March 2019

Flynote: Constitutional law - Fundamental rights - Right to fair trial – Application for a permanent stay of prosecution in terms of art 12(1)(b) of Constitution – Court applying test laid down in *S v Myburgh* 2008 (2) NR 592 (SC) – Court accordingly

holding that the following questions needed to be considered by the Court in its determination whether or not the applied for permanent stay should be granted ie. the Court had to consider whether: 1) the applicant had proved that his trial had not taken place within a reasonable time, and 2) the applicant had proved that irreparable trial prejudice was occasioned as a result, and/or 3) if the applicant had proved the existence of any other exceptional circumstances justifying the sought remedy.

Constitutional law - Fundamental rights - Right to fair trial – Application for a permanent stay of prosecution in terms of art 12(1)(b) of Constitution – In interpreting the Supreme Court’s dictum the Court held that an applicant seeking a release from trial in terms of Article 12 (1) (b) of the Constitution must prove at least either the said first and second requirements or the first requirement together with the exceptional circumstances requirement, at the very least. Obviously, and if an applicant could satisfy all three requirements, so much the better. After a consideration of the facts pertaining to the matter the court found that the applicant had proved the first requirement together with the exceptional circumstances requirement. The court thus granted the application seeking a release from trial in terms of Article 12 (1) (b) of the Constitution as a result of which it ordered a permanent stay of prosecution

Summary: The facts appear from the judgment.

ORDER

1. The criminal proceedings provisionally withdrawn on 4 August 2014 in the Regional Court for the District of Windhoek held at Katutura, in the case of The State v Marien Ngouabi Namoloh (applicant) and Others, (instituted under Katutura CR 535/06/2009), are hereby stayed permanently insofar as they relate to Marien Ngouabi Namoloh, the applicant herein.
2. The first respondent is ordered to pay the applicant’s legal costs.

3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

GEIER J:

[1] The applicant seeks a permanent stay of prosecution.

[2] He has brought this application on the basis that, the delay in his prosecution has been unreasonable, and which position, so it is put in heads of argument, has thus become inconsistent with Article 12(1)(b) of the Namibian Constitution and which position therefore requires that the applicant be permanently released therefrom.

[3] The first respondent, the Prosecutor- General of Namibia, has opposed this application.

[4] The background facts against which the court is to determine the matter are as follows:

- a) the applicant, a Police Officer, was arrested on 26 June 2009 and charged together with others with corruption and extortion;
- b) he was released on bail after one week and has been out on bail at least till August 2014;
- c) his first court appearance, before the Katutura Magistrate's Court, was on 9 December 2010, where the charges were read to him;
- d) the case was postponed to 28 January 2011 for the matter to be transferred to the regional court;

- e) on 28 January 2011, the legal representation of the applicant and that of his co-accused was confirmed before the court;
- f) the postponement to the 1st of August 2011 was agreed upon by all parties;
- g) on 1 August 2011 the case had to be postponed to 30 to 31 January 2012, as the applicant's legal practitioner was engaged in the High Court and the legal practitioner for the 1st accused required more time to read the record;
- h) on 16 January 2012 the applicant's legal practitioner wrote to the prosecutor that the matter would not be able to proceed on 30 January 2012. He placed on record that he was also acting for accused no.3, who was in the Ukraine at the time and who would only return to Namibia during July and August 2012. The applicant's legal practitioner wrote and I quote:

‘This serves as a notification that the matter will not proceed on the dates previously set down as we hold instructions to request a remand. We wish to avoid witnesses being subpoenaed and also for the State to incur costs.’

The case was then set down for plea and trial for the period 23 to 24 July 2012.

- i) again the trial did not proceed and was postponed to 5 June 2013; From the papers the reasons for this lengthy postponement are not apparent.
- j) on 5 June 2013, the matter was postponed again for plea and trial to 3 December 2013. According to the applicant the prosecutor had failed to secure the attendances of the State witnesses. There was from the defence side a request for this to be a final remand. The record also reflects that the case had to be postponed due to the absence of State witnesses and some of the defence counsel.
- k) the first respondent amplified the advanced reasons for this postponement by adding that it was actually the applicant's legal practitioner that was not present in court on that date, due to a death in the family;

l) on 3 December 2013 the magistrate ordered that the matter be postponed to 6 December 2013 for fixing a trial date.

m) on 6 December 2013 a final postponement for plea and trial to 4 August 2014 was ordered.

n) on 4 August 2014 the court noted that the case had indeed finally been remanded for plea and trial, and that the State could not locate and secure the State witnesses and that it was for these reasons that the court refused a further remand. The case against the applicant was then provisionally withdrawn.

[5] Although the Prosecutor General in her answering affidavit filed on 6 February 2018 states that all the Namibian nationals, who are witnesses, are still alive and that the foreign based complainants can attend trial, and where she states further that the investigating officer has apparently even confirmed that, since the provisional withdrawal, numerous attempts were made to locate witnesses and that the complainants and even one of the co-accused, accused no.3, were all traced and would thus be present once the trial would resume, it remains inexplicable why, in such circumstances, the case was never placed back on the roll.

[6] The applicant launched these proceedings during November 2017 and - as mentioned above - the Prosecutor General did file her answering papers in February 2018. In spite of all this, no further attempt was made by the Prosecution to date – that is by the end of January 2019 - to reactivate the provisionally withdrawn case.

[7] The first respondent has opposed the application and has raised various grounds in opposition. They include inter alia:

- a) that numerous postponements occurred at the applicant's request;
- b) that all missing witnesses have been located and can be secured to attend;
- c) the court is reminded that the sought permanent stay has far reaching consequences and that the sought remedy has been described as extreme, radical and an exception and that it impacts on the prerogative of the Prosecutor- General;

- d) the court was asked to keep in mind, that the applicable prescriptive period is 20 years;
- e) that there is an adverse effect on the victims and the public interest;
- f) that no permanent stay has ever been granted in Namibia;
- g) that a long delay should not per se be regarded as an infringement of the right to a fair trial;
- h) that the applicant has another criminal case pending, which would in any event be an obstacle to his quest for promotion;
- i) that although the applicant complains of having lost documents and apparently has forgotten detail no specifics have been provided by him in this regard;
- j) that the applicant has been charged with serious offences and that corrupt police officials are a serious danger to society, security and law and order. The more serious the offences, the greater the need for fairness to the public that the matter goes to trial;
- k) the delay was not occasioned by negligence;
- l) the applicant has already provisionally been released from a plea on the merits;
- m) no extra- ordinary reason has been supplied by the applicant for the court to grant a permanent stay;
- n) no irreparable trial prejudice has been proved;
- o) that there is no irreparable prejudice in the sense that the applicant's trial has been prejudiced to such an extent that the fairness of the trial cannot be sustained;

p) that to say that documents have been lost without identifying them or the allegation that he has forgotten some facts cannot be regarded as irreparable trial prejudice;

q) that to say that he has been denied promotion because of the pending matter would not amount to trial related prejudice; and

r) that the applicant has ultimately failed to meet the requirements for a permanent stay.

[8] On the other hand and on behalf of the applicant it was submitted that:

a) the initial delay, since the commencement of the prosecution until the provisional withdrawal, as well as the failure of the first respondent to resurrect the case for prosecution, constitutes a remarkable and considerable amount of time;

b) that the lapsing of such a long period of time (more or less ten years) was in no way attributable to the applicant;

c) that an accused has a legitimate interest in his trial commencing and being concluded expeditiously;

d) that the prejudicial effect suffered by the applicant since the commencement and the failure to bring the criminal case to finality has been established;

e) that the prejudice complained of rides rough- shod over the required fairness of the trial;

f) that no supporting affidavits from any of the witnesses have been filed in support of the allegations that they are available and willing to come to attend at a trial; and

g) that relief sought is appropriate in the circumstances of this case.

[9] It should be mentioned that both parties presented well researched heads of argument, for which the court is grateful. But the law is settled in this regard and the

applicable test, against which applications of this nature have to be decided, was laid down by the Supreme Court in *S v Myburgh* 2008 (2) NR 592 (SC). This test was generally formulated at pages 623G to page 624F of the judgment as follows:

'The question however still remains what is the full significance of an order - 'shall be released from the trial'.

It is clear that the remedy provided in art 12(1)(b) - 'shall be released', is couched in mandatory and peremptory terms. Nevertheless it does not seem to me that only one form of release from the trial would meet the peremptory requirement.

The following forms of release from the trial will, in my view, all be legitimate forms meeting the peremptory requirement:

(i) A release from the trial prior to a plea on the merits, which does not have the effect of a permanent stay of the prosecution and is broadly tantamount to a withdrawal of the charges by the State before the accused had pleaded.

This form of release from the trial will encompass:

(a) Unconditional release from detention if the accused is still in detention when the order is made for his/her release;

(b) release from the conditions of bail if the accused had already been released on bail prior to making the order;

(c) release from any obligation to stand trial on a specified charge on a specified date and time if the accused had previously been summoned or warned to stand trial on a specified, charge, date and time.

(ii) An acquittal after plea on the merits.

(iii) A permanent stay of prosecution, either before or subsequent to a plea on the merits.

Which form the order of 'release from the trial' will take, will depend not only on the degree of prejudice caused by the failure of the trial to take place within a reasonable time, but also by the jurisdiction of the court considering the issue and making the order.

So eg as I have indicated in the discussion *supra*, a magistrate's court would not be able, as the law stands at the moment, to order a permanent stay of prosecution before plea and remedy No (iii) *supra* would thus fall outside the options available before the magistrate's court.

The High Court, on the other hand, will be competent to grant all the remedies enumerated under (i), (ii) and (iii) and as far as (iii) is concerned, it will act in terms of its powers as a 'competent' court under art 25(2) read with art 5 and art 12(1)(a) and 12(1)(b) of the Constitution.

It is necessary to reiterate that the remedy of a permanent stay of prosecution will only be granted if the applicant has proved that the trial has not taken place within a reasonable time

and that there is irreparable trial prejudice as a result, or other exceptional circumstances justifying such a remedy.

Courts making an order under 12(1)(b) must not merely state that the accused 'shall be released' but use one of the forms of order enumerated in (i), (ii) or (iii) supra so that the ambit of the order will be clearly understood by all concerned.'

[10] It appears from the cited passage of the said judgment that the following questions need to be determined by the Court in cases where a litigant seeks relief in terms of Article 12 (1) (b) of the Constitution and where such application can only be granted in the one or other of the permissible forms if:

- 1) the applicant has proved that the trial has not taken place within a reasonable time, and
- 2) the applicant has proved that there is irreparable trial prejudice as a result, and/or
- 3) if the applicant has proved there exist other exceptional circumstances justifying the sought remedy.

[11] In my view an applicant seeking a release from trial in terms of Article 12 (1) (b) of the Constitution must prove at least either the said first and second requirements or the first requirement together with the exceptional circumstances requirement at the very least. Obviously, and if an applicant can satisfy all three requirements, so much the better.

[12] I will now turn to deal with these aspects in turn.

Question 1: Has the trial of the applicant not taken place within a reasonable period of time

[13] Here it should be considered against the applicable background facts whether or not the applicant's trial has taken place within a reasonable time or not.

[14] In this case it is undisputed that the criminal process commenced with the applicant's arrest on 26 June 2009 - that it continued until the case was provisionally withdrawn on 4 August 2014 - and that - by the end of January 2019, such prosecution can at any stage still be re-commenced. Over all that is a period of nearly ten years.

[15] It is clear however that a court is not just required to look at what seems, at first glance, an extra- ordinary long period of time, but that the court is required to look at the reasons for the delay and distinguish between systemic delays and delays attributed to an accused for instance.¹

[16] On analysis, it appears that the entire period, throughout which the applicant was faced with prosecution, should be divided into two periods, namely the period 26 June 2009 to 4 August 2014 and the period 4 August 2014 to the end of January 2019.

[17] If one has regard to the above analysis of the case history, up to the date of the provisional withdrawal of the charges, in August 2014, it appears that the applicant most certainly, in a material manner, contributed to the initial period of delay if one for instance has regard to the postponements from August 2011 to January 2012 or that from January 2012 to July 2012.

[18] Systemic factors seem to have played a contributing role. It is for example not explained how the case could be postponed from July 2012 to June 2013 for instance, and why no objections were raised in this regard to what would seem an extra-ordinary long postponement.

[19] I would not have granted any relief to the applicant on the basis of the initial delay and would, against such background, not have found that this initial period would have amounted to an actionable unreasonable delay.

[20] The second part of the delay in my view - that is the further period of delay from August 2014 to date - does however stand on a different footing. Here it here becomes clear, on the papers before court, that the prosecution has not been re-

¹ Compare for example: *Coetzee & Others v Attorney-General of KwaZulu-Natal & Others* 1997 (3) ALL SA 241 at 225G.

instated and that the criminal process has not been resumed despite protestations on behalf of the first respondent that all witnesses have in the interim been traced, including the complainants and that they will all be present once the trial (re)commences.

[21] Also the third accused was expected to return to Namibia in 2018. So much is clear from the Prosecutor General's own affidavit.

[22] In spite of the State thus seemingly being ready to re-commence the prosecution this has not occurred.

[23] It is that part of the delay that I find particularly unreasonable and accordingly I find that the applicant has proved this leg of the applicable test.

Question 2: Has the applicant been able to prove irreparable trial prejudice as a result?

[24] Here it must be kept in mind that the requirement here is that the complained of prejudice must be trial related.

[25] The first complaint is that the applicant has spent thousands of dollars on his defence. Here it can immediately be said that the applicant to date remains represented by senior legal practitioners and although he may have been financially prejudiced as a result - the fact that he has remained legally represented throughout - proves that this adduced prejudice cannot be regarded as being trial related. I accept here that the applicant, at all material times, has received the benefit of effective and proper legal representation, which representation would at all times have ensured that the applicant would not have been (trial) prejudiced during the criminal proceedings he was facing.

[26] The applicant also complains of the fact that he has forgotten some facts surrounding the matter. Here it cannot be ascertained whether these facts are material or not as no detail was provided. It must be taken into account further that the applicant would however be in the same boat as the complainants and the State witnesses. This aspect would certainly be prejudicial to some extent but on the

information before the court the applicant has failed to prove that this factor would amount to irreparable trial prejudice. In this regard it is certainly accepted that a delay of time affects the ability of witnesses to recollect incidents of the past. But at the same time, it is also to be accepted that any trial court would, when assessing the credibility of witnesses, be able to take this aspect into account.

[27] The third factor advanced by the applicant on this score is that he has lost material documents, which he intended to use at the trial.

[28] On behalf of the first respondent it was immediately pointed out that no detail was provided in this regard against which the veracity of these averments can be tested. In any event, I find it highly unlikely that a police officer facing serious charges will not ensure, like any other reasonable person, that such material documents would not be lost. One would expect a reasonable person to guard against such loss and to secure such important evidence against the possibility of loss or destruction.

[29] It is conspicuous that the circumstances, pertaining to the alleged loss of documents, were not explained.

[30] In addition one would have expected the applicant to make such important documents immediately available to his legal practitioners seized with his defence, who would, surely, have kept such material documents on file for use at the appropriate time. All this is not explained and the applicant has thus not taken the court into his confidence.

[31] Ultimately and for all the said reasons, I am not persuaded that the applicant has discharged his onus in regard to this requirement.

Question 3: Are there exceptional circumstances justifying a release?

[32] I believe there are.

[33] They are found in the inexplicable failure by the prosecution to re-commence the provisionally withdrawn criminal proceedings.

[34] The first respondent was at pains to point out that the applicant is a police officer, facing extremely serious charges of corruption and extortion, in circumstances where it is alleged that he abused his office to extort money from foreign nationals. Against such background - and where the Prosecutor- General of this country alleges in no uncertain terms that considerations of public safety and public interest are at stake - it becomes even more inexplicable why this case was not prosecuted with due promptitude and vigour.

[35] The lackadaisical prosecution which had initially brought with it the suspension of the applicant from active duty, now resulted in his reinstatement, after the provisional withdrawal of the charges, in August 2014. The effect of this must be laid at the door of the first respondent and the manner in which the prosecution has done its work which thus resulted in a situation where a police officer, suspected of corruption and extortion, was allowed to continue to work - now already for some further 4 and a half years - without the serious charges pending against him being re-instated for determination by a court of law. If the prosecution would really have had the interests of the public and those of public safety and security at heart, one would have expected a prompt and vigorous resumption of the prosecution. The State has failed dismally in this regard.

[36] I consider this dereliction of duties exceptional on the basis of which I then find that this leg of the applicable test has been met.

[37] In the result, I grant the following orders:

1. The criminal proceedings provisionally withdrawn on 4 August 2014 in the Regional Court for the District of Windhoek held at Katutura, in the case of The State v Marien Ngouabi Namoloh (applicant) and Others, (instituted under Katutura CR 535/06/2009), are hereby stayed permanently insofar as they relate to Marien Ngouabi Namoloh, the applicant herein.
2. The first respondent is ordered to pay the applicant's legal costs.
3. The matter is removed from the roll and is regarded as finalised.

H GEIER
Judge

APPEARANCES

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