

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
EX TEMPORE RULING

CC20/2018

In the matter between:

**MERVIN KOZONGUZI**

**APPLICANT**

**And**

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Kozonguizi v The State* (CC 20/2018) [2021] NAHCMD 103 (5 March 2021)

**Coram:** JANUARY J

**Heard:** 2, 3 & 4 March 2021

**Delivered:** 5 March 2021

**Flynote:** Criminal Procedure – Applicant is charged with money laundering and theft and out on bail – Applicant applied for postponement of plea and trial on medical ground – Case history of postponements - Application opposed by the respondent – Dispute of facts realized parties to led evidence – Court satisfied with application – Application granted.

**Summary:** Applicant is charged with money laundering and theft and is out on bail. Applicant applied for postponement of commencement of his trial from the bar on medical ground. The application is opposed by the respondent. The applicant's case has a history of postponements every time the matter is to go to trial. Once the court realized that there is dispute of facts, the parties led evidence on the basis of their respective positions. The court is satisfied that the applicant made out a case for the matter to be postponed. Application granted.

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## RULING

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[1] Applicant is charged with theft and a money laundering. Applicant is out on bail. The matter was enrolled for plea and trial on 2<sup>nd</sup> to 12<sup>th</sup> March 2021. The accused is absent from the 2<sup>nd</sup> March 2020.

[2] Initially the legal representative for the accused applied for a postponement with oral submissions from the bar, motivated with a medical certificate and documents in relation to medical imaging where X-rays or sonar scans were done. The application was opposed by the State because the matter was set down from the 2<sup>nd</sup> of March 2021 to the 12<sup>th</sup> of March 2021 for plea and trial.

[3] The court, after considering the submissions realized that there where disputes of facts. The court directed that evidence should be presented in the application for postponement and opposition thereto. The defence counsel for the accused, Mr. Ujaha, called the doctor of the accused who confirmed the medical condition of the accused before the court date.

[4] The accused underwent an operation on the 25<sup>th</sup> of February 2021. The accused was discharged on 26<sup>th</sup> of February 2021 because his condition was satisfactory to be discharged. The accused however, returned on 1<sup>st</sup> of March 2021, not as a follow up but with a complaint that he was uncomfortable or that he is feeling sick. The doctor on that date examined the accused and referred him for medical imaging. The findings are reflected on the document concerning the radiologist, doctor PE Re Loux, who noted certain findings. Dr. Ndjoze then booked off the accused from the 25<sup>th</sup> of February 2021, the date on which the accused was operated on to the 1<sup>st</sup> of March 2021, prior to the date on which the plea and trial should have commenced.

[5] There is no dispute that the medical condition of the accused at this point in time is in such a state that he is not fit to stand trial. This is a satisfactory explanation also for his absence. There is uncertainty at this point in time as to when the accused will be fit to stand trial.

[6] At this point in time the court is not going to comment or make any finding in relation to any of the witnesses. Although, just to point out that the timelines when the allegation on the accused's condition was investigated as alleged by the investigating officer, who is experienced investigating official, leaves the court with certain question marks.

[7] Furthermore, he is an experienced investigating officer who sat in court whilst the defence witness was testifying. His explanation given is that it slipped his mind not to be present in court. In the courts view, that it is not a satisfactory answer, but be that as it may, I won't comment further on that. I am only expressing my dissatisfaction with what transpired in court.

[8] In the circumstances the court is satisfied that the defence made out a case for a postponement. The further question is what should it be postponed for? The Practice

Directive of the High Court in place provides for procedures before matters are set down for plea and trial. In other words the case should be trial-ready before it is set down for plea and trial. It seems to me from the history of the case that as far as the decision of the Prosecutor-General is concerned and as far as the investigation in this matter is concerned that the State is ready to proceed. The State in fact informed the court that the States witnesses are subpoenaed and are at court.

[9] At some point in time the defence should have been ready because there are pre-trial proceedings that need to be complied with before the matter is set down for plea and trial. Pre-trial documents are in the normal course of events exchanged between counsel or if not counsel, between the state and the accused. Those documents need to be answered. What follows is a pre-trial review conference where the matter is consulted on and where it is eventually decided whether the matter is trial-ready or not.

[10] The only *lacuna* at this point in time why the matter cannot proceed is because of the ill-health of the accused. I find that in these circumstances that the matter is not trial-ready and should be removed from the trial-ready case roll. It should rather be postponed to the criminal review court roll. For information to counsel, on that roll, the different dates were already allocated to different judges, including myself. With my decision the court also considers the fact that the State already incurred costs when the matter was set for plea and trial. Witnesses were summonsed and in fact, the witnesses attended and are attending court.

[11] In view of the economic climate and the notorious fact that government is struggling to make ends meet it is not conducive that witnesses are subpoenaed every time and then there is a hiccup. Matters should in fact be trial-ready to proceed. For that reason, in addition, I decided to place the matter on criminal review roll.

[12] Mr. Ujaha representing the accused initially requested for a period of at least three months. Considering the evidence of the doctor that recovery of a patient with this type of operation, differs from person to person, it is difficult to set a date for plea and trial. He could not inform the court specifically in relation to the accused, how long it will take for him to recover and be trial-ready.

[13] In my view, considering that the State is not disputing the medical condition of the accused, it is appropriate, if I look at criminal review roll, to postpone the matter to 30<sup>th</sup> of March 2021 at 09H00. This will enable the court to make an assessment of the health condition of the accused and to determine if he is fit and if not, when he will be fit and trial-ready to stand trial. Both counsels should also consider that there are circumstances where the court may proceed in the absence of the accused.

[14] The application for postponement is granted.

1. The matter is removed from the trial-ready roll and placed on criminal review roll;
2. The matter is postponed to 30 March 2021 at 09H00 on the criminal review roll to be adjudicated by myself;
3. The warrant of arrest issued on 16 November 2021 against the accused is stayed to that date.

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H C JANUARY

Judge



APPEARANCES:

APPLICANT:

Mr. Ujaha

Of Mukonda & Associates

RESPONDENT:

Mr. Lisilo

Of Office of the Prosecutor-General