REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-MOT-GEN-2019/00434

In the matter between:

ALEX MABUKU KAMWI KAMWI **APPLICANT**

and

THE PROSECUTOR-GENERAL OF NAMIBIA **1st RESPONDENT**

THE MAGISTRATE OF KATUTURA

MAGISTRATE'S COURT **2nd RESPONDENT**

Neutral Citation: *Kamwi v The Prosecutor – General of Namibia* (HC-MD-CIV-MOT-GEN-2019/00434 [2021] NAHCMD 222 (07 May 2021).

CORAM: MASUKU J
Heard: **06 October 2020**
Delivered: **07 May 2021**

Flynote: Constitutional Law - Application for permanent stay of prosecution – Article 12(1)(b) of the Namibian Constitution – Requirements to be met – Section 6(a) of the Criminal Procedure Act and the effect thereof.

Summary: The applicant was arrested and charged during 2004 for contravening section 21 of the Legal Practitioners Act, Act No. 15 of 1995. After numerous postponements, the matter against the applicant was withdrawn by the Prosecutor-

General. The applicant was eventually re-summoned. Aggrieved by this decision, the applicant launched proceedings for a permanent stay of prosecution premised on the fact that the withdrawal of the matter was final in nature. The applicant contended that the order withdrawing the charges against him ought to have been set aside by a competent court of law prior to the reinstatement of the charges against him.

Held: that the applicant did not meet the requirements for an application for the permanent stay of prosecution.

Held that: there were no exceptional circumstances placed on record that could persuade the court to make a finding in favour of the applicant.

Held further that: where a matter has been withdrawn in terms of section 6 of the Criminal Procedure Act, 51 of 1977, the withdrawal is not final in nature but is provisional, entitling the Prosecutor-General to reinstate such charges against the applicant.

The application for permanent stay was thus refused with costs.

ORDER

---

1. The application for the permanent stay of the prosecution of the Applicant as contemplated in Article 12 (1) of the Namibian Constitution, before the Regional Court, Katutura, Windhoek, Namibia, be and is hereby refused.
2. The Applicant is ordered to pay the costs of this application.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] The application presently before court is one for a permanent stay of prosecution which emanates from a criminal prosecution of the applicant, which was set for 29 November 2019 in the Regional Court of Katutura in Windhoek. This prosecution stems from charges that the applicant is guilty of contravening section 21 of the Legal Practitioners Act.[1] It is imperative to mention that the applciation is opposed by the respondent.

The parties

[2] The applicant is Mr. Alex Mabuku Kamwi Kamwi, an adult Namibian male resident in Mafuta Compound, Zambezi Region, Republic of Namibia. The 1st respondent is the Prosecutor-General of the Republic of Namibia, duly appointed in terms of the Constitution of the Republic of Namibia, ('the Constitution'). The 2nd respondent is the Magistrate of the Katutura Magistrate's Court where the applciant was previously arraigned.

Relief sought

[3] The relief sought by the applicant, as set out in his notice of motion, is as follows:

'[1] Ordering the permanent stay for the prosecution set down on 29 November 2019 in the Regional Court, Katutura, Windhoek, Namibia as contemplated in Article 12(1) of the Constitution of Namibia;
[2] Costs of suit only if this application is opposed;
[3] Further and/ or alternative relief.'

Background

[4] The applicant was arrested during 2004 for allegedly contravening section 21 of the Legal Practitioners Act. Following the arrest and the appearance of the applicant, the matter was postponed on various occasions. The postponements were occasioned by the State and by the applicant and or/his legal practitioner

[1] Legal Practitioners Act 15 of 1995

interchangeably. It appears that after various postponements the charges against the applicant were withdrawn and bail posted by him was refunded on 23 August 2007. After some time after the withdrawal of the charges, the Applicant was summoned to appear in court on 17 June 2016 on the same charges that had been preferred against him.

[5] It is the applicant's case that when the charges against him were withdrawn in terms of section 6(a) of the Criminal Procedure Act,[2] this was done with a measure of finality. This, he contends, implied that in terms of the law, the prosecution was halted and the charges so withdrawn could never be reinstated against him without the Prosecutor-General first making an application to set aside that order withdrawing the charges. The applicant is of the view that this presupposes that all the charges preferred against him were permanently dropped.

[6] The applicant, in his submissions, relies on s. 6(a) of the Criminal Procedure Act[3] which reads as follows:

> 'Power to withdraw charge or stop prosecution
> (6) An attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may –
>
> (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
>
> (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney.'

[7] The applicant argued that it is a well-established principle of law that the order withdrawing the charges dated 23 August 2007, and duly pronounced, stands until set aside by a court of competent jurisdiction. Additionally, the applicant contended

[2] Criminal Procedure Act, 51 of 1977
[3] Criminal Procedure Act 51 of 1997

that the failure of the 1st respondent to provide reasons why she recommenced the proceedings after a period of nine years rendered the prosecution liable to be permanently stayed.

[8] The Respondents opposed the application but failed to file their answering affidavits within the timelines stipulated. A condonation application was launched for the late filing of same, but it was refused as the 1st respondent failed to make out a case for the condonation applied for. The net effect of this was that the 1st respondent was confined to dealing with the matter on the facts deposed to by the applicant and in terms of the law applicable. She remained barred from dealing with the facts viewed from her prism. I now turn to deal with the applicable law addressed by the respondent.

[9] The respondents submitted that a permanent stay of prosecution has far reaching consequences and has been described as extreme, radical and exceptional. The burden on an applicant for permanent stay, to prove that he is entitled to such extreme relief, is thus an onerous one.[4]

[10] In the Supreme Court matter of *S v Myburgh*,[5] the court held that:

> 'It must be borne in mind that a permanent stay of prosecution would gravely impact on and even qualify the prerogative of the Prosecutor-General to prosecute, embodied in article 88 of the Namibia Constitution and section 2 of the Criminal Procedure Act 51 of 1977.'

[11] In advancing their arguments, the respondents argued that the permanent stay of the proceedings based on the mere passage of time would be equivalent of imposing a judicially created limitation period for prosecuting a criminal offence. In tackling the issue of unreasonable delay, the respondents quoted the judgment of *S v Heidenreich*[6] which postulated that when the courts consider what constitutes reasonable time within which to prosecute an accused person, the court must endeavour to balance the fundamental right of the accused to be tried within a

---

[4] *S v Myburgh* 2008 (2) NR 592 SC
[5] *S v Myburgh* supra at p602
[6] *S v Heidenreich* 1995 NR 234 (HC)

reasonable time against the public interest in the attainment of justice in the context of the prevailing economic, social, and cultural conditions to be found in Namibia. What is required at the end of the day is a value judgement. This was position confirmed in the *Myburgh* case.

[12] In *Zanner v Director of Public Prosecutions*, *Johannesburg*[7] the court found that, 'Although the time period is central to the enquiry of whether it was unreasonable, the fact of a long delay cannot in itself be regarded as an infringement of the right to a fair trial but must be considered in light of all the circumstances of each case.'

[13] The issue that this court is called upon to determine is whether or not a case has been made out for a permanent stay of prosecution, and whether or not the charges withdrawn against the applicant amount to a final withdrawal in the circumstances.

[14] The Supreme Court in *S v Myburgh*[8] held that the following questions needed to be considered by a court in its determination whether or not the application for permanent stay should be granted, namely:

'(a) the applicant had proved that his trial had not taken place within a reasonable time,
(b) the applicant had proved that irreparable trial prejudice was occasioned as a result,
(c) if the applicant had proved the existence of any other exceptional circumstances justifying the sought remedy.'

[15] The Supreme Court in the latest judgment, namely that of the *Prosecutor-General of Namibia v Namoloh*[9] Damaseb, DCJ, held that:

'[51] Delay is not always a function of dereliction of duty by those responsible for criminal prosecutions. 'Limits on institutional resources' are just as responsible for delay. It is not a small matter therefore that courts in jurisdictions with whom we share the common-law

[7] *Zanner v Director of Public prosecutions, Johannesburg* 2006(2)SACR 45 (SCA)
[8] *S v Myburgh* 2008 (2) NR 592 (SC)
[9] Prosecutor-General of Namibia v Namoloh SA 4/2019

heritage and progressive constitutions have recognised that systemic delay attributable to 'limits on institutional resources' is an important factor to be taken into account in the assessment of whether or not there was an unreasonable delay in bringing about a prosecution within a reasonable time.'

[16] During the prosecution of the matter in the regional court it is common cause that various postponements were made. I pause to state that during these times the applicant was legally represented. The postponements occurred because of agreements between the state and the applicant's legal practitioner of record at the time. On the occasions when the applicant's legal representative and the prosecution were at loggerheads in respect of another postponement in the matter, the matter was withdrawn.

[17] This withdrawal had the effect of releasing the applicant from any obligation to stand trial on a specified, charge, date, and time. In the interregnum, before the re-summoning of the applicant, it cannot be said that period in question added to the time that can be regarded as unreasonable and thus infringing the applicants' rights in terms of Article 12 of the Namibian Constitution. In the result the applicant has failed to prove that his matter was not heard within a reasonable time.

[18] It appears that the prejudice suffered by the applicant relates to what he refers to as to his integrity and his conduct in the eyes of families, friends, colleagues, and the society at large. The applicant is adamant that this matter is set to have a negative impact on the conduct of his business because of how he will be perceived by society. This prejudice, however, pales in significance when one considers it in contrast to the irreparable trial prejudice that would eventuate with the granting of a permanent stay. If one is to grasp the context of this requirement that ought to be proved for a successful application for a stay in prosecution, one needs to prove that there is no way in which fairness of the trial could be sustained. The prejudice needs to be attributed to the trial and not the person.

[19] In the premises, I am of the considered view that there are no exceptional circumstances placed on record that can persuade this court to make a finding in favour of the applicant.

[20] *The* Supreme Court further stated the following in the *Namoloh* [10]*,* namely that:

'[40] Section 6*(a)* of the CPA empowers a prosecutor to withdraw a charge before plea. The most significant consequence of a withdrawal is that it does not entitle an accused to an acquittal. In other words, unless the statutory prescription sets in, such a person can again be charged.'

[21] At para 43, the Supreme Court proceeded and stated thus: 'The effect of the withdrawal as far as the PG is concerned is that whilst the statutorily prescribed prescription period has not run out, the State can bring fresh charges against the person, either identical to those withdrawn or entirely different ones arising from the same factual matrix.'

[22] It is thus clear that the Prosecutor-General, in reinstating the applicant's charges, acted in line with the decision of the Supreme Court in *Namoloh.* Having regard to this, I conclude that the applicant's argument is misplaced in law. Section 6(a) of the Criminal Procedure Act is not final but has a provisional effect in that it allows for the charges to be brought back against an accused person, so long as the statutory limitation period has not been reached.

Conclusion

[23] In view of what is stated above, the court is satisfied and of the considered view that the applicant has failed to make out any case for a permanent stay of prosecution. The application accordingly has no merit.

Order

[10] Prosecutor-General of Namibia v Namoloh, *supra*, para 40.

[24] In the circumstances the court makes the following order:

1. The application for the permanent stay of the prosecution of the Applicant as contemplated in Article 12 (1) of the Namibian Constitution, before the Regional Court, Katutura, Windhoek, Namibia, be and is hereby refused.
2. The Applicant is ordered to pay the costs of this application.
3. The matter is removed from the roll and is regarded as finalised.

_____

T.S. Masuku

Judge

APPEARANCES:

APPLICANTS:	In Person
SECOND RESPONDENTS:	Office of the Government Attorney J. Ncube