

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION

RULING ON THE APPLICATION FOR A POSTPONEMENT TO CALL FURTHER  
WITNESSES

CASE NO.: CC 10/2019

In the matter between:

THE STATE

APPLICANT

v

LEWENA WALTER MIKITI

ACCUSED

Neutral Citation: *State v Mikiti* (CC 10/2019) [2021] NAHCMD 74 (25 February 2021)

**Coram:** RAKOW, J

**Heard:** 24 February 2021

**Delivered:** 25 February 2021

**Flynote:** Criminal Law – Section 168 of the Criminal Procedure Act 51 of 1977 - Request for a postponement – State wanting to call more witnesses - Principles applicable to postponements restated – Good cause in launching the application for postponement required – Rights of the accused - Interest of Justice.

**Summary:** The accused was arrested on charges of fraud alternatively theft, forgery and uttering of a forged document and Contravening section 4(b)(1) of the

Prevention of Organized Crime Act 29 of 2004. The trial commenced and the state led its witnesses. Towards the end of its case, the state brought an application for postponement, to enable it to consult and call two more witnesses. The application for was opposed by the accused.

*Held that*, in considering applications for postponement the court should weigh the prejudice that the accused would suffer against the prejudice the state would suffer if the application is not granted.

*Held further that*, the prejudice the accused would suffer by granting of this postponement and by allowing the testimony of the witnesses can be cured by allowing the accused to recall some witnesses if he so wishes.

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**ORDER**

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1. The application for postponement is granted.
2. The matter is postponed to 17 – 21 May 2021 for continuation of trial.
3. A subpoena to be issued for a certain Brighton Mwala, the public prosecutor stationed at Uutapi.
4. The accused bail is extended and warned 10h00

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**RULING**

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RAKOW, J

[1] The Accused/Respondent was charged with the following counts:

- |         |   |  |
|---------|---|--|
| Count 1 | - | Fraud alternatively Theft  |
| Count 2 | - | Forgery and uttering of a forged document  |
| Count 3 | - | Contravening section 4(b)(1) of the Prevention of Organized Crime Act 29 of 2004 – Money laundering. |

[2] Towards the end of the state's case, the counsel for the state, Mr. Iitula applied to court for the postponement of the matter in order for them to ensure the presence of a certain Ms du Plessis and to consult and obtain a witness statement of a certain Mr. Scholtz. This application is opposed by the accused.

#### Brief background

[3] The matter appeared for the first time in the High Court on the mentions roll of Justice Liebenberg on 18 April 2019 from where it was postponed from time to time to allow the accused and the state to ensure that the matter was ready to proceed on trial. It was set down for trial before myself for the period 18 – 29 November 2019. The trial could not proceed on 18 November 2019 as I was engaged in another matter. It then commenced on 25 November 2019 and was heard until 26 November 2019. On 26 November 2019, counsel for the accused presented a sick certificate from a doctor indicating that the accused was booked off and the trial could therefore only proceed on 24 – 28 February 2020.

[4] Once again the matter could not proceed on 24 February 2020 as the legal practitioner of record for the accused withdrew and the accused needed time to appoint a new legal practitioner. The matter was postponed to 13 April 2020 for legal representation. On 13 April 2020 the matter was again postponed to 6 May 2020 for legal representation. On 6 May 2020 the court was informed that Mr. Greyling will appear on behalf of the accused but that he was not present. The matter was then set down for continuation of trial on 18 – 20 May 2020 and proceeded accordingly. The matter was then postponed to 13 – 21 August 2020 for continuation of trial and the witness Mr. Mateus was warned to appear.

[5] During the period 13 – 21 August 2020 the matter could not proceed due to the full lock down of Windhoek under the Covid regulations. The matter was postponed to 23 November – 2 December 2020 for continuation of trial. The trial did continue during that period and only proceeded until 26 November 2020 after which the matter was postponed to 22 – 26 February 2021 for continuation of trial as the state wished to call a certain Ms du Plessis but could not procure her air ticket in advance due to problems being experienced with the financial office responsible for

purchasing the said ticket. The witness who was recalled on request of the accused was also present during this period and further questions were put to him by the accused's counsel. On 22 – 23 February 2021 the matter proceeded with the state bringing their application on 24 February 2021.

### The application

[6] The state submitted that the reason why Ms du Plessis cannot be at court this week was set out in email correspondence between the witness and Mr. litula when he sent her an email to find out whether she would be available to come to court on 8 February 2021. She indicated that she is not available as she would be moving house and her children are to start school again. She further indicated that she had pneumonia during last year which increase her risk of contracting Covid and therefore she would not like to travel at this time. There was however certain concerns raised during the testimony of some of the witnesses by the defence counsel, which at that times was answered that Ms du Plessis would be in a position to answer to the said questions, necessitating her coming to give evidence. Thus, calling this witness will allow for these questions that was so raised to be answered and she, who apparently raised the initial complaint can come and testify to that as well. She is also needed to hand in some documents that were generated by the system Santam uses.

[7] Mr litula further argued that the need to obtain a statement from Mr. Scholtz and to call him as a possible witness only became clear during the testimony of the Investigating Officer as it was clear from her testimony that Mr. Scholtz played a big role in the investigations conducted in this matter as well as being the person who took down a number of the statements in the docket. It seems that the Investigating Officer made some attempts to talk to Mr. Scholtz at the end of 2020 but was informed that he was in hospital at that stage. The Investigating Officer spoke to Mr. Scholtz in the presence of Mr. litula on the morning of 24 February 2021 and he confirmed that he would be able to travel to Windhoek over the weekend of 27 - 28 February 2021 and is willing to consult with the state and to provide a witness statement.

[8] Mr Greyling for the accused argued that the state did not discharge the onus put on them as per the requirements set out in case law. It was his submission that the state needs to show that the witness sought to be called is a material witness and need to address the probative value of the evidence that is sought to be introduced by the witness. The current continuation date was already known at the end of last year but no subpoena was issued for Ms du Plessis. She in fact complained in her email that it is too short notice for her. The state further could not assure the court that she indeed will come and testify as she has never come to court in the past.

[9] It was further his submission that there is no statement of Mr Scholtz available and therefore no grounds to determine what his knowledge is and what he will contribute to the proceedings. The state never alluded to calling Mr. Scholtz and in the six years that the matter was pending never obtained a statement from him. The Investigating Officer did not explain why this was not done, except for informing the court that she lost contact with him. Mr Scholtz's contribution can therefore not be gaged.

[10] As to the prejudice the accused is to suffer, Mr Greyling submitted that it relates mainly to his fair trial rights which include a speedy trial as a postponement would cause a time delay in the finalization of this matter, the additional expenses the accused must incur and that some witnesses might need to be recalled after the evidence of Mr. Scholtz is lead as his evidence might change the entire landscape of the trial.

#### Legal considerations

[11] Postponements of proceedings are regulated by s 168 of the Criminal Procedure Act 51 of 1977 as amended which provides:-

'A Court before which Criminal proceedings are pending, may from time to time during such proceedings, if the Court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the Court may deem proper and which are not inconsistent with any provision of this Act'.

[12] In *S v Bashala*<sup>1</sup> Usiku J said the following regarding the duty of courts in these applications:

‘It is therefore trite that courts bear the duty of controlling court affairs but the prosecution have also the duty in motivating the application for remand or postponements and must lay a proper basis for such an application, either by giving reasons from the bar or lead evidence in support thereof. It is not for the mere asking and the court cannot afterwards be heard complaining that there were no reasons advanced.’

[13] When dealing with an application for a postponement to call a specific witness as well as allowing the state to submit DNA evidence, Sibeya AJ (as he then was) in *S v Katanga*<sup>2</sup> said the following:

‘[17] Postponements infringe on the accused person’s right to a fair trial which embodies the right to have the trial begin and conclude without unreasonable delay. Therefore, the reasons for the request for a postponement advanced should be balanced against the constitutional right of the accused to have a speedy trial (including the right for the hearing to proceed on the appointed day), the prejudice that the accused may suffer and the convenience of the court. For the applicant to succeed in an application for a postponement, there should be demonstrably good and strong reason for the application. It is further in the public interest that there should finality to litigation.’

[18] The Constitutional Court of South Africa in the matter of *National Police Service Union v Minister of safety and Security*<sup>3</sup> stated that:

‘The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the court. Such postponement will not be granted unless this court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the court that a good case does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that gave rise to the application. Whether a postponement will be granted is therefore in the discretion of the court and cannot be secured by mere agreement between the parties. In exercising that discretion, this court will take into account a number of factors, including (but not limited to)

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<sup>1</sup> *S v Bashala* (CC 30/2020) [2020] NAHCMD 39 (04 February 2020).

<sup>2</sup> *S v Katanga* (CC 23/2018) [2019] NAHCMD 376 (27 September 2019).

<sup>3</sup> *National Police Service Union v Minister of safety and Security* 2000 (4) SA 1110 (CC) at 1112 C-F; *S v Acheson* 1991 NR 1 (HC).

whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.’

[14] *Myburgh Transport v Botha t/a SA Truck Bodies*<sup>4</sup> is seen as the *locus classicus* governing postponement applications wherein the Supreme Court outlined the relevant principles applicable. Although this was a civil matter, the same principles find application in criminal matters, excluding the parts where these principles relates to appropriate cost orders as these are not applicable in criminal cases. These principles can be paraphrased in the following terms:

(a) The trial judge has a discretion as to whether to grant or refuse an application for a postponement;

(b) That discretion should be exercised judicially and not capriciously, whimsically or on a wrong principle;

(c) A court should be slow to refuse a postponement where the true reason for a party’s non-preparedness has been fully explained and is not due to dilatory tactics on his or her part and where the demands of justice show that that party should have further time for the purpose of presenting his or her case;

(d) An application for a postponement must be made timeously, as soon as the circumstances call for the need to make the application become known to the applicant. Where the demands of justice and fairness however, call for the granting of a postponement, the court may grant such application even if it was not timeously made;

(e) An application for a postponement must be bona fide and not resorted to as a tactical manoeuvre geared to gaining an advantage to which the applicant is not entitled;

(f) Considerations of prejudice will ordinarily play a pivotal part in the direction the court’s discretion will be exercised. In this regard, the court should consider whether prejudice suffered by the respondent cannot be cured or compensated by an appropriate order for costs;

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<sup>4</sup> *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 NR 170 (SC).

(g) The court should weigh the prejudice that will be occasioned to the respondent if the application is granted, against the prejudice that the applicant will suffer if the application is not granted;

(h) Where the application has not been timeously made, or the applicant is otherwise to blame for the procedure adopted, but justice nevertheless calls for postponement to be granted in the peculiar circumstances, the court may, in its discretion, allow the postponement but direct the applicant to pay the wasted costs occasioned by the postponement on the scale between attorney and client. In this regard, the court may even order the applicant to make good on the costs order even before the applicant prosecutes the matter further.'

### Conclusion

[15] It is indeed the court's discretion to allow the matter to be postponed or not and this is a judicial discretion which need to be exercised on good grounds shown. In doing so, the court should decide whether the true reason was fully disclosed. In the current matter the state explained as far as possible as to why Ms du Plessis is not at court and why Mr. Scholtz's statement was not yet taken. There was an attempt made to get hold of him by the investigation officer although perhaps not a serious enough attempt. The court is however satisfied that Mr Scholtz was indeed traced and is willing to testify should the state, after consultation decide to call him.

[16] The court weight up the prejudice that the accused would suffer against the prejudice the state would suffer if the application is not granted. The court also looked at the history of this matter and came to conclusion that there was not a great number of postponements that could be laid before the state's door. The prejudice the accused would suffer however can in some ways be curbed by allowing the accused to recall some witnesses if the need for such arises. The state will, in the event that they wish to call Mr. Scholtz still need to bring an application to call him and convince the court that the requirements as set out in *S v Van Der Westhuizen*<sup>5</sup> have been met.

[17] In applying the above principles the court concludes that it will be in the interest of justice to allow the application as requested by the state. The state did not

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<sup>5</sup> *S v Van Der Westhuizen* (CC 11/2018) [2020] NAHCMD 528 (18 November 2020).



seek a lengthy postponement and will be in a position to know, after the weekend, whether they intend to call Mr. Scholtz and, if they want to do so, be in the position to provide the accused with a statement of Mr. Scholtz. When evaluating the interest of justice concept, the court took into account that each application for postponement must be decided on its own merits and within the confinements of the specific case before court. In this instance there were numerous discrepancies which were pointed out by the accused, between the evidence presented by a number of witnesses and their statements and from the evidence of the investigating officer it seems that most of the statements in this matter was authored by Mr. Scholtz. There were also instances where there was confusion between typed statements of a person and handwritten statements. It further seems that Mr. Scholtz conducted a portion of the police investigation and not only for the purpose of providing feedback to Santam.

[18] The court will therefore grant the application for postponement.

[19] Order:

1. The application for postponement is granted.
2. The matter is postponed to 17 – 21 May 2021 for continuation of trial.
3. A subpoena to be issued for a certain Brighton Mwaala, the public prosecutor stationed at Uutapi.
4. The accused bail is extended and warned 10h00

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E Rakow  
Judge



APPEARANCES:

For the State:

T litula

Office of the Prosecutor General,

Windhoek.

On behalf of the Accused:

J Greyling

Greyling and Associates, Oshakati.