

REPUBLIC OF NAMIBIA



**IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: HC-MD-CIV-ACT-OTH-2017/04189

In the matter between:

PETRUS SHOOVALEKA

PLAINTIFF

and

PRESIDENT OF THE REPUBLIC OF NAMIBIA

1ST DEFENDANT

PROSECUTOR GENERAL

2ND DEFENDANT

MINISTER OF SAFETY AND SECURITY

3RD DEFENDANT

INSPECTOR GENERAL NAMIBIAN POLICE

4TH DEFENDANT

ATTORNEY GENERAL

5TH DEFENDANT

Neutral citation: *Shoovaleka v President of the Republic of Namibia* (HC-MD-CIV-ACT-OTH-2017/04189) [2024] NAHCMD 30
(2 February 2024)

Coram: OOSTHUIZEN J

Heard: 23 November 2022

Delivered: 2 February 2024

Flynote: Constitutional rights — Articles 5, 7, 11 and 12(1)(b) read with article 88(2)(a) of the Namibian Constitution — Whether Prosecutor-General is responsible for the detention of an accused person and for the time it takes to finalise a trial after commencement.

Summary: Plaintiff was arrested on 5 December 2005 on charges of armed robbery with aggravating circumstances allegedly committed on 4 December 2005. Plaintiff was granted bail on 20 April 2016 and released after paying bail on 2 June 2016. Plaintiff's trial in the Regional Court commenced on 8 April 2013. Plaintiff was acquitted and discharged in respect of all eleven charges against him on 11 July 2016. Plaintiff claims against the Prosecutor-General for general, alternatively constitutional damages in that the prosecution wrongfully and unlawfully violated his constitutional rights to be tried within a reasonable time and not to be subjected to arbitrary detention.

Held that, the Namibian Supreme Court adopted the position that the first leg of the enquiry under article 12(1)(b) of the Constitution is whether the right to be tried within a reasonable time has been infringed. Only when it is found that the right was infringed, the enquiry as to the potential remedies arises.

Held further that, it is the primary responsibility of a presiding judicial officer to manage and direct a criminal trial in order to finalise same within a reasonable time.

Held further that, delays are not always a dereliction of duty by the prosecution. Systemic delays are important factors to be taken into account.

Held further that, systemic delays are caused by multiple charges; more than one accused; four legal practitioners with different and overlapping trial schedules; court congestion; state sponsored legal aid; time consuming periods awaiting legal aid application outcomes; a directorate of legal aid unable to effectively deal with the sheer number of legal aid applications and a serious commitment or the lack thereof to the principle of finalising cases effectively and within a reasonable time and agreements between the prosecutor and counsel for the accused as to when and for how long the case was postponed from time to time.

Held further that, the systemic factors in this case caused the delays and/or postponements not to be unreasonable although time consuming.

Held further that, the prolonged detention of the plaintiff was not arbitrary but in accordance with competent court orders and in accordance with article 11(3) of the Constitution and according to procedures established by law.

ORDER

IT IS ORDERED THAT:

1. Plaintiff's claim against the Prosecutor-General for general damages, alternatively constitutional damages for pain and suffering, is dismissed.
2. Plaintiff's claim against the Prosecutor-General for loss of income, is dismissed.
3. No order is made in respect of costs.
4. The matter is regarded as finalised and removed from the roll.

JUDGMENT

OOSTHUIZEN J:

Background

[1] The plaintiff is a self-employed adult male residing in Windhoek, Republic of Namibia.

[2] The plaintiff claims general damages against the second defendant, the Prosecutor-General (the PG) of Namibia, alternatively constitutional damages, for

pain and suffering as a consequence of a wrongful and unlawful lengthy incarceration and trial which took unreasonably long to commence and complete while the plaintiff was kept in custody.

[3] Plaintiff alleges that the second defendant wrongfully and unlawfully caused the delays in prosecuting the trial contrary to her constitutional duties embodied in Articles 5, 7, 11, 12(1)(b) read with 88(2) of the Namibian Constitution.

[4] The second defendant denies liability by pleading that where constitutional infringements are alleged by the plaintiff and the constitution provides a remedy, the release of the plaintiff, the plaintiff was bound to pursue his release and is prevented from pursuing constitutional damages.

[5] The second defendant denies wrongful and unlawful conduct on the part of the Prosecutor-General or her prosecutors and pleads that the courts (magistrates) postponed the matter each time and remanded the plaintiff in custody.

[6] The Prosecutor-General pleaded that the postponements were necessitated by the number of different accused and their need for legal representation and the time it took the Directorate of Legal Aid to appoint legal representation for the different accused.

[7] The Prosecutor-General also pleaded that every postponement was agreed on between the prosecution and defence and sanctioned by the Court.

Facts not in dispute as per Pre-Trial Order¹

[8] On 5 December 2005, Plaintiff was arrested under case number CR 114/12/2005, by members of the Namibian Police Force on charges of armed robbery with aggravating circumstances allegedly committed on 4 December 2005.

¹ Pre-Trial Order dated 11 April 2022, pp 498 to 505, Further Amended Trial Index, Vol 1 of 2.

[9] On 7 December 2005, Plaintiff appeared in the Magistrate's Court, Katutura, under case number A 3809/2005 as the third accused person and the matter was postponed to 12 December 2005. Plaintiff remained in custody.

[10] On 12 December 2005, the matter was postponed to 24 January 2006 for further investigation. Plaintiff remained in custody.

[11] On 24 January 2006, the matter was postponed to 1 February 2006 for a formal bail application. Plaintiff remained in custody.

[12] On 1 and 2 February 2006, Plaintiff brought a formal bail application, at which he was unrepresented. The presiding officer refused bail and ordered that the Plaintiff remain in custody pending finalisation of the case. Plaintiff was not advised of his right to appeal the Court's refusal of bail. The matter was postponed to 28 February 2006 for purposes of fixing trial dates. Plaintiff remained in custody.

[13] On 28 February 2006, the Prosecution requested a postponement to 2 August 2008 on the grounds that the Prosecutor-General's decision had to be obtained. The presiding officer granted the request and remanded the case to 2 August 2006. Plaintiff remained in custody.

[14] On 2 August 2006, the Prosecution put five charges to Plaintiff and Plaintiff pleaded not guilty to all five counts. The Court thereafter halted the proceedings and postponed the case to 29 September 2006 for the State to obtain the Prosecutor-General's decision (PGD). Plaintiff remained in custody.

[15] On 29 September 2006, the Prosecution indicated to the Court that the Prosecutor-General's decision had been received on 26 September 2006. The matter was transferred to the Regional Court for "first appearances" on 24 October 2006. Plaintiff remained in custody.

[16] On 24 October 2006 Plaintiff appeared in the Regional Court. The matter was postponed to 19 January 2007 to await the outcome of Plaintiff's application for legal aid. Plaintiff remained in custody.

[17] On 19 January 2007, the matter was postponed to 16 February 2007 for legal aid, albeit it was not recorded as such. Plaintiff remained in custody.

[18] On 16 February 2007, the Court inquired from the Plaintiff as to the status of his application for legal aid. Plaintiff advised that he had received no response, but that he made up his mind and that he would conduct his own defence. The matter was postponed to 30 March 2007 to enable one of the co-accused persons to obtain private representation. Plaintiff remained in custody.

[19] On 30 March 2007, the matter was postponed to 23 July 2007 for plea and trial. Plaintiff remained in custody.

[20] On 23 July 2007, the matter was postponed to 14 November 2007 for plea and trial. No reason was stated for the postponement. Plaintiff remained in custody.

[21] On 14 November 2007, the Court recorded that Plaintiff had applied for legal aid but had received no response. The Court failed to record that Plaintiff had chosen to conduct his own defence on 16 February 2007. The matter was postponed to 18 January 2008 for legal aid. Plaintiff remained in custody.

[22] Had the plaintiff stated that he wished to conduct his own defence, the matter would have been postponed in any event for the outcome of the legal aid applications for the co-accused.

[23] On 18 January 2008, the Court recorded that Plaintiff had applied for legal aid and that no response had been received. The matter was postponed to 7 March 2008 for legal aid. Plaintiff remained in custody.

[24] On 7 March 2008, Plaintiff presented a letter from the legal aid directorate acknowledging receipt of his application for legal aid to the Court. The matter was postponed to 29 May 2008 for legal aid. Plaintiff remained in custody.

[25] On 29 May 2008, Plaintiff appeared with legal representation (Mr Muluti). The matter was postponed to 18 July 2008 for the fixing of a trial date. Plaintiff remained in custody.

[26] On 18 July 2008, Plaintiff appeared with legal representation. The matter was postponed to 14 August 2008 for the fixing of a trial date. Plaintiff remained in custody.

[27] On 14 August 2008, the representative for the fourth accused person was absent from Court. The matter was postponed to 30-31 March and 1-3 April 2009 for plea and trial. Plaintiff remained in custody.

[28] On 30 March 2009, Plaintiff's representative informed the Court that he would be unable to represent all four persons due to the inevitable conflicting instructions he would receive. He withdrew his representation of the first, second and fifth accused persons and remained the representative for the Plaintiff. The matter was postponed to 30 April 2009 for legal aid in respect of the first, second and fifth accused persons and for the fixing of a trial date. Plaintiff remained in custody.

[29] On 30 April 2009, the matter was postponed to 2 August 2009 to enable the first, second and fifth accused to obtain legal aid. Plaintiff remained in custody.

[30] On this day counsel for the fourth accused was absent and the first, second and fifth accused persons indicated that there was still no outcome of their legal aid applications.

[31] On 2 August 2009, the unrepresented accused persons had still not received a response from the legal aid directorate and the matter was postponed to 3 October 2009 for legal aid. Plaintiff remained in custody.

[32] On 3 October 2009, Plaintiff's legal representative was absent from Court. All but the fifth accused person had obtained legal representation. Plaintiff remained in custody.

[33] Plaintiff, as well as the first, fourth and fifth accused persons indicated that they wished to request bail. The matter was postponed to 2 December 2009 to enable the fifth accused person to obtain legal aid and for a formal bail application. Plaintiff remained in custody.

[34] On 2 December 2009, the fifth accused person was still without representation. The representative for the first accused person indicated that they were still insistent on bringing a bail application. The other accused persons and/or their representatives, including the Plaintiff confirmed that they too still intended to bring an application for bail. The matter was postponed to 5 February 2010. Plaintiff remained in custody. The matter was also postponed for the fifth accused to obtain legal aid.

[35] On 5 February 2010, Plaintiff's representative was absent from court. The matter was postponed to 8 March 2010 for the fixing of a trial date. Plaintiff remained in custody. The plaintiff's representative on that day, Mr Nyambe, was not present and the matter was postponed also "for Mr Nyambe".

[36] On 8 March 2010, the representative for the first accused person was absent from Court. The matter was postponed to 16-17 September 2010 for plea and trial. Plaintiff remained in custody. Plaintiff's counsel agreed to the postponement and dates.

[37] On 16 September 2010, the representative for the first accused was absent. The matter was postponed to 4-6 April 2011 for plea and trial. Plaintiff remained in custody.

[38] On 4 April 2011, the representative for the first accused person was absent. The Prosecution requested a postponement to the next day. Plaintiff remained in custody.

[39] On 5 April 2011, the Prosecution informed the Court that the representative for the first accused person would no longer represent him. The matter was postponed

to 31 May 2011 for the first accused person to obtain legal aid. Plaintiff remained in custody.

[40] On 31 May 2011, the first accused person had obtained new representation. The matter was remanded to 6-7 December 2011 for plea and trial. Plaintiff remained in custody. The plaintiff's representative was absent from court on that day.

[41] On 6 December 2011, the representatives for the first and fourth accused persons were absent. The matter was remanded to 7 December 2011 for the fixing of a trial date. Plaintiff remained in custody.

[42] On 7 December 2011, the representative of the first accused person was absent. The representative for the second and fifth accused persons indicated that they intend to bring a bail application grounded in new facts. The matter was postponed to 15-16 November 2012 for plea and trial. Plaintiff remained in custody.

[43] On 23 October 2012, Plaintiff represented by his legal practitioner applied for bail, which was refused on 25 October 2012. Plaintiff remained in custody.

[44] On 15 November 2012 Plaintiff appeared for plea and trial. The case was postponed to 8-10 April 2013 on account of the fact that not all defence counsel were in possession of the relevant charge sheets and discovery. Plaintiff remained in custody.

[45] The prosecutor on that day indicated to the court that they would "squeeze the case in" and that they would "give the case preference". The plaintiff's representative that day agreed to the new dates.

[46] On 13 December 2012 Plaintiff, together with his co-accused persons in the criminal trial, all of them unrepresented, lodged an urgent application to the High Court, seeking the following relief:

(a) an order quashing the Prosecutor-General's decision to arraign him for trial, alternatively an order directing that Plaintiff be admitted to bail in a reasonable amount;

(b) ordering the commencement of the trial set for 8-10 April 2013 strictly on the basis of the evidence disclosed by the Prosecution, failing which the applicants are to be liberated and exonerated from all charges;

(c) And/or granting a committal order for the criminal case to be tried in the High Court for the sake of fairness, alternatively granting the applicant further or alternative relief.

[47] The basis for the application was:

(a) The gross infringement of the Plaintiff's fundamental rights;

(b) The fact that the trial was being conducted in an absurd manner;

(c) The fact that the trial had been inordinately delayed;

(d) That bail had been unreasonably denied; and

(e) That the inordinate delay had put the applicants' hope in a fair trial in jeopardy.

[48] Against the above factual background, Plaintiff requested from the High Court that the charges be quashed followed by his release subject to article 12(1)(b) of the Namibian Constitution.

[49] The urgency of the application was grounded in the principle that an accused person may not be held in custody as a form of anticipatory punishment.

[50] On 21 December 2012, the High Court struck the application from the roll for lack of urgency. The Plaintiff remained in custody.

[51] On 8 April 2013, the Prosecution put eleven charges to the Plaintiff and Plaintiff pleaded not guilty to all eleven charges. The Prosecution called two witnesses and subsequent to their testimony, requested an adjournment to the following day, on account of the fact that the remainder of the State's witnesses were not present at Court. The Plaintiff remained in custody.

[52] On 9 and 10 April 2013, the trial against Plaintiff continued with the Prosecution calling one further witness. The matter was adjourned to 8 May 2013 for cross-examination of the witness. Plaintiff remained in custody.

[53] On 8 May 2013, the testimony of the witness was finalised and the matter was adjourned to 27 June and 14 and 15 August 2013. Plaintiff remained in custody.

[54] On 27 June 2013, the trial against Plaintiff continued and the matter was postponed to 14 August 2013 on account of the fact that one of the defence counsels had to appear in the High Court. Plaintiff remained in custody.

[55] On 14 August 2013, the trial against the Plaintiff continued and the matter was adjourned on account of the fact that the Prosecution, was unable to call other witnesses because they had not been requested to make themselves available at Court on that day. Plaintiff remained in custody.

[56] The Court recorded that the case had been going on for many years and that the Plaintiff and the other accused persons were entitled to a speedy trial. The matter was postponed to the following day (15 August 2013). Plaintiff remained in custody.

[57] On 15 August 2013, the trial against the Plaintiff continued and the matter was postponed to 16 October 2013 for the continuation of the trial-within-a-trial on account of the fact that the Prosecution intended to call the arresting officer who was not present at Court. Plaintiff remained in custody.

[58] On 16 October 2013, the matter was postponed to 6 November 2013 for the fixing of trial date(s). No reason was stated for the postponement. Plaintiff remained in custody.

[59] On 6 November 2013, the Prosecution informed the Court that the next available dates for all the legal practitioners are 6-9 October 2014. Plaintiff remained in custody. The plaintiff's representative (Mr Muluti) confirmed the dates to be those on which the legal practitioners would be available.

[60] On 6 October 2014 Plaintiff appeared before Court. The representative of the fourth accused person was absent from Court. The second and fifth accused persons (both represented by the absent representative) applied for the postponement of the matter. None of the other representatives or the Prosecution objected. The matter was postponed to 9 October 2014. Plaintiff remained in custody.

[61] On 9 October 2014, the proceedings were digitally recorded and the matter was postponed to 9 April 2015 for the continuation of trial. Plaintiff remained in custody.

[62] On 9 April 2015, the matter was postponed to 27 May 2015 on account of the fact that the defence counsel for accused persons two, five, and four, as well as the prosecutor were absent from Court. Plaintiff remained in custody.

[63] On 26 May 2015, the matter was postponed to 11 June 2015 on account of the fact that the prosecutor was absent due to sickness. Plaintiff remained in custody.

[64] On 11 June 2015, the matter was postponed to 28 July 2015, with no reason stated. Plaintiff remained in custody. The reason given for the postponement was that all legal practitioners (defence counsel) and the prosecutor agreed to the postponement to 28 July 2015.

[65] On 28 July 2015, the matter was postponed to 7 August 2015. Accused persons four and five and the defence counsel for the first accused person were absent from Court. Plaintiff remained in custody.

[66] On 7 August 2015, the matter was postponed to 14 August 2015. The fourth accused person was hospitalised and the defence counsel for the first accused person was absent from Court. Plaintiff remained in custody.

[67] On 14 August 2015, the fourth accused person was still hospitalised but officially recorded as at large. The prosecutor assigned to the case was recorded as being on sick leave. The matter was postponed to 18-22 April 2016 for the continuation of the trial. Plaintiff remained in custody.

[68] The second accused's representative was absent and the prosecutor, standing in that day, stated that defence counsel had agreed to 18-22 April 2016 as the only dates suitable for all counsel.

[69] On 24 November 2015 the Plaintiff (together with three of his co-accused persons) persisted with his application to the High Court, previously struck for want of urgency, by placing the matter back on the roll. Plaintiff sought additional relief in the following terms:

- (a) The Court's interpretation of article 12(1)(b) and 18 of the Namibian Constitution;
- (b) An order directing the Prosecution to comply with articles 12(1)(b) and 18 of the Namibian Constitution;
- (c) An order directing the Prosecution to grant the Plaintiff bail;
- (d) Further and/or alternative relief.

[70] The basis for setting the matter down and seeking additional relief was:

- (a) The Prosecution's continued violation of the applicants' constitutional rights, in particular articles 12 and 18 of the Namibian Constitution;
- (b) The fact that the State's delay of the prolonged trial has resulted in the Plaintiff being held in custody for ten years (at that stage);
- (c) The fact that the last postponement on 14 August 2015 was for a period of more than seven months to accommodate the fact that the prosecutor was sick, which was unjust and unfair to the Plaintiff;
- (d) The Prosecutor General's failure to assign a different prosecutor to the case, resulting in the Plaintiff remaining in custody for another nine months for no good reason;
- (e) The fact that the various postponements in the period of 9 October 2014-14 October 2015 to accommodate a State's witness, were unfair, unconstitutional and seriously prejudiced the Plaintiff and constituted a miscarriage of justice; and
- (f) The fact that the applicants' constitutional rights were being seriously violated by the Prosecution.

[71] The application was heard on 18 February 2016 and the Court delivered judgment on 7 April 2016. The High Court dismissed the application on the grounds that:

- (a) The Court is not competent to interpret article 12(1)(b) of the Namibian Constitution because the Court does not give legal advice to litigants;
- (b) The Court is not competent to order that the respondents comply with articles 12(1)(b) and 18 of the Constitution, finding that there was no reason to order a mandamus generally addressed to public authorities to obey the Constitution of Namibia;

(c) With respect to bail, that the Court is not competent to interfere with a decision of a lower court where there is no appeal before the Court from that decision or an application to review that decision.

[72] On 18 April 2016, the matter was postponed to 20 April 2016 for the continuation of the trial. Plaintiff remained in custody. The prosecutor and the fourth accused were absent.

[73] On 20 April 2016 the Court, with no formal bail application, therefore, granted Plaintiff and the other accused persons bail in the amount of N\$ 5000 per person. The matter was postponed to 2 June 2016 for the continuation of the trial.

[74] On 2 June 2016, Plaintiff secured his release from custody on bail by paying the bail amount of N\$ 5000. The matter was postponed to 3 June 2016 for the continuation of trial.

[75] On 3 June 2016, the Prosecution informed the Court that its next witness was unable to attend to Court on that day. The matter was postponed to 24 June 2016 for the continuation of trial.

[76] On 24 June 2016, the matter was postponed to 11 July 2016 for the continuation of the trial.

[77] On 11 July 2016, Plaintiff was acquitted and discharged in respect of all eleven charges, in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA).

[78] Article 5 of the Namibian Constitution imposes on the Executive, Legislature, and Judiciary and all organs of Government and its agencies, and where applicable to them, all natural and legal persons, a positive duty to respect, uphold and enforce the fundamental rights and freedoms enshrined in the Constitution.

[79] Pursuant to article 88 (2)(a) of the Namibian Constitution, the Prosecutor-General prosecutes, subject to the provisions of the Constitution, in the name of the Republic of Namibia in criminal proceedings.

[80] The Prosecution is constitutionally duty bound to carry out its duties and functions in a manner which respects due process as well as respects the rights of all parties involved in the criminal process, including the Plaintiff's right to be tried within a reasonable time and not to be subjected to arbitrary detention.

[81] At all relevant times, the prosecutors acted under the delegation, subject to the control and the direction of the Prosecutor General.

[82] The investigation by the Namibian Police was completed in February 2006 and the matter was postponed to 28 February 2006 for the fixing of trial dates. The Plaintiff's trial commenced on 8 April 2013, i.e seven years and four months after the Plaintiff's arrest. Once it had commenced it took three years and three months to conclude.

Pleadings

[83] The plaintiff alleges that the prosecution wrongfully and unlawfully violated his constitutional rights to be tried within a reasonable time and not to be subjected to arbitrary detention², in requesting lengthy postponements of the criminal trial from time to time without demonstrating that the postponements were necessary and expedient, contrary to s 168 of the CPA³

[84] The plaintiff alleges that the entire period from 28 February 2006 to 11 July 2016, when plaintiff was finally acquitted and discharged in terms of s 174 of the CPA, constitutes unreasonable delay and an infringement of his right under article 12(1)(b) of the Namibian Constitution.⁴

[85] According to the plaintiff, the period 28 February 2006 to 2 June 2016, when he was released on bail, constitutes an infringement of his constitutional rights under articles 7 and 11.⁵

² Para 78 of the Second Further Amended Particulars of Claim, Trial Bundle, Vol 1, pp 14 and 15.

³ Para 79 of the further amended particulars of claim, op cit, p 15.

⁴ Para 81 of the further amended particulars of claim, op cit, p 15.

⁵ Para 82, further amended particulars of claim, op cit, p 15.

[86] The plaintiff then avers that there are twelve (12) specific periods which in and of themselves constitute unreasonable delays and arbitrary detention.⁶

[87] The plaintiff alleges that the prosecution acted wrongfully and unlawfully, when, in view of the delay it had occasioned, it failed to request the presiding officers to revisit the question of bail, when it became apparent that the trial would not commence and would not be finalised within a reasonable time.⁷

[88] The plaintiff then alleges that as a result of the second defendant's violations of his fundamental rights, he suffered pain, anxiety, trauma and the indignity of spending ten years, five months and 29 days in custody, more than seven years of which he spent as a trial awaiting person.⁸

[89] The plaintiff alleges that he suffered general damages, alternatively constitutional damages as envisaged in article 25(4) of the Namibian Constitution for pain and suffering in the amount of N\$10 million (and a further amount for loss of income).⁹

[90] The second defendant, the Prosecutor-General (the PG) raised three special pleas and pleaded on the merits.

[91] The first special plea in a nutshell is that article 12(1)(b) of the Constitution provides for both the right (the trial to take place within a reasonable time) and the remedy (failing which the accused shall be released) and that damages or compensation is not available as a remedy.¹⁰

[92] The second special plea is that there was no arbitrary detention of the plaintiff as the orders for his detention were made by the court.¹¹

⁶ Para 83, further amended particulars of claim, op cit, pp 15 and 17.

⁷ Para 86, further amended particulars of claim, op cit, p 18.

⁸ Para 87, second further amended particulars of claim, op cit, p 18.

⁹ Paras 90 and 91, second further amended particulars of claim, op cit, p 19.

¹⁰ Trial Bundle, Vol 1, p 25

¹¹ Trial Bundle, Vol 1, pp 26 and 27.

[93] The third special plea is a plea of prescription.¹²

[94] The plaintiff instituted action on 2 November 2017 and any acts or omissions of the Prosecution which are alleged to have taken place more than three years before 2 November 2017 have prescribed in terms of s 11 of the Prescription Act 68 of 1969.

[95] On the merits the Prosecutor-General denies that she violated the plaintiff's rights to be tried within a reasonable time and not to be subjected to arbitrary detention.¹³

[96] The Prosecutor-General denies that she had the duty to demonstrate the necessity or expedience for postponements or adjournments and pleads that the decision was for the court in each instance and that the postponements were brought about by numerous factors such as —

- (a) her decision to prosecute or not;
- (b) her decision to remand the matter to the Regional Court;
- (c) awaiting the outcome for legal aid applications;
- (d) enabling co-accused of plaintiff to obtain private legal representation;
- (e) enabling three co-accused to seek legal aid;
- (f) absence of legal representatives at different stages;
- (g) enabling bail applications;
- (h) bail applications made and refused;

¹² Trial Bundle, Vol 1, pp 28 to 30.

¹³ Plea, Trial Bundle, Vol 1, p 38.

- (i) not all defence counsel were in possession of relevant documentation;
- (j) State witnesses not present at court;
- (k) defence counsel's appearance in High Court;
- (l) different defence counsel' availability at different times;
- (m) co-accused absence due to illness;
- (n) availability of court for continuation of trial.¹⁴

[97] The Prosecutor-General pleads, concerning the allegations of arbitrary detention, that the detention was in accordance with competent Court orders and in accordance with article 11(3) of the Constitution and according to procedures established by law and not in breach of article 7 of the Constitution.¹⁵

Discussion and findings

[98] It is common cause that the plaintiff's actual trial commenced on 8 April 2013, i.e seven years and four months after his arrest. It is not disputed that plaintiff was charged with serious offences together with four other accused. Four different legal practitioners represented the five accused.

[99] Once the trial commenced it took three years and three months to conclude on 11 July 2016 with the acquittal and discharge in respect of all eleven charges in terms of s 174 of the CPA.

Prescription

¹⁴ Plea, Trial Bundle, Vol 1, pp 38 to 40.

¹⁵ Plea, Trial Bundle, Vol 1, pp 40 to 41.

[100] The Supreme Court in *Myburgh*¹⁶ assumed for the purpose of that decision that the reasonable time within which a trial shall take place in terms of article 12(1)(b) of the Constitution, started to run “from the time a person has been arrested on a particular charge”

[101] The Supreme Court in *Myburgh*¹⁷ also adopted the position (taken by the Constitutional Court in South Africa concerning s 25(3)(a) of the South Africa Constitution)¹⁸ that the first leg of the enquiry in article 12(1)(b) should be whether the right to be tried within a reasonable time has been infringed or not. Only if and when it is found that the right has been infringed, the enquiry as to the potential remedies arises.

[102] The Prosecutor-General argued that a claim for violation of section 12(1)(b) of the Constitution commences to run from the time a person has been arrested on a particular charge and therefor it cannot be said that the time begins to run on discharge (as replicated by plaintiff)¹⁹. The Prosecutor-General based her argument on *Myburgh and Namoloh*²⁰ and argued that prescription on a claim under article 12(1)(b) started to run when the plaintiff was arrested on a specific charge.

[103] Neither *Myburgh*²¹ nor *Namoloh*²² had anything to do with prescription. They explicitly dealt with when reasonable time under article 12(1)(b) starts to run.

[104] It must be remembered that the binding Namibian position is that article 12(1)(b) of the Constitution contains both the right and the remedy (for breach of the right, i.e release).

[105] It must also be remembered that *Myburgh* made clear that the right and the remedy are distinct and must be decided on at different stages, the first being

¹⁶ *S v Myburgh* 2008 (2) NR 592 SC at 600 B-D.

¹⁷ *S v Myburgh*, Op Cit, at 600 F-H.

¹⁸ *Wild and Another v Hoffert NO and Others* 1998(2) SACR 1 (CC).

¹⁹ Second Defendant's Heads of Argument pp 21 and 25.

²⁰ *Prosecutor-General of Namibia v Namoloh and Others* 2020 (3) NR 839 (SC) para 7.

²¹ Op cit.

²² Op cit.

whether the right was infringed and only if it was infringed the second leg of the enquiry into the remedy kicks in.²³

[106] If the Prosecutor-General's argument in paragraph [102] supra is to be accepted, the plaintiff's claim(s) was extinguished before the actual trial started on 8 April 2013. Such an outcome is clearly wrong.

[107] The Prosecutor General specially pleaded that any claims which arose before 2 November 2014 have prescribed in terms of s 11 of the Prescription Act 68 of 1969.

[108] The plaintiff replicated that the Prosecutor-General's (second defendant's) violation of his rights constituted a continuous wrong, which terminated with plaintiff's discharge on all charges on 11 July 2016 and that for purposes of computing prescription, time started to run on 11 July 2016 and plaintiff's summons was issued on 2 November 2017 well within the three year period.

[109] The trial contemplated in article 12(1)(a) has actually started on 8 April 2013, whereas it arguably could have started much sooner (if it was not for the delaying, time squandering occurrences which were to be attributed to all roll players and to circumstances relating to this case).

[110] It is common cause that the charges were put to the accused in the Regional Court and pleaded to by them on 8 April 2013.

[111] On 24 November 2015, the plaintiff and three co-accused (renewed) their application to be released from trial, alternatively on bail. The application was initially brought (and struck) during December 2012.

[112] On 7 April 2016, the High Court dismissed the plaintiff's attempt to obtain his remedy under article 12(1)(b) of the Constitution, but the trial was still ongoing.

²³ Op cit, para[101] supra.

[113] The enduring nature of the article 12(1)(b) right (to be tried within a reasonable time) is such that it does not lend itself to extinction by prescription before the trial is completed.

[114] I therefore, concur with counsel for the plaintiff that prescription (if applicable) only started to run when the plaintiff was discharged and acquitted.

Merits

[115] The Prosecutor-General admitted that article 5 and 88(2)(a) are applicable and binding on the prosecution.

[116] The Prosecutor-General admitted that the prosecution is constitutionally bound to carry out its duties and functions in a manner which respects due process as well as respects the rights of all parties involved in the criminal process, including the plaintiff's right to be tried within a reasonable time and not to be subjected to arbitrary detention.

[117] It is also common cause that the prosecutors acted under the delegation and subject to the control and direction of the Prosecutor-General.

[118] The Prosecutor-General however, pleaded that the prosecution does not alone control the pace of the trial and the duration of detention of an accused.

[119] It is trite that a presiding judicial officer has the primary responsibility to manage and direct a criminal trial in order to finalise same within a reasonable time.²⁴

[120] In *Namoloh*²⁵ our Supreme Court recognised that delay is not always a dereliction of duty by the prosecution. Systemic delay attributable to 'limits on institutional resources' is an important factor to be taken into account whether there was an unreasonable delay in bringing about a prosecution within a reasonable time.

²⁴ *Sanderson v Attorney-General, Eastern Cape* 1998(1) SACR 227 (CC) para 37.

²⁵ *Op cit*, para [51].

[121] Systemic delay is *inter alia* caused by factors which are not solely in the hands of the prosecution, but is present due to multiple charges; more than one accused (five); four legal practitioners with different and overlapping trial schedules; court congestion; state sponsored legal aid; time consuming periods awaiting legal aid application outcomes; a directorate of legal aid unable to effectively deal with the sheer number of legal aid applications; a serious commitment or the lack thereof to the principle of finalising cases effectively and within a reasonable time and agreements between the prosecutor and counsel for the accused as to when and for how long the case was postponed from time to time.

[122] Going through the case record and the facts not in dispute as per the pre-trial order, it appears that all the legal practitioners for all five accused, including Mr Muluti for the plaintiff, applied for the release on bail of the accused on 18 April 2016 due thereto that their Article 12(1)(b) right to be tried within a reasonable time was infringed.²⁶ The legal practitioners, including Mr Muluti for plaintiff, did not act for the accused in December 2012 and November 2015 when the Article 12(1)(b) applications were brought to the High Court.

[123] In this matter one of the singular serious criticisms against the prosecution was that a replacement prosecutor was not arranged for the period August 2015 to April 2016 when Mr Lutibezi for the prosecution was on sick leave.

[124] It was however, agreed between the prosecution and all the defence counsel that 18 to 22 April 2016 was suitable for all counsel for continuation of trial.²⁷

[125] The plaintiff failed to prove that the Prosecutor-General was solely responsible for delays. The delays (postponements) were principally systemic and agreed upon between the defence counsel and prosecution and approved by the court.

²⁶ Evidentiary affidavit of Cliff Lutibezi, Trial Bundle, Vol 1 of 2, page 149 and transcribed record in the Regional Court, page 466 to 471 in Vol 2 of 2 of the Trial Bundle.

²⁷ See paras [67] and [68] Supra

[126] Once the plaintiff was arrested and remanded in custody it was the principal responsibility of the plaintiff to apply for his release on bail and to appeal decisions to refuse bail (which were not done) and to review the High Court decision to strike an urgent application for release (December 2012) or to proceed with the application in the normal cause.

[127] The inherent difficulty the plaintiff faced in this case was the manner in which he elected to frame his claim. He claimed the right to be tried within a reasonable time and the right not to be arbitrarily detained in conjunction and had to prove both rights in order to make out a claim for general, alternatively constitutional damages in the face of and in addition to the constitutional remedy provided, i.e release from trial in its three forms.²⁸

[128] The systemic factors pleaded by the Prosecutor-General²⁹ and discussed in para [121] supra caused the delays and/or postponements not to be unreasonable although time consuming.

[129] I find that the prolonged detention of the plaintiff was not arbitrary but in accordance with competent court orders and in accordance with article 11(3) of the Constitution and according to procedures established by law.

[130] It was likewise not the duty or obligation of the prosecution in a case where the plaintiff was legally represented to request the court to revisit the question of bail to the plaintiff when the trial took considerable time to finalise.

[131] Due to my finding that the plaintiff failed to prove that his trial did not take place within a reasonable time in the circumstances of this case, I do not find it necessary to consider appropriate remedies.³⁰

[132] I am not ordering the plaintiff to pay the costs of the second defendant because the plaintiff's claim has raised important constitutional issues.

²⁸ *S v Myburgh*, op cit, para 623 H to 624 B.

²⁹ Para [96] supra.

³⁰ Paras [101] and [105] supra.

[133] In the premises the following orders are made:

1. Plaintiff's claim against the Prosecutor-General for general damages, alternatively constitutional damages for pain and suffering, is dismissed.
2. Plaintiff's claim against the Prosecutor-General for loss of income, is dismissed.
3. No order is made in respect of costs.
4. The matter is regarded as finalised and removed from the roll.

G H OOSTHUIZEN
JUDGE

APPEARANCE

PLAINTIFF: U Katjipuka-Sibolile
of Nixon Marcus Public Law Office, Windhoek

DEFENDANTS: E Nekwaya
Instructed by the Office of the Government Attorney,
Windhoek