

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING IN TERMS OF SECTION 174 OF ACT 51 OF 1977

Case No: CC 10/2019

In the matter between:

**LIWENA WALTER MIKITI**

**APPLICANT**

and

**THE STATE**

**RESPONDENT**

**Neutral Citation:** *Mikiti v S* (CC 10/2019) [2024] NAHCMD 622 (22 October 2024)

**Coram:** RAKOW J

**Heard:** 17 July 2024

**Delivered:** 22 October 2024

**Flynote:** Criminal Law: Discharge of accused in terms of section 174 of the Criminal Procedure Act 51 of 1977. Criminal Procedure – Trial – Discharge of accused at close of States case in terms of s 174 of Criminal Procedure Act 51 of 1977 – Approach by court and guidelines set out in *S v Nakale* and *S v Teek* followed.

**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.

*Held that:* there is no evidence that the accused was the person who changed the date and vehicle model on the copy of the Accident Report which was handed in at the branch office of Welwichia Insurance Brokers. There is further no evidence which shows that the accused had any knowledge that the document was in fact changed and therefore uttered the document.

The court finds that the section 174 application must succeed.

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### **ORDER**

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1. The accused is found not guilty on the charge of fraud alternatively theft.
  2. The accused is found not guilty on the charges of forgery and uttering of a forged document.
  3. The accused is found not guilty on the contravening section 4(b)(1) of the Prevention of Organized Crime Act 29 of 2004 – Money laundering.
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### **JUDGMENT**

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RAKOW J:

#### Introduction

[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.

## The witnesses

### Oivo Hauholo

[2] The witness is currently unemployed but was previously employed as a police man. He got to know the accused on the day of the accident which took place on 13 June 2014 in the morning. The accident occurred on the way from Oshakati heading to Ongwediva at Oneshila. He was in his vehicle in front and were followed by a Mercedes Benz (of the accused) and a Nissan pick-up truck (driven by Mr Kaujeua).

[3] The drivers of these vehicles got out of their vehicles after the accident and the witness went to look at the damage to the vehicle. His vehicle had a broken tail light on the right hand side. There was also a bump on the bumper on the right side. He also inspected the Mercedes and the front side was not damaged but the boot of the vehicle was open. It was forced open by the accident. The Nissan was also damaged at the front side.

[4] The police officer who came to the scene asked them to come to the police office on Monday as it was Friday. He took in some quotations for the damage to his vehicle and after a few days the police official phoned him and told him to come and collect N\$500 for the damage to his vehicle. He then bought a light and repaired his vehicle. This witness was eventually recalled for further cross-examination.

### Puneka Mutungasa

[5] The witness is a claims consultant employed by Welwitchia Insurance. During 2014 he was a receptionist. He knows the accused before court as one of their clients and he came in on a specific day, 23 June 2014 to register his claim. He would help with the basic completion of the forms etc. if the consultants are busy. He would then complete the first page of the claim form but the sketch is completed by the client. He further was asked to identify a claim form which he did identified as the one for the accused. Most of the form was completed by the witness or his colleague. The only part completed by the accused was the description of the accident and the sketch of the accident. The accused then also signed the form.

[6] The year model being 2010 was recorded by the witness on the form but she could not remember where she got the information, whether from their system or the accused.

Akapidus litula

[7] During 2014 he was a police officer, employed by the Ministry of Safety and Security. He was attached to the Criminal Investigation Unit. He met the accused on the date of the accident. At about 11h00 on 13 June 2014 he was on standby duty when he received a call that there was an accident which happened at Oneshila on the road from Oshakati to Ongwediva. He then drove to the scene and found three cars involved in the accident, a Toyota Corolla sedan, a Mercedes Benz sedan and a Nissan NP200 pickup. One of the drivers he found at the scene was Mr Mikiti, the accused. He was informed by the drivers that the Nissan pickup hit the Mercedes Benz from the back who in turn hit the Corolla in front.

[8] He was on standby the whole weekend and only came to register the accident on Monday in the Pol 66. A Pol 66 is a form with all the information of the accident. Anybody involved in the accident can get a copy of the Pol 66. The Pol 66 is normally contained in a book. He further inspected the vehicles on the scene. The Nissan pickup had damage in front because it hit the Mercedes Benz from the back. The Mercedes Benz had damage at the back of the boot and on the bonnet in front on the left side. The Mercedes Benz also had a dent on the rear bumper. The boot did not want to open after the collision and it was dented. The Corolla's rear left side tail light was smashed. There was no serious damage on any of the cars and all the cars drove away from the scene of the accident.

[9] Regarding the Pol 66 or Accident Report, he testified that he completed it on Monday but the one shown to him in court had a different handwriting on it where the address of the accused was indicated. He was handed another accident report and on the said report the details differed from the initial report. It said that the accident took place on 14 June 2014 which was a Saturday. On the original Pol 66 he indicated that the Mercedes Benz was a 2009 model but on this second document it is indicated that it was a 2010 model. There was also additional damage indicated on the form where

he only indicated at the back of the Mercedes Benz, this form also had an indication of damage on the front of the Mercedes Benz.

[10] He had a view of the photos of the damage to the Mercedes Benz and it did not correspond with the vehicle damage he observed at Oneshila. He handed over the accident report and the POL 24 to the charge office and does not know who handed over the accident report to the drivers. The cellphone number on the Pol 66 was not his handwriting. He also did not have the residential address of the accused when he completed the Pol 66. The initials on the changed report as well as the date and all the changes were not done by him. He also did not handle the accident report book after he completed the said report. He denied seeing the accused after the date of the accident.

[11] During February 2015 Ben Zeruka with his driver came to the police station and he was called to the office of the unit commander. He was called in and was shown photos of a Mercedes Benz but the damage to the Mercedes Benz was much more than at the time that he saw it at Oneshila on the day of the accident.

#### Johannes Kaujeua

[12] He testified that he was employed at Ben's Building Suppliers. He worked there until 2015 but still helps out from time to time. On Friday 13 June 2014 he was in a motor vehicle accident. It was a chain collision with him being bumped from the back, in turn he bumped the vehicle in front of him, which bumped into the vehicle in front of it. The vehicle immediately in front of him was a Mercedes Benz but he does not know the name of the driver. The vehicle in front of the Mercedes Benz was a Toyota Corolla. Mr Ithula was the police officer who was on the scene to take notes.

[13] The Mercedes Benz's boot had a problem to open but they could eventually manage to open it. His vehicle had a little dent on the front bumper, on the Mercedes Benz he did not observe any dents, just that the boot could not open and the Corolla's right back light was damaged. He ended up paying for the light of the Corolla. All the vehicles could drive away from the scene of the accident. The accident took place at 11h00 in the morning. The owner of the Mercedes Benz sounded like a magistrate as

he informed the police officer that he has to travel to Windhoek to attend to some cases.

[14] At a later stage his employer told him that the damage to the car that he bumped was N\$180 000 to N\$200 000 and he said it was impossible. His employer is Ben Zaaruka. He was also shown photographs of the vehicle he supposedly bumped but it showed a lot more damage. The only damage he observed at the accident scene was that the boot could not open. The photos showed damage to the front of the vehicle and even the airbag was damaged. He was then shown the photographs of the damaged vehicle and confirmed that those were the photographs shown to him.

#### Fanneky Matias

[15] The witness used to have a panel beating shop in Ongwediva called Fanny Motor Repairs. He knows the accused as the accused used to come to his shop for repairs to his vehicle. On 13 June 2014, he was contacted via phone by the accused who told him that he had an accident somewhere in Oshakati. It was during the morning that he was called. The accused came to see the witness that afternoon to make a quotation for the repair of his vehicle, a silver Mercedes Benz. The vehicle had a bump on the rear bumper. The witness told him he could not repair the vehicle as he was not registered with the insurance. He told him that he refer vehicles to Tsumeb for repairs to a place owned by a certain Jaco.

[16] The accused then drove off and said he would return at a later stage with the vehicle as he is travelling to Windhoek. He then left the vehicle with the witness for almost a week. It was parked in his warehouse. He returned after a week and called and said he would collect his car. He arrived at the warehouse and was given his car and he drove off. After about two hours the accused phoned him again and said he was in another accident and whether the witness can give him again the number in Tsumeb and if the witness knew a recovery truck to tow his vehicle to Tsumeb. So the witness gave him the number of Simo Luuli. After a while he again phoned and asked the witness to give Simo Luuli the amount of N\$1500 as he was a bit far away. After a while Simo Luuli called and asked him if he spoke to the accused and he said yes, he did. He is supposed to give him N\$1500 for fuel.

[17] The witness told Simo Luuli to meet him at a service station close to his garage and when they met he saw the same silver Mercedes Benz on a trailer belonging to Simo Luuli. He saw that the vehicle was damaged at the front. The bonnet, the front bumper, the headlights everything were smashed. It was a total write-off. The accused called him around 18h00 and he saw the vehicle at about 20h00 to 21h00. He received his money back from the accused. The accused called him about a week week and a half later and said he wants to give him back his money.

[18] During cross-examination he was not too sure that the date was indeed the 13<sup>th</sup> and explained that it was some time back.

### Simo Luuli

[19] He is the owner of a transportation business and has never met the accused. In June 2014, he cannot recall the date, he received a call from a person asking whether the witness can tow his car from Okatana. The person informed him that it is a silver Mercedes Benz and that it was bumped in front. He found the vehicle and the key was on top of the right front tyre. He loaded the vehicle with the help of passers-by onto his trailer. He then called the person who called him and asked where the vehicle must go to and was informed that it must go to Tsumeb, Northern Auto Repairs. The person he spoke to told him he was the owner of the vehicle but he did not know his name. I told him that I did not have enough money for petrol and he said that he will arrange with his friend for money. Later Mr. Fanneky called me telling me that he received a call from his friend to give me money and to assist me with petrol. He was at the Engine close to CTM. He received the call between 18h00 – 19h00 in the evening.

[20] When he arrived at Northern Auto Repairs, they off-loaded the vehicle from the trailer. The damage he observed was to the front of the vehicle, the radiator was damaged, the bumper, the bonnet, the windscreen had a crack and the air bag had popped. During cross-examination it was pointed out that neither of the two phone numbers used by the witness showed on the MTC statement of the accused's phone calls up till the end of June 2014.

### Genes Hebsch

[21] During 2014 the witness was employed at Northern Auto Repairs. He made a quotation for the repairs to a Mercedes Benz on 26 June 2014. He never met the client before. They received the vehicle and the insurance company forwarded all the client's details to them. The vehicle was badly damaged and the air bags had popped. He made a written-off quotations because in his experience the vehicle could not be repaired. He could not remember who or which company brought in the vehicle. He was with Mrs Engelbrecht when she came to inspect the vehicle.

#### Natasha Engelbrecht

[22] The witness is a general claims adjuster for Santam Insurance. She was approached by the investigator in the matter during 2020 and asked whether she took photos of the vehicle involved in this particular case which she did. She was appointed in 2014 to do an assessment of the damages to the vehicle which was parked at Northern Auto Body Repairs in Tsumeb. The claim from the police report indicated that the client's vehicle was bumped from behind and that he bumped someone in front of him also. The client's name was Mr Makiti and the vehicle was a Silver 2010 C180 Mercedes Benz. The damage to the front of the vehicle was more severe. There was damage to the radiator, the air conditioner, the front suspension, the airbags, the front bumper, the head lights. The photos she took was uploaded on the Santam system. All the claim documents were electronically indexed. The settlement amount was N\$246 000 less the excess.

#### Aron Panduleni Megameno Mupupa

[23] The witness is a junior service consultant for Welwitchia Insurance Brockers. He has seen the accused before in Oshakati at the office where he used to work at. He explained the procedure for a claim. The client would complete a claim form, they would submit quotations and the police report. After he received all the documents he would register the claim and sent it through for further processing. He did not assist the accused with completing his claim form, his colleague Puneka Mutungasa did, he just loaded the forms on the system. He also arranged for car rental for the accused. He scanned the claim form onto the email system. Mr Mupupa was recalled and testified that he made a note on the computer system which handles the claims of Santam. He



indicated that the client, the accused, informed him that he will make his own arrangements to the body works in Tsumeb.

#### Stella Ndeshimona Nghikembua

[24] She is a police officer stationed at Oshakati Oshona Region. She is an investigating officer in the commercial crime sub division. She knows the accused because he is a magistrate and an accused in her case. Santam Insurance Company opened the matter and a private investigator Mr Scholtz van Santam came to assist with the case. The investigation started with an accident between three vehicles. One of the vehicles belonged to a business man Ben Zaruka. She received a file from Mr Scholtz.

[25] She investigated the matter and checked and found two accident reports. The one was kept by their offices and the other handed in by Mr Makiti with the insurance and the two documents differed. She further spoke to Mr Faneki and he told her that when the accused brought the vehicle to his workshop it was slightly damaged at the back. All the vehicles could drive from the scene. Mr Faneki informed her how he gave money to the tow-truck driver to take the vehicle of Mr Makiti to Tsumeb. She further spoke to the employees of the insurance office.

#### Leone Issabel du Plessis

[26] She is a recovering claims handler at Santam Legal Cape Town. Before that she was employed by Stantam's Namibian branch. She knew the accused as a policy holder. On 20 June 2014 the accused handed in a claim to Santam. The legal branch proceeded and attempted a recovery against the person who caused the accident. They sent out a letter of demand to the driver of the Nissan NP200 vehicle. The letter was sent to Mr Kayewa the driver of Mr Zaruka. He requested the accident report and photos of the vehicle and later came to their offices and brought another accident report and statements and said he saw the vehicle on the scene.

#### Methodeus Shaamena

[27] Mr Shaamena is a police officer also attached to the Commercial Crimes Unit in Oshakati. He received instructions to obtain hand writing specimens from the accused and Mt litula.

#### Aina Nangua Imalwa

[28] She is a forensic scientist and police officer and work for the Namibian Police Forensic Science Institute. She is a document examiner and their unit examine disputed documents which work more in forgeries and handwriting analysis. She was presented with two handwriting specimens which she compared with the document she received. During her comparison she found that both the handwriting on the samples did not match the handwriting on the accident report form.

#### Legal considerations

[29] Section 174 of the Act makes plain that the court, at the close of the case for the State, has discretion to return a verdict of not guilty if it is of the opinion that there is no evidence that the accused committed the offence charged, or can be convicted on any of the competent verdicts finding application. No evidence has been interpreted to mean no evidence which a reasonable man acting carefully may convict<sup>1</sup> and in our Namibian Courts in *S v Nakale and others*<sup>2</sup> the words 'no evidence' was interpreted to mean no evidence upon which a reasonable court acting carefully may convict (also see *S v Teek*<sup>3</sup>). This approves the reasoning in an earlier case, in *R v Herhold and Others*<sup>4</sup> at page 722-H, where the following was stated regarding the application before Court:

'It has repeatedly been held in our Courts that the test to be applied in an application of the present nature is not, whether there is evidence upon which a reasonable man should convict, but, whether the evidence by the prosecution is such that a reasonable man, acting

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<sup>1</sup> *R v Shein* 1925 AD 6

<sup>2</sup> *S v Nakale and others* 2006 (2) NR 455 (HC) at 457.

<sup>3</sup> *S v Teek* 2009 (1) NR 127 (SC).

<sup>4</sup> *R v Herholdt and Others* (3) 1956(2) SA 722-H.

carefully, might properly convict. If there is such evidence then an application of this nature is not to be sustained.'

[30] There is no formula or test that remains applicable to all circumstances when deciding whether or not to discharge. Each case must be decided on its own merits in order to reach a just decision.<sup>5</sup>

[31] The inquiry was not, and has never been whether the evidence was cogent, plausible or constituted proof of guilt beyond a reasonable doubt. The court in *Teek* (supra) also re-affirmed the generally accepted view that, although credibility is a factor that may be considered during the s 174 application, it plays a very limited role. It is only if the evidence is of such poor quality that, in the court's opinion, no reasonable court could accept it as reliable, that the application for discharge will succeed. In *Kariseb v S*<sup>6</sup> January J held that:

'(t)his would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed.'

[32] The court must further have regard to the totality of the evidence placed before it. It is further trite that the credibility of the State witnesses plays a limited role at the stage of a section 174 application and if there is evidence supporting a charge, an application for discharge can only be sustained if that evidence is of such poor quality that it cannot, in the opinion of the Trial Court, be accepted by any reasonable Court.<sup>7</sup> It is further important to remember that in exercising its discretion in terms of section 174 of the Criminal Procedure Act, the exculpatory parts of an accused's section 115 statement forms part of the evidential material before the Court at the end of the State's Case.<sup>8</sup> Although the sentiments expressed in *S v Teek*<sup>9</sup> in obiter dictum was that very little weight can be attached to those parts of the statement.

## Findings

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<sup>5</sup> *S v Ningisa and Others*, unreported judgment of this Court delivered on 14 October 2003) and also *Roelf v S* (CC 5/2019) [2019] NAHCMD 268 (12 June 2019 at para 10

<sup>6</sup> *Kariseb v S* (CC 04/2012) [2019] NAHCNLD 86 (5 September 2019).

<sup>7</sup> *S v Nakale and others* supra.

<sup>8</sup> *S v Tjiho* (20 1990 NR 226 (HC) at 271E; *S v Shivute* 1991 NR 123 (HC) at 127 C.

<sup>9</sup> *S v Teek* supra at para 15.

[33] The court considered the evidence presented to this court as well as the arguments presented by the parties and at this stage does not have to make a decision on the credibility of the witnesses as showed out by *Teek*<sup>10</sup>. It is however important to decide whether there is enough evidence available on which a court might convict. The evidence presented to this court clearly stated that the initial accident took place on 13 June 2014 and not on 14 June 2014. The court however has identified a problem with the said date as the accused presented court with a court book indicating that he was busy with court duties at his duty station which was a number of kilometers away from the accident scene.

[34] The second issue with the evidence which was found, was that the accused presented phone records to the court of his cell phone as well as the towers through which this cellphone operated at certain times. Nowhere did we find the numbers of Mr Fanyki or Mr Lulli during the evening of 14 June 2014. There is thus no information that the accused made calls from his cellphone to these numbers to make arrangements for the vehicle to be transported to Northern Panel Beaters in Tsumeb.

[35] There is further no evidence that the accused was the person who changed the date and vehicle model on the copy of the Accident Report which was handed in at the branch office of Welwichia Insurance Brokers. There is further no evidence which shows that the accused had any knowledge that the document was in fact changed and therefore uttered the document. The court finds that the section 174 application must succeed.

[36] In the result, I make the following order:

1. The accused is found not guilty on the charge of fraud alternatively theft.
2. The accused is found not guilty on the charges of Forgery and uttering of a forged document.
3. The accused is found not guilty on the contravening section 4(b)(1) of the Prevention of Organized Crime Act 29 of 2004 – Money laundering.

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<sup>10</sup> Supra.

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E RAKOW  
Judge

## APPEARANCES

Applicant: P Greyling  
Of Greyling & Associates, Windhoek

Respondent: T Itula  
Of Office of the Prosecutor General, Windhoek