

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REASONS

Case No: HC-NLD-CIV-ACT-DEL-2017/00095

In the matter between:

HILYA MWENENI SHIIMI

APPLICANT

and

MINISTER OF SAFETY AND SECURITY

FIRST RESPONDENT

STAPHANUS KLEOPAS

SECOND RESPONDENT

PAULINA KAULUWASHA

THIRD RESPONDENT

SARGENT ASINO

FOURTH RESPONDENT

Neutral citation: *Shiimi v Minister of Safety and Security* (HC-NLD-CIV-ACT-DEL-2017/00095) [2020] NAHCNLD 78 (30 June 2020)

Coram: DIERGAARDT, AJ

Heard: 26 June 2020

Delivered: 26 June 2020

Released: 30 June 2020

Flynote: Practice – Applications – Stay of Proceedings – An application for stay of civil proceedings – The High Court has inherent jurisdiction to stay civil proceedings pending the outcome of criminal proceedings – Requirements restated - Exceptional circumstances must be present for the Court to grant such an order – Prejudice to the opposing party is a consideration

Summary: I have before me an application for stay of proceedings. The applicant sought an order for staying the civil litigation issued under case number HC-NLD-CIV-ACT-DEL-2017/00095 pending the finalization of the criminal proceedings currently pending before the Oshakati Magistrate's Court under case number OSH-SCR-2119/2018. Some of the respondents are defendants in the civil action pending before this court.

ORDER

1. The point *in limine* is dismissed;
2. Application to stay civil proceedings has been granted, pending the finalization of the criminal proceedings;
3. Costs to be costs in the cause;
4. Reasons to be released 30 June 2020;
5. The matter is removed from the roll.

JUDGMENT

DIERGAARDT AJ:

Introduction

[1] The matter emanates from an incident that occurred between 9 September 2016 to 12 September 2016. Applicant (plaintiff in the main action) alleges that she was wrongfully arrested and assaulted by the respondents (first to fourth defendants in the main action) and thus instituted civil action against the respondents. The applicant was criminally charged with six counts in the Oshakati Magistrate's court.

[2] On or about 31 March 2017, summons was issued out of this Honourable Court. The respondents duly filed a notice to defend and the matter proceeded accordingly. Both parties filed their respective pleadings, discovery, further discovery and witness statements. During the course of the civil litigation, applicant received a criminal summons informing her that the prosecutor general has decided to prosecute Plaintiff for various alleged criminal offences, relating to the current civil litigation. On the 15th of March 2019, applicant instituted the present interlocutory application to stay the civil proceedings pending the finalization of the criminal matter against her, instituted in the Oshakati Magistrate's court. The application is opposed by the respondents. I delivered the ruling on the 26th of June 2020, what follows herein are the reasons.

Ad the point in limine

[3] At the resumption of the hearing the applicant raised a point in limine that the deponent in the opposing affidavit did not have the necessary power of attorney. Mr Greyling submitted that the opposing affidavit was deposed to by Ephraim Angombe Shikongo (hereinafter referred to as the deponent). It appears further ex facie that the deponent is not a party to the present proceedings, nor does it appear from the respondents' list of witnesses that he is a witness in the present proceedings. It is the applicant's contention that the deponent does not have the necessary authority to depose of the affidavit.

[4] It is applicant's further contention, as stated in her replying affidavit that same is not sufficient to vest the deponent with the necessary locus standi to oppose the

present application for and on behalf of the respondents. It is the applicant's prayer that the respondents' opposition must be dismissed.

[5] Mr Tibinyane vehemently responded to Mr Greyling's submission and replied that Deputy Commissioner Shikongo is not only a member of the Namibian police but also a representative of the Namibia police. He further argued that the deponent indeed stated in his affidavit that he was duly authorised. Mr Tibinyane further submitted that that complainant at no stage objected to such affidavit. It is therefore necessary to first deal with the point in limine. The Honourable Angula AJ (as he then was) stated in *Shoprite Namibia (Pty) Ltd v Hamutele* (LC 172/2013) [2014] NALCMD 43 (20 October 2014) '... It has long been held that the rules do not contain a provision that a power of attorney is required in application proceedings. The rationale for the absence of the requirement to file a power of attorney in application proceedings appears to be that unlike in action proceedings where the pleadings are drafted and signed by the legal representative for the party.' For this reason I find no merit in the point in limine and the point is dismissed.

AD the merits of the application

[6] The plaintiff was arrested by the Namibian police on the 9th of September 2016 and was released on the 12th of September 2016. Plaintiff instituted civil proceedings against Defendants on the 31st of March 2017, prior to receiving a criminal summons during May 2018.

[7] The applicant's contention is that she intends to prove her claim for damages against the four defendants on a preponderance of probability alleging wrongful and unlawful conduct by the police on her person.

[8] It is not in dispute that the criminal proceedings as registered in the Oshakati Magistrate's Court relate directly to the present civil proceedings and include the same facts and allegations as the present proceedings. It is not in dispute that the same witnesses might be utilised in both proceedings.

Applicant's case

[9] Applicant in her founding affidavit stated the following as the basis for the present application. At the time of instituting the present civil proceedings, she had not been aware nor was she informed that she will and/or may be prosecuted for any alleged criminal offence. Plaintiff commenced with the present civil litigation on the 31st of March 2017 whilst only receiving the criminal summons during May of 2018. The applicant is facing various and serious criminal charges in the Oshakati Magistrate's Court. She further stated that there are certain witnesses that she wished to utilize for the present civil litigation or at least be able to consult with to ascertain if the witnesses may be useful to her matter, which may be utilized by the State during the criminal proceedings and accordingly she would require permission from the prosecutor attending to the matter to consult with and utilize the said witnesses. Despite numerous correspondences and personal attendance to the prosecutor no response was received. Accordingly it has been deemed that Plaintiff and/or her legal practitioner may not consult with and/or utilize the said witnesses for the present civil proceedings.

The Respondents' opposition to the application

[10] Counsel for the respondents' argument is that it would be convenient and appropriate for the applicant to stay her civil claim(s) against the respondents so as not to interfere with the criminal process that is still not complete. He further stated that to allow the civil claim(s) to proceed would essentially open the doors for that case to prejudice the outcome of the criminal proceedings. He further argued that the applicant was given disclosure of docket and therefore has insight into the witnesses. He argued that the applicant had the right to silence is at her disposal.

Issues for determination

[11] In cases of this nature there are two main issues to decide: Firstly, whether there are criminal proceedings on going or pending against the applicant (See Damaseb JP in

the matter of *Akuake v Jansen Van Rensburg* (I 2619/2006) [2009] NAHC 12 (09 February 2009). Secondly, whether the circumstances relied upon by the applicant can be construed as exceptional circumstances.

[12] In *casu* both applicant and respondent concede that the first issue has been satisfied. My concentration is thus only on the second issue.

Applicable legal principles

[13] In the matter of *The Prosecutor-General v Mwananyambe* (I 18/2014) [2017] NAHCMD 48 (24 February 2017) ad para 24, the court held that: 'the main purpose for the stay of civil proceedings is to protect the uprightness of the criminal justice system and to avoid any prejudice against the accused' this court is not in position to speculate or imagine what prejudice the applicant will suffer. The court will only order a stay in order to prevent an injustice taking place but will only do so provided the applicant can show that there is a real danger and not an imaginary or speculative one.

[14] The court further stated in *The Prosecutor-General v Mwananyambe* the following;

'It would appear to me that in most cases, applications for stay of proceedings are made in respect of civil proceedings where both criminal as well as civil proceedings are based on the same facts. In such cases, the main purpose for the stay of civil proceedings is to protect the integrity of the criminal justice system and to avoid any prejudice against the accused...'

[15] I share the same sentiment with Masuku J in *Mouton v Gauseb* (I 4215/2011) [2015] NAHCMD 257 (28 October 2015) para 20, where he held that: 'It thus becomes clear that applications for stay of proceedings are not granted lightly and merely for the asking. It would seem that exceptional circumstances must be proved to be extant before the court may resort to this measure.'

[16] It is trite that the High Court have a discretion to suspend civil proceedings where there are criminal proceedings pending in respect of the same issues. In exercising its discretion the court will have regard to inter alia the extent to which the person's right to a fair trial might be implicated if the civil proceedings are allowed to proceed prior to the criminal proceedings.

[17] I am of the view that the court must be satisfied that there is a danger that the accused might be prejudiced in the conduct of her defence in the criminal matter if the civil case is allowed to proceed before the finalisation of the criminal case against her.

The parties' respective submissions and merits considered

[18] The applicant's submissions supplemented her founding affidavit where she stated that she did not receive any reply from the State up to date and therefore she has no witnesses. Would the civil proceedings commence she would be obligated to testify and place her version of events before the Court to prove her claim and she will be burdened with the possibility of a severe cost order.

[19] I take cognisance of the applicant's above-mentioned argument as well as her submission that she would then run the risk of contradicting herself, alternatively tender evidence either in main examination and/or cross-examination which, although not relevant to the civil dispute, may have a severe impact upon her criminal matter.

[20] The respondent's argument is that the plaintiff will suffer no prejudice as she has insight in all witness statements.

[21] I am of the view that the state being *dominus litis* is not bound by witness statements.

[22] It is also important not to lose sight of the fact that the criminal proceedings are not under the judicial case management of this court. The state is thus not prohibited to

lead evidence in the manner they deem fit, which includes the prerogative to add witnesses as the case progresses.

[23] The respondent further argued that the plaintiff may exercise her constitutional right to remain silent.

[24] In this regard I turn to the remarks made by Naidu, AJ in *S v Sidzija & Others* 1995 (12) BCLR 1626 (Dk) at 1648I to 1649B:

‘The right ... means no more that an accused person has the right of election whether or not to say anything during the plea proceedings or during the stage when he may testify in his defence. The exercise of this right like the exercise of any other must involve the appreciation of the risks which may confront any person who has to make an election. Inasmuch as skilful cross-examination could present obvious dangers to an accused should he elect to testify, there is no sound basis for reasoning that, if he elects to remain silent, no inference can be drawn against him.’

[25] In *S v Katari* (CA 124/2004) [2005] (2005/06/16) Maritz J (as he then was) stated

‘When the State has established a *prima facie* case against an accused which remains uncontradicted, the Court may, unless the accused’s silence is reasonably explicable on other grounds, in appropriate circumstances conclude that the *prima facie* evidence has become conclusive of his or her guilt...’

[26] I am of the view that the applicant indeed runs a huge risk of self-incrimination if she is compelled to remain silent in the face of six serious charges. The respondent further advanced the argument it will not be in the best interest of the respondents for the matter to be stayed considering that the second to the fourth respondents will not be eligible for promotion and the all proceedings should be finalized within a reasonable time.

Against the background of the legal principles outlined above, I then turn to consider the facts of the present application.

[27] I am of the view that the mere fact that the applicant is unable to consult with witnesses places her preparation of her case already in a less fortunate position. In the context of the consideration of potential prejudice to the respondents if the proceedings are delayed it is evident that Mr Tibinyanes submission pertaining to a police officer not being eligible for promotion while civil proceedings are present was unsubstantiated. It is clear that this policy only applies to criminal and departmental proceedings

[28] Having considered all the relevant factors I am satisfied that the applicant has made out a case that exceptional circumstances exist to move this court to exercise its inherent jurisdiction to grant the stay of the ongoing civil proceedings.

[29] In the result the order was made:

1. The point *in limine* is dismissed;
2. Application to stay civil proceedings has been granted, pending the finalization of the criminal proceedings;
3. Costs to be costs in the cause;
4. Reasons to be released 30 June 2020;
5. The matter is removed from the roll.

A DIERGAARDT
ACTING JUDGE

APPEARANCES

FOR THE APPLICANT:

Mr P Greyling
Of Greyling & Associates
Oshakati

FOR THE RESPONDENT:

Mr L Tibinyane
Government Attorneys,
Windhoek