

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**JUDGEMENT**

Case no: HC-NLD-CRI-APP-CAL-2022/00008

In the matter between:

**HANGO SINDANO**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Sindano v S* (HC-NLD-CRI-APP-CAL-2022/00008) [2024]  
NAHCNLD 22 (4 March 2024)

**Coram:** SALIONGA J and KESSLAU J

**Heard:** 10 November 2023

**Delivered:** 01 March 2024

**Reasons:** 04 March 2024

**Flynote:** Criminal Procedure - Notice of appeal filed out of time- Condonation- Detailed explanations given reasonable and acceptable-Parties allowed to address the court on prospects of success.

Appeal against sentence- mandatory prescribed sentence under the Combating of Rape Act 8 of 2000 imposed - Absence of substantial and compelling circumstances- granting the court the jurisdiction to impose a prescribed sentence-- Trial court found no substantial and compelling circumstances -Appeal court can interfere with the sentence where the trial court had materially misdirected itself on the facts or the law or committed an irregularity, or where the sentence imposed was startlingly inappropriate or induced a sense of shock or was such that a striking disparity exists between the sentence imposed by the trial court and that which the court of appeal.

**Summary:** The appellant was acquitted on 13 October 2019 in the Regional Court Oshakati which the state successfully appealed against. On 18 February 2021 the High Court Northern Local Division upheld the appeal and substituted the acquittal with an order convicting the appellant of contravening s2 (1) (a) read with ss1, 2 (1), 3, 5 and 6 of the Combating of Rape Act 8 of 2000 read with s21 of the Domestic Violence Act 4 of 2003. The matter was referred back to the Regional Court for sentencing before the same magistrate.

Appellant unsuccessfully applied for leave to appeal to the Supreme Court against the conviction of the High Court. On 18 June 2021, the matter was struck from the roll. He thereafter petitioned the Supreme Court for leave to appeal without success.

The Regional court eventually sentenced the appellant to an effective 15 years' imprisonment for contravening section 2(1) (a) of the Combating of Rape Act 8 of 2000 on the 4<sup>th</sup> February 2022. Dissatisfied with the sentence imposed appellant appealed against sentence only.

Held; that, the magistrate was justified in his finding that there was no substantial and compelling circumstances.

Held further; that, although the explanation for the delay was accepted, the regional court magistrate did not commit any misdirection when he imposed the minimum prescribed sentence of 15 years' imprisonment in terms of s 3(1) (a) (iii) of CORA and thus no prospects of success on appeal.

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## ORDER

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1. The appellant's *point in limine* is dismissed.
2. The application for the condonation for the late filing of the respondent's heads of argument is granted.
3. The respondent's *point in limine* is upheld.
4. The application for condonation for the late filing of the appellant's notice of appeal is refused
5. The appeal is struck from the roll and considered finalised.

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## JUDGEMENT

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SALIONGA J (KESSLAU J concurring):

### Introduction/Background

[1] The appellant pleaded not guilty in the Regional court of Oshakati on an offence/charge of rape under the Combating of Rape Act 8 of 2000. He was acquitted on 13 October 2019 after the evidence was led. The state appealed against the acquittal. The High Court Northern Local Division upheld the appeal. It substituted the acquittal with an order convicting the appellant of contravening s2 (1) (a) read with ss1, 2(1), 3, 5 and 6 of the Combating of Rape Act 8 of 2000, read with s21 of the Domestic Violence Act 4 of 2003. The matter was referred back to the same Regional Court magistrate for sentencing.

[2] Before the matter was set down for sentencing in the Regional court, appellant applied for leave to appeal against the conviction of the High Court. On 18 June 2021 the High Court of Namibia struck the matter from the roll, reasoning that it cannot allow piecemeal appeals or entertain the application for leave to appeal in the absence of exceptional circumstances. He thereafter petitioned the Supreme Court

without success. Appellant was represented by Ms Kishi of Dr Weder Kauta attorneys up until he was convicted.

[3] Appellant appeared in the Regional court on the 4<sup>th</sup> February 2022 and was sentenced to 15 years' imprisonment for contravening section 2(1) (a) of the Combating of Rape Act, 8 of 2000.

[4] Appellant dissatisfied with the sentence of 15 years' imprisonment, filed his notice of appeal and subsequently an amended notice of appeal. Because both notices were filed out of time, appellant filed an application for condonation for non-compliance with the rules as required.<sup>1</sup> In the instant matter there was thus no appeal before court. Appellant was supposed to withdraw the initial appeal notice which was defective and file an amended notice of appeal with grounds but failed to do so. See *S v Kakololo*<sup>2</sup>. However due to an oversight on our side the issue was not raised during the hearing and the matter proceeded for hearing.

[5] Although the appellant was represented by Mr Kadhila Amoomo, during sentencing, Adv Garbes-Kirsten on the instruction of Jacobs Amupolo Lawyers & Conveyancers appeared for the appellant. The respondent was represented by Mr Matota.

### Condonation

[6] Appellant filed a notice of appeal on 4 March 2022 without grounds of appeal and later filed an amended notice of appeal on 3 August 2023 with grounds of appeal out of the prescribed time period. The amended notice filed was accompanied by a detailed affidavit explaining the reasons for the delay. Notwithstanding the aforesaid respondent opposed the application for condonation only on the basis of prospects of success. For purposes of this application, it should be taken that the respondent considers the appellant's reasons for filing both notices out of time reasonable and acceptable.

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<sup>1</sup> Rule 67 of the Magistrates' Court Rules.

<sup>2</sup> *S v Kakololo* 2004 NR 7 (HC)

[7] Counsel for the appellant opposed the respondent's condonation application for the late filing of the heads of argument on the basis that Respondent failed to allege prospects of success therein.

[8] It is a well-established principle that an application for condonation is required to meet the two requisites of good cause before an applicant can succeed. These entail firstly establishing a reasonable, acceptable and bona fide explanation for the non-compliance with the rules and secondly satisfying the court that there are reasonable prospects of success on appeal.<sup>3</sup>

#### Reasons for the delay

[9] Appellant's explanation for the delay was that after he was sentenced the record of transcribed proceedings was not provided timeously to enable his legal practitioners to clearly identify the grounds of appeal. He filed a notice without reasons but reserved his right to file the grounds of appeal as soon as the transcribed record is obtained. He filed an application for condonation whereby he explained all the steps his legal practitioners took to obtain the full record of proceedings which allowed the drafting of the amended Notice of Appeal containing the grounds of Appeal.

[10] At the same time, Respondent in response to the appellant's point in *limine* blamed the late filing of their heads of argument to the appellant's failure to provide a complete record. He explained that he was waiting for the magistrate's reasons which appellant failed to serve on them. With regard to failure to allege prospects of success, Mr Matota submitted that same was raised in paragraph 3 of their heads of argument and that he be allowed to argue the matter as there is no provision that requires the respondent to allege prospects of success in the application for condonation. He referred the court to Rule 118 of the High Court Rules/Magistrate Court Act of 1944. In support of his arguments he further referred the court to several case law as authority.

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<sup>3</sup> *Balzer v Vries* 2015 (2) NR 547 (SC) at 551 J.

[11] In this instant matter we found that the delay in both *points in limine* cannot be attributed to either party and therefore the explanations for the delay are accepted. Counsel were allowed to address the court on the second leg being the prospects of success.

### The grounds of appeal

[12] The following are grounds of appeal as outlined in the Notice of Appeal:

#### 'AD SENTENCE

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1.1 Failure to consider or comment to the testimony of the three witnesses called by the State in aggravation being that of Ms N N Nalungu, Veronika Theron and Ms R V Namises and having failed to consider that

1.1.1 Their evidence do not advance the State's case in any way in that:

1.1.1.1. Their evidence do not prove mental harm being committed to the complainant as a result of rape as

(a) Ms Nalungu was unable to make a diagnosis of mental harm in respect of the complainant and failed to refer the complainant to an expert to make such a diagnosis;

(b) The evidence of Ms Nalungu is impermissible hearsay evidence which is totally unsupported by any evidence by the complainant or any other witness, whilst the opportunity existed that same be done.

(c) All the evidence advanced by Ms Theron is impermissible hearsay evidence as she has never consulted the complainant and her testimony was not corroborated by either the complainant or any other witness that testified whilst the opportunity existed that same be done.

(d) Ms Namises did not testify regarding any mental harm committed to the complainant as a result of the rape.

1.2 Committing a patent error by failing to assess upon, a consideration of all particular circumstances of the case whether a prescribed minimum sentence is indeed proportionate to the particular offender being the accused, prior to imposing a sentence of 15 years imprisonment.

1.3 Committing a patent error in imposing a minimum sentence whilst no evidence exists that the complainant has suffered grievous bodily harm or mental harm as a result of the rape.

1.4 Committing a patent error by failing to assess upon consideration of all the particular circumstances of the case, whether a prescribed minimum sentence is indeed proportionate to the particular offender being the accused prior to imposing a sentence of 15 years imprisonment.

1.5 Merely narrating in mitigating and aggravating factors advanced on behalf of the State and the accused, but he failed to weigh up these circumstances against each other and to decide whether substantial and compelling circumstances exist to depart from imposing a minimum prescribed sentence as set out in s3 (1) (a) (ii) of the Combating of Rape Act, 8 of 2000.

1.6 Committing a misdirection by imposing a sentence which is disproportionate and unjust to the minimum sentence prescribed by s3 (1) (a) (ii) of Combating of Rape Act, 8 of 2000.

1.7 Failing to consider that the accused did not have a fair trial due to his legal practitioner who acted on his behalf during the trial has failed to put all his defences to the state's witnesses and has failed to timeously launch an application in terms of s 227 A of Act 51 of 1977 whilst it was her instructions that the complainant and accused had previous sexual encounters with each other, therefore substantial and compelling circumstances exist to deviate from the minimum prescribed sentence as per s3 (1) (a) (ii) of CORA.

1.8 Entirely omitting to conduct an enquiry into the yardstick of substantial and compelling circumstances and failing to exercise the discretion as to sentence judicially and therefore the sentence imposed is a misdirection and is under the circumstances disturbingly inappropriate.'

### Prospects of success

[13] In view of the elaborative formulation of the grounds of appeal articulated in the amended notice and some largely overlapping and/or repeating, we do not intend dealing with these grounds *seriatim* (point by point). The grounds with similarities will be grouped and dealt with together according to their identically.

[14] Ground 1.1 concerns the magistrate's failure to assess or comment to the testimony of the three witnesses called by the State to testify in aggravation. It was

submitted that the magistrate imposed a sentence of 15 years imprisonment whilst there is no evidence that the complainant has suffered mental harm as a result of rape, that Ms Nalungu was unable to make a diagnosis of mental harm and failed to refer the complainant to an expert, that the evidence of Ms Nalungu and Ms Theron are impermissible hearsay evidence and that Ms Namises did not testify regarding the mental harm.

[15] It was further submitted that the injury complainant suffered according to the J88 was a broken nail which does not constitute grievous bodily harm and that the magistrate has not given any reasons why he had considered the prescribed minimum sentences or why the court has not deviated from the prescribed minimum sentence.

[16] The scope of practice of social workers is extensively dealt with in Regulations 2 made in terms of the Social Work and Psychology Act 6 of 2004 as amended. The relevant parts of Regulation 2 states that:

‘The scope of practice of a social worker consists of the counselling of, and the providing of therapy, guidance and resolutions for persons...relating to or in aid of or the presenting of...

(c) Legal proceedings including...

(ii) Preparation for court procedure and

(iii) vulnerable witnesses and acting as expert witnesses at trials.

...

(j) Trauma and post-traumatic stress syndrome.

...

(n) Stress and stress management.

...

(u) Professional report writing with diagnostic and evaluative information

...’

[17] In terms of the above mentioned Regulations, a social worker qualifies as an expert witness to make conclusions with regard to trauma and post-traumatic stress syndrome, to testify in legal proceedings, as well compiling and presentation of



professional report writing with diagnostic and evaluative information. The Victim Impact Statement Ms Nalungu compiled and submitted as exhibit "A", is based on the 20 sessions she had with the complainant. She is a registered Social worker with the Health Professional Councils of Namibia, Social Work and Psychology Council with seven years' experience. Her evidence is not hearsay and is in line with *S v Domingo* and *S v Haufiku*<sup>4</sup>. Same was also not displaced or challenged in cross examination. However there might be merits in submission that the evidence of Ms Theron is hearsay with limited relevancy to the specifics of this case. Whilst the evidence of Ms Namiseb is more of general application with limited relevance to the specific case.

[18] On whether the magistrate failed to consider the testimony of the three witnesses called to testify in aggravation, the Supreme Court of Namibia in *State v Teek*,<sup>5</sup> held, 'it does not follow that because something has not been mentioned therefore it has not been considered.' The aforesaid principle is sound in law and should be applied. It follows that because the magistrate did not comment to the testimony of the three witnesses called by the state in aggravation therefore it has not been considered. We find this ground without merits and has to fail.

[19] With regard to Grounds 1.2, 1.3, 1.4, 1.5 and 1.6 appellant is alleging that the magistrate failed to assess upon a consideration of all particular circumstances of the case whether a prescribed minimum sentence is indeed proportionate to the particular offender prior to imposing a sentence of 15 years imprisonment, that the magistrate merely narrated the mitigating and aggravating factors advanced by the state and the accused but failed to weight them against each other and decide whether substantial and compelling circumstances exist to depart from imposing a minimum prescribed sentence provided for in s3 (1) (a) (ii) and thereby committing a misdirection by imposing a sentence which is disproportionate and unjust to the minimum sentence prescribed by section 3 (1) (a) (ii) of the Combating of Rape Act 8 of 2000. It was submitted further that the magistrate entirely omitted to conduct an enquiry into the yardstick of substantial and compelling circumstances and he failed

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<sup>4</sup> *S v Domingo* (1) (CA 85 of 2004)[2005] NAHC 37(19 October 2005) and *S v Haufiku* Case No: SA 6/2021 delivered on 21 July 2023

<sup>5</sup> Case no: SA 12/2017, delivered on 3 December 2018 para 47

to exercise the discretion as to sentence judicially and therefore the sentence imposed is a misdirection.

[20] It should be noted that ground 1.2 is a repetition of ground 1.4 where the appellant is arguing that the magistrate committed a patent error by failing to assess upon a consideration of all the particular circumstances of the case, whether a prescribed minimum sentence is indeed proportionate to the particular offender being the accused, prior to imposing a sentence of 15 years imprisonment.

[21] From the judgment on sentence the Magistrate summarised in detail the contents of the appellant's statement under oath as well as his prayer for a wholly suspended prison sentence of five years with additional 24 months with an alternative to pay a fine of N\$100 000. The magistrate went further to consider that the offence the appellant was convicted of is serious and it had a traumatic impact on the complainant. That the complainant suffered injuries as a result of this rape and that coercive circumstances were present. The court in the end concluded that it did not find any substantial and compelling circumstances present and sentenced the appellant to 15 years imprisonment. The trial court applied the relevant principles applicable to sentencing and gave due consideration to the triad of factors. The offence of rape was described in many of the decisions of this court and the Namibian Supreme Court in the case of state versus Sem Shafioishuna Haufiku case No SA 6/2021 delivered on 21 July 2023; *State versus Kaanjuka* 2005 NR 201 HC at page 206 F-I as serious, brutal and a crime of violence against women. Therefore the sentence of 15 years imprisonment was indeed proportionate to the seriousness of the offence of rape. On that basis the grounds are dismissed.

[22] Regarding ground 1.3, that the magistrate committed a patent error in imposing a minimum sentence of 15 years whilst no evidence exists that the complainant has suffered grievous bodily harm or mental harm as a result of rape. The state led the evidence of three witnesses in aggravation of sentence. The fact that the J88 did not indicate grievous physical harm was not the only consideration. There are other considerations such as; the circumstances surrounding the rape, the fact that the victim was not raped by a stranger but by a family member she shared a residence with, that the victim was subjected to rejection, humiliation and hatred not

only by her immediate family members but also by those who were to protect her, that the victim had no support, resulting her to stay with people not related to her and that complainant was forced to withdraw the case on numerous occasions. Nothing in the personal circumstances of the appellant stands out as substantial and compelling deviation from minimum prescribed sentence of 15 years. It is therefore not correct that the magistrate erred to consider the testimony of the three witnesses called in aggravation. With exception of Ms Theron and Namiseb, Ms Nalungu's evidence supported serious mental harm suffered by the complainant and was left undisputed in line with *S v Domingo* referred to above.

[23] The three witnesses who testified in aggravation were all experts to some extent on gender based violence cases and on the psychological effects of such cases on victims in general and in this case. Ms Nalungu in particular is a social worker in the employment of the government, has 7 or 8 years of experience and the author of the trauma assessment report marked exhibit "A". She held 20 sessions of therapy with the victim and her evidence and conclusion reached definitely could not be hearsay. She noted certain features in this victim which were common in all rape cases i.e. a post-traumatic stress disorder. Ms Nalungu in her post-traumatic effect report detailed the effects rape had on the victim. Her evidence was not challenged in cross-examination and was supplemented by that of the other two witnesses.

[24] Ground 1.5 and 1.6 are not clear. In an amended notice of appeal, appellant indicated in ground 1.5 that the magistrate merely narrating the mitigating and aggravating factors advanced on behalf of the State and the accused but failed to weight up these circumstances against each other in deciding whether the substantial and compelling circumstances exist to depart from imposing a minimum prescribed sentence as set out in s 3(1) (a) (ii) of CORA. While in ground 1.6 appellant is complaining of the magistrate committing a misdirection by imposing a sentence which is disproportionate and unjust to the minimum sentence prescribed by s3 (1) (a) (ii) of CORA.

[25] If we understood the appellant's argument well, their contention was that the magistrate applied a wrong penalty under s3 (1) (a) (iii) instead of applying s3 (1) (a) (ii) of CORA. However in the instant case the court imposed the prescribed minimum

sentence in terms of s3 (1) (iii) (aa) of CORA, Act 8 of 2000 and not under s3 (1) (ii) of CORA. In the amended notice of appeal, no such ground was listed other than ones we earlier highlighted. It is impermissible for the appellant to introduce new grounds in the heads of argument or in oral submission. Therefore we are not inclined to discuss that ground any further and dismissed it as a new ground introduced in the heads of argument.

[26] Ground 1.7 concerns the failure to get a fair trial due to the conduct of appellant's erstwhile lawyer during the trial. It was submitted that the accused did not have a fair trial due to his legal practitioner's (who acted on his behalf during the trial) failed to put all his defences to the State witnesses and has failed to timeously launch an application in terms of s 227 A of Act 51 of 1977 whilst it was her instructions that the complainant and accused had previous sexual encounters with each other, therefore substantial and compelling circumstances exist to deviate from the minimum prescribed sentence as per s 3(1) (a) (ii) of CORA. In addition, during mitigation his lawyer did not question Nalungu and others on their qualifications and that fact remains undisputed.

[27] It appears from the submission that the appellant was also satisfied with his erstwhile legal practitioners in the conduct of the proceedings in the *court a quo*. As respondent correctly submitted, the general rule is that where an accused entrusts his defence to his legal representative, he is bound by the actions of his representative.<sup>6</sup> However, the court in *R v Muruven*<sup>7</sup> found the rule not entirely inflexible but with the qualification that:

'... It is clear that a very strong case must be made before a decided case can be re-opened on the ground of an error of judgment on the part of the legal representative. But for that, there would be a lack of finality about court judgments which would be entirely against public interest.' We found no such a strong case has been made warranting interference in the present case and this ground has no merits.

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<sup>6</sup> *Vincent Kapumburu Likoro v The state* CA 19/2013 2 (8 December 2017)

<sup>7</sup> *R v Muruven* 1953 (2) SA 779 (N).

[28] Furthermore the defence's failure to bring an application in terms of s 227 of the Criminal Procedure Act 51 of 1977 and the magistrate by allowing the defence to question the complainant on her sexual history though impermissible does not constitute an irregularity for purposes of sentencing.

[29] On ground 1.8 that the magistrate did not hold an enquiry with regard to the substantial and compelling circumstance, the approach of the court to substantial and compelling circumstances in sentencing, has been clearly set out in this jurisdiction in a plethora of judgments and need not be repeated.<sup>8</sup> Suffice to say that the court has a discretion which has to be exercised judiciously, guided by the principles set out in *S v Malgas* and adopted with approval by this court in *S v Lopez*.<sup>9</sup>

[30] While agreeing with the legal principle that no judgment is ever perfect, we find what Shivute CJ state, in *State versus JB*<sup>10</sup> apposite, that: 'although it is necessary nevertheless to emphasise that in an attempt to make a value judgment as to whether there are substantial and compelling circumstances present in a given case, a court is required to take into account all the factors relevant to sentencing and that it should refrain from finding that a part of facts amount to substantial and compelling circumstances just because in its view the prescribed minimum sentence appears to be harsh or because of some sympathy towards the accused or even an aversion to minimum sentences in general.'

[31] Shivute CJ, went on to state that the court is under a statutory obligation to impose the prescribed minimum or a higher sentence where the facts of the case are for the imposition of such a higher sentence.

[32] In the matter before us, the accused who was legally represented opted not to testify in mitigation. The state presented evidence in aggravation which was not challenged in cross-examination. The magistrate after finding no compelling and substantial circumstances present, was obliged to impose the prescribed minimum sentence of 15 years. For the aforesaid reason we dismiss this ground as baseless.

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<sup>8</sup> *S v Malgas* 2001 (2) SA 1222 (SCA).

<sup>9</sup> *S v Lopez* 2003 NR 162 (HC).

<sup>10</sup> Case No: SA 18/2013 [2015] NASC (13 November 2013)

[33] It is trite law that a court of appeal will be entitled to interfere on appeal with the sentence imposed where the trial court had materially misdirected itself on the facts or the law or committed an irregularity, or where the sentence imposed was startlingly inappropriate or induced a sense of shock or was such that a striking disparity exists between the sentence imposed by the trial court and that which the court of appeal would have imposed had it sat as a court of first instance.<sup>11</sup>

### Conclusion

[34] When applying the aforesaid principles to the present circumstances in our view, the appellant's contention that the Magistrate committed a patent error is without merit. We found no misdirection or irregularity the magistrate is said to have committed. The magistrate exercised his jurisdiction judiciously and was justified in his finding that there was no substantial and compelling circumstances when he imposed the minimum prescribed sentence of 15 years' imprisonment in terms of s 3(1) (a) (iii) (aa) of CORA. Resulting that to uphold the appellant's *point in limine* would be unfair considering that the applicant failed firstly to ensure that the record of appeal is in order and secondly their delay in obtaining and filling the magistrate's reasons in essence caused the delay for the respondent to file heads on time. Furthermore, although the appellant's explanation for the delay was found reasonable and acceptable, there are no prospects of success on appeal and condonation has to be refused.

[35] In the result:

1. The appellant's *point in limine* is dismissed.
2. The application for the condonation for the late filing of the respondent's heads of argument is granted.
3. The respondent's *point in limine* is upheld.
4. The application for condonation for the late filing of the appellant's notice of appeal is refused
5. The appeal is struck from the roll and considered finalised.

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<sup>11</sup> *State versus Shapumba* 1999 NR 342 SC

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J T SALIONGA  
Judge

*I concur*

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E E KESSLAU  
Judge

## APPEARENCIES

For the appellant

Adv. H Garbes-Kirsten instructed by Jacobs  
Amupolo Lawyers & Conveyancers, Ongwediva

For the Respondent

L Matota  
Office of the Prosecutor –General, Oshakati