CASE NO.: SA 04/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MARGARET MALAMA-KEAN
APPELLANT

and

THE MAGISTRATE OF THE DISTRICT OF OSHAKATI NO **FIRST RESPONDENT**

THE PROSECUTOR-GENERAL NO **SECOND RESPONDENT**

CORAM: Strydom, C.J.; O'Linn, A.J.A. *et* Chomba, A.J.A.

HEARD ON: 2002/06/21
DELIVERED ON: 14/10/2002

APPEAL JUDGMENT

O'LINN, A.J.A.:

SECTION A:

INTRODUCTORY REMARKS

The appeal before us is against an order of the High Court made in a review application combined with an appeal where the applicant sought to have an order set aside which was made by the Magistrate for the District of Oshakati on 5th July 2001 "refusing to release the applicant under article 12 (1)(b) of the constitution."

Mr Heathcote appeared before us for the appellant, Mr Botes for the first respondent and Mr January for the second respondent.

Although Mr Botes and January each provided this Court with written heads of argument, they informed this Court at the outset that the argument will be combined and Mr Botes will present the *viva voce* argument.

It should be noted at the outset that the arrest of the applicant and the subsequent legal proceedings, followed upon a complaint by CD Namibia, a non-governmental organization, apparently engaged in activities for the upliftment of Namibians, with head office in Oshakati, alleging that substantial sums of money had been stolen, apparently by one or more of its employees. At the time which this was discovered, the applicant was the Chief Executive officer of the complainant.

I will hereinafter refer to the parties in this appeal as in the Court *a quo.*

The application for review to the Court *a quo*, was based in essence on the following allegations:

> There was a gross irregularity in the proceedings; admissible evidence were not admitted; the first respondent, the magistrate for the District of Oshakati, who presided in the proceedings, had an interest in the course of the proceedings; the said magistrate was biased, alternatively, the applicant was entitled to perceive her as biased; she was not independent because she was until shortly before the applicant's arrest, a prosecutor in the region, whereafter she was elevated to the post of magistrate.

It was further submitted on behalf of applicant that the cumulative effect of the aforementioned irregularities was that the applicant did not have a fair trial as envisaged by article 12 of the Namibian Constitution in the proceedings before the magistrate and could not have a fair trial if the trial continued because of the pre-trial irregularities; the applicants trial also did not take place within a reasonable time and accordingly she "shall be released" as envisaged in Article 12 (1)(b) of the Namibian Constitution.

The relevant part of the order made by the Court *a quo* on 7th September 2001, reads as follows:

> "2. The order of the first respondent made in the Magistrate's Court, Oshakati, in case no. 491B/2000 on 5th July 2001 refusing to release the applicant under Article 12(1)(b) of the Constitution from the conditions of her bail is set aside and substituted for the following order:
>
> 'The accused is released on bail in the amount of N$50 000.00 and she is warned to appear in the Regional Magistrate's Court at Oshakati on 13th July 2001, failing which, she may be arrested and her bail may be forfeited';

3. The applicant is released in terms of Article 12(1)(b) of the Constitution from all the conditions of her bail other than those contemplated in the order under paragraph 2;

4. The second respondent is ordered to pay the costs of the application."

As pointed out by appellants' counsel, the Court *a quo* made the following findings of fact relevant to the merits.

1. "the investigating officer withheld vital information from court, when making his affidavits which were placed before the High Court and when testifying in the Magistrate's Court;"

2. "the delay complained of by the applicant was the responsibility of the State;"

3. "the arrest of the applicant was in the nature of a pre-emptive strike;"

4. "the delay was presumptively prejudicial;

5. "the applicant and her lawyers had been misled by the statements made by the public prosecutors;"

6. "the applicant's trial did not take place within a reasonable time."

The applicant sought leave to appeal, was granted leave to appeal.

The grounds of appeal are set out in the notice of appeal as follows:

"1. The learned Judges erred in not releasing the Appellant in terms of Article 12(1)(b) of the Namibian Constitution, in the sense that the Appellant is to be released from further prosecution.

2. The learned Judges erred in that they found that they still have a discretion once a factual finding had been made that the Appellant did not have a trial within a reasonable time, alternatively did not exercise their discretion judicially, alternatively was influenced by wrong principle, in the further alternative misdirected themselves on the facts, in the further alternative reached a decision which cannot reasonably have been made by a Court properly directing itself, and more particularly on the following basis:

   2.1 despite the fact that the learned Judges found:

      (a) that Mulimina withheld vital information when making his affidavit which was placed before the High Court and when testifying in the Magistrate's Court;

      (b) that the delay complained of by the Appellant was the responsibility of the State;

      (c) that the arrest of the Appellant was in the nature of a pre-emptive strike;

      (d) that the delay was presumptively prejudicial;

      (e) that the Appellant and her lawyers had been misled by statements made by the public prosecutors; and

      (f) that the Appellant's trial did not take place within a reasonable time, the Court still failed to release the Appellant from further prosecution;

   2.2 the learned Judges erred in finding that the Appellant did not prove that she would suffer irreparable trial related prejudice, particularly in the light of the finding of the learned Judges that the delay in finalising the trial was presumptively prejudicial to the Appellant. Such presumptive prejudice also relates to trial related prejudice and accordingly the evidential burden shifted to the State to prove in such circumstance, that the Appellant would not suffer trial related prejudice;

   2.3 the learned Judges erred in not finding that the delay caused by the State was a deliberate stratagem;

2.4 the learned Judges failed to take into consideration that in as far as the Appellant was hampered in proving trial related prejudice, it was not her fault at all, but the fault of the State in not providing detailed charges against the Appellant in order to enable the Appellant to prove trial related prejudice;

2.5 the learned Judges erred in finding that the word **“release”** as used in Article 12(1)(b) of the Constitution can have a different application and meaning, depending on the circumstances;

2.6 the learned Judges erred in finding that once it had been determined that the Appellant’s trial had not taken place within a reasonable time, then and in that circumstances, the Court does have a discretion whether or not to release the Appellant, particularly in the light of the wording of Article 12(1)(b) which provides that the Appellant **“shall be released”**;

2.7 in as far as the learned Judges had a discretion once they found that the Appellant’s trial had not taken place within a reasonable time, the learned Judges erred in not releasing the Appellant from prosecution, particularly in circumstances where:

(a) as a result of the pre-trial irregularities, the misleading of the Courts by the State and/or the Prosecutors acting on behalf of the Second Respondent, it was an appropriate case to release the Appellant without being necessary to determine whether or not the Appellant will suffer trial related prejudice;

(b) as a result of the combined factor that the Appellant did not have a fair trial in the circumstances (and therefore can never have a fair trial) as well as the fact that the trial had not taken place within a reasonable time;

2.8 the learned Judges erred in not finding that on a proper interpretation of Article 12(1)(b) of the Constitution, that article does not require or demand trial related prejudice before an accused can be released from further prosecution;

2.9 the learned Judges erred in not holding that Article 12(1)(b) envisaged two scenarios where an accused shall be released from prosecution, being:

(a) where the accused (Appellant) did not have a fair trial and cannot have a fair trial as a result of the pre-trial irregularities mentioned in the Appellant's application, (i.e. even in circumstances where an **"unfair"** trial can take place within a reasonable time);

(b) where the trial had not taken place within a reasonable time; both the aforementioned scenarios having been applicable to the Appellant's case."

SECTION B:

THE BACKGROUND FACTS

The relevant background facts have been set out by Mr Heathcote in his heads of argument. These facts, with very few exceptions, appear to be accepted by respondents in substance. Consequently it is convenient to repeat these facts for the purpose of this appeal, as renumbered by me and headings inserted where appropriate:

"1. The Appellant was arrested on 27 June 2000. She first appeared in court on 29 June 2000. The matter was then remanded until 30 June 2000 for a bail application.

2. On 30 June 2000, the prosecutor informed the court that the State was unable to proceed with the bail application as the docket *is voluniane*. It was then agreed that the matter should be postponed to 4 July 2000 for the bail application.

3. On 4 July 2000 the prosecutor informed the court that a bail application was opposed on the basis that, *inter alia*, the investigation would take a long time. Thereupon, the Appellant's legal representative accepted that the case had to be remanded for a bail application to be held.

4. On 9 August 2000 the bail application was called. The State was represented by public prosecutor Imalwa (hereinafter "Imalwa") and the Appellant was represented by Advocate Metcalfe.

5. The court was informed that the State would not have an objection against bail, and that it was agreed (or so it was thought) that the Appellant had to pay an amount of N$100,000.00, and had to deliver a Toyota Corolla motor vehicle to the police as security.

6. In addition, the bail conditions were determined as:

   6.1 the Appellant had to report twice per day to the Oshakati police station between 07h00 and 08h00 and between 19h00 and 20h00;

   6.2 the Appellant had to surrender her passport to the Clerk of the Oshakati Court;

   6.3 the Appellant was not permitted to leave the district of Oshakati without permission of the investigating officer or the station commander; and

   6.4 the Appellant was not to visit the premises of the organisation of CD or interfere with the witnesses in any manner.

7. During these bail proceedings Imalwa, the public prosecutor, on that occasion, stated the following:

   > 'Regarding problem of transport problems accused might incur, State objects to that, investigations incomplete, complication investigations, money involved so far is in excess of one million N$ if convicted, sentence will be high.'

8. Metcalfe, in support of his submissions stated *inter alia* 'The investigations to be long'.

9. Metcalfe further raised the issue that the matter was one of negotiation. To this Imalwa later responded:

'Communications between the attorney (defence) and of the board is irrelevant to our criminal case. That is their civil trial.'

10. Thereafter, bail of N$150,000.00 was granted and on conditions as set out above. The matter was then postponed for further investigations.

11. Thereafter, the matter was postponed on various occasions. Those dates, and the reasons given for the postponement can be summarised as follows:

14/8/00	'Investigation incomplete'
12/9/00	'Docket not brought, do not know how far investigations are. Adj. To 16/10/2000 for fi'
16/10/00	'May the matter be postponed till 23/11/00 for fi'
23/11/00	According to the court order the case was postponed to 29/4/00 for further investigation. This is most probably an incorrect date. It should read 29//11/00.
29/11/00	The case was adjourned to 7/12/00 for an application to be made on behalf of the appellant.
7/12/00	The prosecutor stated 'The investigation is not completed' As well as: '… we waiting for PG Decision whether to withdraw or continue with the case' When Metcalfe stated that the matter is a civil one other (rather) than a criminal one, the prosecutor stated: 'Court will decide'
7/12/00	The case was postponed to 19/12/00 for further investigations.

19/12/00 The prosecutor requested the matter to be adjourned to 01/2/01 for further investigation.

1/2/01 The prosecutor stated: 'The case is still under investigation' and 'May the matter be adj until 9/4/01 for fi'"

The first objection to postponements requested by the State

"12. On 9 April 2001, when the State indicated again that the investigations were incomplete the appellant's representative objected. Thereafter, the appellant testified, *inter alia*, that:

12.1 she was a Zambian citizen and was arrested on 27 June 2000;

12.2 she came across documents which suggested that the finance officer might have been committing theft and fraud. She report this to the board during March 2000;

12.3 on 27 June 2000 however, she was arrested out of the blue;

12.4 she did not see her children since November 2000 (who are twins, 6 years of age);

12.5 already during the internal investigation:

'Everything was there and even documentary evidence was there.'

12.6 the complainant in this matter has informed the prosecutor that:

'It is the company's wish to withdraw any or criminal charges against the said Margaret Malama-Kean with immediate effect and does not desire any further prosecution against the said Margaret Malama-Kean'

12.7 the State did not provide the court with any evidence to support the prosecutor's statement from the bar that: 'The investigations are incomplete.'

13. During the cross-examination of the appellant the prosecutor put the following to the appellant: 'So it was adj only for 8 times for fi not for 10 times.'

14. The appellant's application/objection was not upheld and the court made the following order: 'Case adj till 24/7/01 for fi finally'."

The appellant's first approach to the High Court for relief

"15. The appellant then lodged an appeal to the High Court of Namibia against the order of the learned magistrate made on 9 April 2001. However, the State lodged an interlocutory application, requesting the matter to be referred to the Magistrate's Court." The High Court of Namibia granted the application by the State and referred the matter to, the Magistrate's Court to reconsider after hearing the evidence of the investigating officer."

The proceedings in the Magistrate's Court after remittal by the High Court:

"16 During the proceedings which commenced on 26 June 2001 Mulimina (the investigating officer) was called as the State's witness. With reference to his evidence, the following is respectfully pointed out:

16.1 the charge sheet states that the accused is charged with the offence of fraud in that upon (or about) the … day of …. 19 … and … in the said district/divisions … the said accused did wrongfully and unlawfully 'APA'.
No particulars were provided;"

Mulimina's affidavit:

"16.2 the first time that the State ever endeavoured to provide any 'details' against the applicant was when Mulimina stated in his affidavit (exhibit L) the following:

'There is a prima facie case in this matter against the Applicant (referring to the appellant) viz:

(i) a company vehicle was sold by money was not deposited in the company's account;

(ii) most of the cheques were written cash and not in the name of the creditors;

(iii) cheques indicated cancelled were cashed;

(iv) staff members were receiving salaries through the bank from company account but still cheques were written cash as salaries of staff members;

(v) false claims were submitted to assurance company that housebreaking took place at the company's office and computer was stolen but no breaking took place;

(vi) amount written on the cheque differs with the amount written on counterfoil of those cheques'."

Mulimina's *viva voce* testimony:

"17. In respect of the respective sub-paragraphs of paragraph 11 (quoted above) and in general, the investigating officer (Mulimina) testified as follows:

17.1 the accused was arrested on 27 June 2000;

17.2 he did not investigate the matter for nine months as alleged. He said:

'The lawyer of the company and the lawyer of accused, they requested me to put the investigation on hold as they were busy trying to settle the matter outside court.'

17.3 the wording here is different than in exhibit L where he stated in his affidavit that:

'During July 2000 the lawyer of the Applicant by the name of Mr Thambapilai and the lawyer of the company Mr Greyling indicated to me to halt the investigation because the Applicant in this matter offered to pay N$250,000.00 as a settlement of the loss the company incurred.'

17.4 he handed in a letter dated 13 November 2000, which was in the State's possession. The prosecutor agreed that the defence was not in possession of such a copy;

17.5 the letter (exhibit J) is dated 13 November 2000. This letter was addressed to the Deputy Prosecutor-General and marked for the attention of Imalwa;

17.6 in that letter it is clearly stated that:

'Our instructions are further that the criminal investigation of the matter were put on hold for this purpose.'
(instructions which were received from Greyling's client (CD Namibia).)

17.7 nevertheless, this letter was only handed in to court during
the proceedings of 26 June 2001;

17.8 Mulimina further testified that he stopped the investigation, and that the approach to halt the investigation came within a month after the appellant was arrested;

17.9 he further testified that:

'Since from July up to November without doing any

investigation. We started in December 2000.'

17.10 he 'only investigated this case as from December to March 2001. It was only for four months';

17.11 his investigation was difficult because the office of CD in Katima Mulilo has closed since December 1998, and the office of CD Rundu since December 1997;

17.12 if there was no interference with the investigation after the arrest of the appellant, the investigation would have already completed;

17.13 after he, in essence, reiterated the allegations made in paragraph 11 of his affidavit (quoted above) he stated that:

'The money involved in this case is 2.8 million. This included, does not include the money for the computer and the money for the car.'

17.14 during cross-examination he testified that the investigation was completed on 12 June 2001;

17.15 during the bail application and on 9 April 2001 he informed the prosecutor (about the status of the investigation);

17.16 the Deputy Prosecutor-General (Imalwa) instructed him to continue with the investigation;

17.17 he further testified that:

'A: During the bail application I was here and on the 9th April 2001 and I was outside.

Q: During this period you did discuss this matter with Mrs Imalwa.

A: Yes, but on the 9th I discussed it with Haindombo.

Q: It is important factor for the Court to know that the investigations were halted during June.

A: Yes.

Q: Whom did you inform to inform the court.

A: I spoke to Imalwa.'

17.18 he halted the investigation during July 2000;

17.19 he had bank statements of the company in his possession. It was in the docket;

17.20 he had no statement in his possession that accused 1 cancelled the cheque but thereafter cashed the cheque which she cancelled;

17.21 although first reluctant, he had to concede that he had no statement confirming that a housebreaking took place.

17.22 the internal investigation of the company was completed during 2000 already;

17.23 he further testified in cross-examination that the State Prosecutor had told him to stop the investigation.

17.24 he had a statement, implicating the appellant in relation to -an allegation made in paragraph 11.1 of his affidavit;

17.25 he trusted the appellant that she would *"never"* abscond;

17.26 in doing his investigation, he is not allowed to phone outside the country;

17.27 he further testified that the Public Prosecutor knew that he had halted the investigation during June 2000.

17.28 on the second day of his cross-examination, he already started to downscale the alleged involvement of accused 1 in the 2.8 million. He stated that:

'According to the internal investigations report this is the amount the company has lost.'

17.29 he further agreed that he was not saying that accused 1 committed fraud or theft in an amount of 2.8 million;

17.30 accused 2 in fact admitted fraud during the internal investigation;

17.31 he learned that accused 2 admitted fraud on 27 June 2000;

17.32 he decided not to arrest accused 2 because of the settlement negotiation, but he did not release accused 1 (who was then still in jail) 'because there

was still some cheques which were not accounted for';

17.33 he then conceded that he only had a *prima facie* case in respect of paragraph 11.1 and 11.5 (as indicated in his affidavit); The allegation in 11.1 was that "a company vehicle was sold but the money was not deposited in the company's account;" the allegation in 11.5 was that a false claim was submitted to the assurance company that housebreaking took place at the company's office and computer was stolen but no housebreaking took place.

17.34 the record omits the word 'only' but it submitted, that if regard is had to his answers in re-examination, it is clearly what he stated;

17.35 when the affidavit of Anna Herman was read to him he agreed that it did not indicate that accused 1 was guilty of theft or fraud of the amount in N$22,000.00;

17.36 he further agreed, that as a result of the delay finalising the investigation it would be very difficult for accused 1 to use her former employees as witnesses because the branches of CD Namibia closed down;

17.37 he agreed that the appellant will suffer trial related prejudice;

17.38 he agreed, that if only the bail condition of N$150,000.00 remains applicable, the appellant will also stand her trial;

17.39 after the hearing of 9 April 2001, he asked the prosecutor why he was not called, but he was not given any reason;

17.40 thereafter, the defence endeavoured to hand in a statement of Anna Herman. That is the statement that was in possession of the State, and on which the investigation officer relied for the allegation that he had a *prima facie* case against the appellant in relation to the allegation made in paragraph 11.1 of his affidavit. The State objected, and the court refused to accept to receive the statement, holding *inter alia* that:

'The court will not allow the statement to be handed in as the court feels that the State might be prejudiced.'

17.41 the defence endeavoured to hand in an affidavit of Hennie Barnard, in response to the affidavit (then already received by court as exhibit I). The State objected and the court upheld the objection stating *inter alia* that 'the State might be prejudiced';

17.42 during re-examination, inspector Mulimina agreed that there was only a *prima facie* case regarding the Mazda 4x4 and that the amount of 2.8 million, did not include the amount of N$22,000.00 in respect of the vehicle;

17.43 he continued to testify that accused 2 was involved in relation to 1.6 million dollars, but for the remainder of 1.2, nobody is responsible."

The testimony of Greyling, attorney for complainant C.D. Namibia

"18. Thereafter, the State called Mr Greyling who testified that:

18.1 he was approached by Mr Thambapilai (the appellant's legal representative) to settle the issue between the appellant and Mr Greyling's client;

18.2 he sought the permission of the investigating officer to engage settlement negotiations;

18.3 he confirmed that, accused 2 was the accounting officer of CD Namibia, and being the accounting officer, she would be the principle officer and the person under whose control finances of the company would be;

18.4 in fact, CD Namibia took particular care to have accused 2 appointed as a finance officer in order to control all the financial issues and money of CD Namibia;

18.5 he did not instruct Mulimina to halt the investigation;

18.6 he also did not tell Mulimina to stop the investigation but he expected that the investigation will not proceed."

18.7 CD Namibia board held an emergency meeting before the appellant was arrested."

Mr Botes on behalf of the respondents, however pinpointed certain other relevant facts which must be considered. A useful summary of the most relevant points are contained in paragraphs 23-46.

The correctness of the said summary was not contested on appeal. The facts not properly covered or on which respondents' counsel wished to place additional emphasis are those contained in the following paragraphs of the summary which I have renumbered for the purposes hereof:

"(i) On 9 August 2000 the bail application was heard. The State was represented by a Public Prosecutor Imalwa and the applicant was represented by Mr. Metcalfe instructed by Thambapilai.

(ii) After some discussions took place and/or submissions were made the Court granted bail to the applicant on certain conditions. All the conditions were concurred with and/or consented to by Mr. Metcalfe.

(iii) During this appearance Mr. Metcalfe indicated that certain negotiations were ongoing between the accussed's legal representatives and Greyling Associates the legal representatives of CD Namibia.

(iv) Thereafter, the matter was postponed on various occasions. The matter in fact from the 14th of August 2000 up and until the 9th of April 2001 was postponed for approximately nine times for further investigation. The dates and the reasons for the postponements are evident from the relevant portions of the record of proceedings.

(v) It is evident from the relevant portions of the record that the applicant at all relevant times was legally represented during the said postponements and that most of the dates of the postponements in fact were agreed upon.

(vi) On the 7th of December 2000 Mr. Metcalfe appeared on behalf of the applicant on the instructions of Mr. Thambapilai. At this appearance the Court was informed that the complainant apparently wants to withdraw the case against applicant and that the matter be referred to the Prosecutor-General for his decision. Mr. Metcalfe also made application for the reduction of the bail conditions. (My emphasis added.)

(vii) On the 1st of February 2001 Mr. Barnard, the present legal practitioner for record of the applicant, officially started to represent the applicant. On that date the matter was postponed until the 9th of April 2001 for further investigation.

(viii) Up and until the 9th of April 2001. None of the legal representatives nor complainant complained or even made any remark as to why the investigation was not completed. It is submitted that this is indicative of the fact that, as Mr. Greyling under oath testified, Mr. Thambapilai was fully aware of the status of the investigation and the settlement negotiations entered into between the parties.

(ix) On the 9th of April 2001 when the matter again was to be postponed Mr. Barnard, appearing on behalf of the applicant, objected to a further postponement. The applicant was called to testify:

'Mr. Metcalfe do appear for me. I also informed him of the distress I am facing. He suggested to me that if I couldn't able to wait for trial in three years I could reach an outside court agreed which involved the money. I was very unhappy about with this but I had not alternative. It is my application so that the Court give me chance to visit my children in England. And if it allow postponement.'

Mr. Barnard, in his address to Court after the evidence of the applicant had been led, made the following submissions:

'We were approaching the Court to give the State chance to investigate and not to deprive us from being with a family. We are here for fairness. That means if the Court release accused in terms of Article 12(b) of the Constitution accused can be recharged. I also refer the Court to the Article 5 of the Constitution.' We are asking the Court to release the accused which will mean that she will be given her passport and she is free to go to her country which the case is being investigated.'

(x) From the aforesaid it is evident that the main gist of the applicant's application was to be released at least from some of her bail conditions so that she can be able to visit her children in England. It never was testified or submitted in argument that the relief sought through the application was a permanent stay of prosecution."

It is important also to note the following further developments:

(i) The adjournment granted on 9/04/2001 to 24/07/2001 was stated to be a "final" adjournment.

(ii) Before the matter could be dealt on 24/7/2001, the appeal by the applicant was launched on 12th April 2001. Before it could be heard, on 15/6/2001 the State launched an interlocutory application for the remittal of the matter to the Magistrate's Court to allow the investigating officer to testify.

As a consequence the adjournment by the Magistrate to 24/7/2001 was set aside and the matter referred back to the Magistrate for rehearing not later than 26th June 2001.

(iii) The rehearing took place on 26th June and continued until 28th June and then adjourned until 5/7/2001 when the magistrate gave judgment. Accused no. 1 was represented at this hearing by Advocate Heathcote and the State by Advocate Imalwa.

(iv) On 5/7/2001, the last day of the remittal hearing, Imalwa informed the Court that the Prosecutor-General's decision has now come to hand and that the Prosecutor-General had decided that the applicant shall be arraigned, as accused no. 1, together with Shipika, as accused no. 2, to stand trial in the Regional Court in Oshakati, on count 1, theft – general deficiency (2, 894, 740.10) and count 2 – Contravening Section 2(b) of Ordinance 2 of 1928, alternatively contravening Section 2(c) of Ordinance 2 of 1928 – Corruption.

The State then applied for the case to be formally transferred to the Regional Court. The State also applied for the matter to be postponed to 9th July because accused no. 2 could not be present, according to Advocate Metcalfe, who at the time was her legal representative and apparently no longer counsel for accused no. 1, the applicant.

Applicant Malama-Kean objected to the postponement, as well as to the transfer to the Regional Court. Her lawyers were not present and she was unable to give any ground for the objection for the transfer to Regional Court. She explained that her absent lawyer, i.e. Mr. Barnard, told her to object.

The Court then ruled that "accused 1 and the record are transferred to the Regional Court, Oshakati on 13/7/2001 for fixing a trial date with counsel for the accused".

(v) On 9/7/2001 the case of accused no. 2, now represented by Advocate Metcalfe, was also transferred to the Regional Court, with the consent of Advocate Metcalfe, for the fixing of the trial date on 13/7/2001.

It is clear from the above that at this stage the State as well as the Court also had to consider the interests of accused no. 2 because both accused were entitled to a fair trial.

SECTION C:

THE INTERPRETATION AND APPLICATION OF ARTICLE 12 (1)(b) OF THE NAMIBIAN CONSTITUTION READ WITH ARTICLES 5 AND 25

In this regard this Court had the benefit not only of the interesting and valuable arguments of counsel in this case, being Mr Heathcote for appellant and Mr Botes and January for respondents, but also those of Mr du Toit for appellant, assisted by Mr Grobler and Mr Small for respondent in the appeal of Myburgh v the State, where the same issues were canvassed.[1]

The judgment in Myburgh in regard to the interpretation and application of art. 12(1)(b) of the Namibian Constitution read with art. 5 and 25 as

[1] State v Myburgh, NmS, not reported

contained in Section B of that judgment is applicable to this judgment, *mutatis mutandis*.

The first leg of the enquiry is the meaning and application of the words in 12(1)(b) "a trial referred to in sub-article (a) hereof shall take place within a reasonable time –"

Before the present appeal and that in Myburgh v The State, the only cases where this issue was dealt with was that in State v Strowitzki & An., and State v Heidenreich, both decisions of the High Court of Namibia. The aforesaid decisions of the High Court did not differ in any material respect on this issue. I affirm for the purposes hereof what I said in State v Myburgh in this regard, but for the sake of brevity I will only quote the conclusion arrived at in that decision:

> "The factors to be considered in deciding when 'long is too long' was summed up in the Canadian case of R v Morin and accepted as useful guidelines in Strowitzki. They are:
>
> '1. Length of delay;
>
> 2. waiver of time periods;
>
> 3. the reasons for the delay
>
> (a) inherent time requirements of the case;
>
> (b) actions by the accused;
>
> (c) actions of the Crown;
>
> (d) limits on institutional resources;
>
> (e) other reasons for the delay; and

4. prejudice to the accused.

There is little or no discernable difference between Strowitzki and the Namibian cases that followed in regard to the interpretation of the terms 'within a reasonable time'.

In Heidenreich it was said:

> 'Reasonable is of course a relative term and what constitutes a reasonable time for the purposes of Art. 12(1)(b) must be determined according to the facts of each individual case. The Courts must endeavour to balance the fundamental right of an accused to be tried within a reasonable time against the public interest in the attainment of justice in the context of the prevailing economic, social and cultural conditions to be found in Namibia... What is required at the end of the day is a value judgment. ...'."

In the Myburgh judgment I also dealt briefly with the judgment of the Court *a quo* in this appeal in regard to the so-called second leg of the enquiry, i.e. the interpretation of the words "shall be released".

The length of this judgment as well as that in Myburgh, covering essentially the same field induced me not to repeat the whole Myburgh judgment on this issue, but merely affirm it for the purpose hereof and repeat only the conclusion arrived at in that decision. The conclusion was:

"After carefully considering the decisions in S v Strowitzki, Heidenreich, Van As and Malama-Kean, I have reached the conclusion that all of them were wrongly decided in part in regard to the correct interpretation of the words 'shall be released' in art. 12(1)(b).

It seems to me that counsel for appellant who argued the Malama-Kean appeal before us, was correct in his contention that 'released' in art. 12(1)(b) read with art. 12(1)(d) means released from the trial as envisaged in 12(1)(a). The Court *a quo* in Malama-Kean came to its conclusion on the three possible forms of the order, without first concluding that the words 'shall be released' were intended in the first place to mean – released from the trial as envisaged in 12(1)(a). Mr. Heathcote's contention also makes sense because such an interpretation will also extend the remedy contemplated by art. 12(1)(b) to accused persons who are not in detention, who would not have had a remedy under art. 12(1)(b) if the term 'released' in 12(1)(b) is restricted to release from detention.

Notwithstanding various pointers to the contrary in my analysis *supra*, this construction appears to me to be the most logical solution to the dilemma caused by the vague language of art. 12(1)(b) and appears to be the interpretation which best reflects the probable intention of the authors of the Namibian Constitution. It is also in line with a broad, liberal and purposive approach.

The decisive consideration for the aforesaid construction however, is that the principle that those criminal courts, which are “competent” courts with the necessary jurisdiction, should have in their armoury of sanctions, the power and the responsibility in an appropriate case of unreasonable delay, to order a permanent stay of prosecution as at least one of its discretionary powers. This is in accordance with principles and procedures in most of the advanced criminal justice systems in democratic countries. It must be assumed that the framers of the Namibian Constitution also had this objective in mind.

The question however still remains what is the full significance of an order – ‘shall be released from the trial’.

It is clear that the remedy provided in art. 12(1)(b) – ‘shall be released’, is couched in mandatory and peremptory terms. Nevertheless it does not seem to me that only one form of release from the trial would meet the peremptory requirement.

The following forms of release from the trial, will in my view all be legitimate forms meeting the peremptory requirement:

(i) A release from the trial prior to a plea on the merits, which does not have the effect of a permanent stay of the prosecution and is broadly tantamount to a withdrawal of the charges by the State before the accused had pleaded.

This form of release from the trial will encompass:

(a) Unconditional release from detention if the accused is still in detention when the order is made for his/her release;

(b) Release from the conditions of bail if the accused had already been released on bail prior to making the order;

(c) Release from any obligation to stand trial on a specified charge on a specified date and time if the accused had previously been summoned or warned to stand trial on a specified, charge, date and time.

(ii) An acquittal after plea on the merits;

(iii) A permanent stay of prosecution, either before or subsequent to a plea on the merits.

Which form the order of 'release from the trial' will take, will depend not only on the degree of prejudice caused by the failure of the trial to take place within a reasonable time, but also by the jurisdiction of the Court considering the issue and making the order.

So e.g. as I have indicated in the discussion *supra*, a magistrate's court would not be able, as the law stands at the moment, to order a

permanent stay of prosecution before plea and remedy no. (iii) *supra* would thus fall outside the options available before the magistrate's court.

The High Court on the other hand, will be competent to grant all the remedies enumerated under (i), (ii) and (iii) and as far as (iii) is concerned, it will act in terms of its powers as a 'competent' court under art. 25(2) read with article 5 and 12(1)(a) and 12(1)(b) of the Constitution.

It is necessary to reiterate that the remedy of a permanent stay of prosecution will only be granted if the applicant has proved that the trial has not taken place within a reasonable time and that there is irreparable trial prejudice as a result or other exceptional circumstances justifying such a remedy.

Courts making an order under 12(1)(b) must not merely state that the accused 'shall be released', but use one of the forms of order enumerated in (i), (ii) or (iii), supra, so that the ambit of the order will be clearly understood by all concerned."

SECTION D:

COMMENT ON THE FINDINGS OF FACT AND REASONS OF THE COURT *A QUO*

It is clear from the facts which are herein set out and not in dispute, that the Court *a quo* was at least justified in finding:

(i) The arrest of the applicant/appellant was in the nature of a pre-emptive strike.

(ii) The investigating officer, Mulimina withheld vital information from Court, when making his affidavit and when he testified in the remitted proceedings before the Magistrates Court.

The vital information which was withheld was that contained in his investigation diary which contradicts his affidavit and *viva voce* evidence in chief in so far as he had contended in the aforesaid testimony that:

> "I stopped the investigation as it was put on hold" and "I only investigated this case as from December to March 2001." The investigation diary showed, as the Court correctly found, that "Mulimina took at least twenty statements between the end of July and November 2000, and also obtained a variety of other documents."

The Court also stated: "What happened seems to me to be clear. Mulimina pursued the investigation with some vigour but a month or so after learning that settlement proceedings were in progress, he lost interest and for several months did nothing". The Court further found: "The delay complained of is the responsibility of the State."

It seems that the Court in the last preceding sentence said and intended to say, that the "several months" that Mulimina "did nothing" was the

responsibility of the State and not that the whole of the delay in the case to bring the applicant to trial, was caused by the State.

The statement by the Court that the accused did nothing for several months is however inconsistent with the previous statement by the Court that Mulimina, according to he investigation diary “took at least 20 statements between the end of July and November 2000 and also obtained a variety of documents.”

Mulimina changed his stance somewhat when he later explained in his affidavit attached to that of Olivia Imalwa in the review proceedings launched in the Court *a quo* on 9th August 2001, that during the period from the end of July 2000, he did in fact obtain certain statements and documents concerning the investigation but only those which were easily obtainable.

There is some support in the investigation diary itself that the statements obtained during this period were “easily obtainable.” Nevertheless, a considerable number of statements were obtained. Mulimina’s aforesaid statements that he “stopped the investigation as it was put on hold,” are consequently incorrect and constitutes a misrepresentation to the Magistrate’s Court. It may also have constituted a misrepresentation to the appellant and her legal representatives or to some of them and it is possible that they were misled by these statements, but that does not mean that the applicant suffered any trial related prejudice as a result.

It is correct to say that Mulimina lost some interest when he was told of the settlement proceedings and may from that point onwards, have pursued the investigation with less vigour, but that is as far as one can take it.

The Court therefore erred in saying that when Mulimina heard of the settlement proceedings he not only lost interest, ‘but for several months did nothing.” (My emphasis added.)

Consequently the finding that “the delay complained of is the responsibility of the State” on which the applicants legal representatives have so strongly relied, should carry little weight, because the alleged delay of ‘doing nothing for several months’ was factually incorrect and misconceived.

Alternatively, in so far as the taking of “at least twenty statements between the end of July and November 2000 and the obtaining of a variety of documents” is consistent with not pursuing the investigation with the required vigour, very little weight, if any, should have been attached by the Court *a quo* to this neglect.

The Court *a quo* regarded the reason for Mulimina’s false evidence as a “stratagem of laying the blame for the delay in completing the investigation at the feet of the applicant” and that this “stratagem” was “without a proper foundation. This finding must however, be seen in context to determine its importance and weight.

It must be remembered e.g. that it is an undisputed fact that there were settlement negotiations almost from the beginning of the period following on the applicant's arrest on 27/6/2000 right up to notification of the settlement and of the complainant's withdrawal statement on 29/11/2000.

It is clear from the testimony of Greyling, attorney for the complainant, that not only was it his point of view, that the continuation of the investigation would be futile, in the light of the settlement negotiations, but he communicated this view to Inspector Mulimina.

Although he did not order Mulimina to put the investigation on hold, he requested Mulimina to do so pending a possible settlement. It is of course correct to say that even if Greyling told Mulimina to put the application on hold, that would have been an instruction with no legality and Mulimina would not have been bound to comply with it. But it is understandable, even if it was merely the point of view of Greyling which was conveyed to Mulimina, if Mulimina was influenced by the point of view of Greyling to pursue the investigation with less vigour and to proceed at a slower pace.

Any settlement between complainant and applicant and any withdrawal of the charges, would certainly have been an important development, which the Prosecutor-General would have had to consider, in conjunction with all the other available facts and circumstances, to decide whether to continue with the prosecution, or withdraw the charges.

This notwithstanding, the Prosecutor-General would need a proper and completed investigation to enable him/her to exercise his discretion properly, whether or not the complainant has settled with the suspect and wishes to withdraw the charges.

The Prosecutor-General will also have to guard against allowing or putting his stamp of approval on “settlements” that may amount to the crime of “compounding a crime”. This crime consists in unlawfully and intentionally agreeing for reward not to prosecute a crime punishable other than by a fine only.”[1]

The eventual agreement between the applicant/appellant and the complainant in this case even provided that the complainant (CD Namibia) in lieu of a payment of N$250,000 will not only withdraw the criminal charges on or before 15/11/2000, and “will not bring any other charges by way of civil or criminal action or otherwise against the second party (Malama-Kean), “but will also not “facilitate support or give information, in the form of any evidence or otherwise to any other individual, party or organization and/or organisations to bring any charges or civil claims against the party of the second part (Malama-Kean), upon payment of the sum of N$250,000.” Clearly, the Prosecutor-General may not or should not be party to such a scheme, which if not illegal, may be on the brink of illegality.

[1] SA Criminal Law and Procedure: Vol 2 Common Law Crimes, p204, S100.

The trial Court emphasized the denial of the applicant's legal adviser Thambapilai in his affidavit that he had not been aware that the investigation had been halted and if he had become aware thereof, he would have strenuously objected to any postponement purporting to be for further investigation by the State. The affidavit of Richard Metcalfe, the second legal representative of applicant, is to the same effect. Their assertions in an affidavit was obviously not tested in cross-examination and the Court *a quo* should have kept this in mind when considering the veracity of such assertions in the light of all the other evidence and the circumstances.

It should be noted here that Thambapilai in his letter dated 31/7/2000, bemoaned the hardships of his client in prison and solicited the assistance of the complainant in the then pending bail application.

In the letter of reply dated 31/7/2000, Greyling pointed out that Malama-Kean was the Chief Executive officer of the complainant and as such may "find herself in a total different circumstances than any of the other employees," clearly insinuating that as such she had some explaining to do.

Greyling further pointed out:

> "Our client is in the process of commencing with civil action against your client for the amounts which our client believes your client is liable to them. As your client is a 'peregrinus' to our courts seen with the well known fact that your client was

> about to leave Namibia, our client is also contemplating procedures to fix jurisdiction in regard to your client and further to obtain security for any amount which may be due and payable by your client should the appropriate Court rule that she is liable for any amount."

However, it is quite clear from what Metcalfe said at an early stage of the proceedings in the Magistrate's Court, i.e. on the 9th August 2000 that "this is a matter for negotiation" together with the letters from Thambapilai and the letter in reply from Greyling and Associates, exhibits "D" and "E" respectively, to the effect that negotiations were taking place in which his client was vitally interested, that appellant and her legal representatives not only knew of these negotiations, but relied on its outcome.

When applicant testified in the magistrates Court on 9.4.2001 during the hearing where the State asked for an adjournment and Mr Barnard on behalf of applicant opposed, the applicant *inter alia* testified in regard to Mr Metcalfe's advice to her:

> "He suggested to me that if I couldn't able to wait for trial in 3 years time I could reach an outside Court agreed (agreement) which involved the money. I was very unhappy about this, but I had no alternative."

Applicant said in her review application, indicating her knowledge of the negotiations:

> "During the same appearance (9 August 2000) my legal practitioner, Mr Metcalfe, informed the Court that there were certain negotiations being conducted between the complainant in this matter (CD Namibia, a non-governmental organization, who was my former employer and myself). This information was made available to the Court because it was relevant insofar as my bail conditions were concerned."

Metcalfe in his address to the Court on 7/12/2000 *inter alia* made the following submissions:

> "The complainant want to withdraw the case against her." "This case is a civil matter rather than a criminal matter..." (My emphasis added)

It must be remembered throughout that Thambapilai was the attorney for appellant and the instructing attorney for Advocate Heathcote, whenever the latter appeared for the applicant up to the time when Mr. Barnard became the instructing attorney on 9th April 2001. Thereafter Barnard also became the instructing attorney for Metcalfe on those occasions when Metcalfe appeared for applicant.

During the period when Thambapilai was the attorney of applicant, one must assume that he would have kept applicant informed of developments as to the settlement negotiations and its implications for the criminal case and its investigation and that Metcalfe would also have been informed.

Greyling who testified in the remitted Magistrate's Court proceedings and whose evidence was relied on by the Court as shown above, also testified that "the legal representative of the accused was aware of all these," referring to the settlement negotiations and his view that any investigation by the police would have been a waste of time if a settlement is reached.

Greyling also testified:

> "The letter was written at this stage we were on use of finalizing the settlement agreement. A draft copy of an agreement was faxed to my office by Mr Thambapilai and the purpose of this document was to request and persuade the prosecution not to proceed with the criminal charges."

He further testified under cross-examination by Heathcote that he had informed Thambapilai, the legal representative of the accused, what he had told Mulimina. He added that during that period he spoke to Thambapilai "at least four times a day." When pressed again by Heathcote "you did not tell Mr Thambapilai that you instructed Mr Mulimina to halt the

investigation" he replied: "I did not tell him. What I did is that I requested Mulimina pending a possible settlement." (My emphasis added). This somewhat unclear testimony appears to mean "I requested Mulimina to halt the investigation pending a possible settlement.

This part of the testimony of Greyling in chief and under cross-examination by Heathcote, was not mentioned by the Court *a quo* in its assessment and probably not considered by the Court when it apparently accepted at face value the assertions of Thambapilai and Metcalfe in their supporting affidavits attached by applicant Malama-Kean in her review application to the Court *a quo*.

In the letter by Greyling and Associates to the Deputy Prosecutor-General Mrs Imalwa, dated 13 November 2000 it was confirmed that: "It has been conveyed to the investigation officer that settlement negotiations were in progress and that if a settlement could be reached, the criminal charges will be withdrawn. Our instructions are further that criminal investigation in the matter were put on hold for this purpose."

It is highly unlikely that applicant/appellants legal representatives were not aware of Greyling's view and that it was communicated to Mulimina with a request to halt the investigations, pending the settlement.

It seems probable that the settlement eventually reached referred to above, involved applicant as well as one or more of her legal advisers and that they were at all relevant times not only aware of it, but participated in it.

To achieve this settlement, must have been a vital link in the strategy of applicant and her legal advisers to end the criminal prosecution. That attitude clearly also emerges from the point of view put to the Court by Barnard, applicants third legal representative, when he submitted in his address to Court in the remitted proceedings that:

> "The Prosecutor-General has no right to refuse the offer of the complainant. The State cannot proceed without the complainant. Whether the allegation is theft, it has to come from the complainant."

This submission was of course without any legal foundation, but gives insight in the strategy of the applicant and her legal advisers at the relevant time. I therefor find it difficult to believe that they were mislead by Mulimina and/or the prosecution and that if they had known that the investigation was on halt, they would have strenuously objected to any further postponements. It seems more likely that the legal representatives did not object to the applications for postponement because they were busy with negotiations with complainant and its legal representatives to achieve a settlement which would end the dispute between them and as they saw it, cause the criminal charges to be withdrawn.

Applicant Malama-Kean in her supporting affidavit in the review proceedings said:

> "If I was aware of the fact that the investigation was halted, I would immediately have instructed my legal practitioners (and I believe they would have in any event done so on their own initiative) to strenuously object to myself being incarcerated or to remain under the most stringent bail conditions, while no investigation was conducted;"
> (My emphasis added)

It should be noted that the applicant did not say that she or her legal advisers would have objected to a postponement and/or asked for a permanent stay of prosecution, but would have objected against "incarceration" and the "most stringent bail conditions, whilst no investigation was conducted."

All these points however loses most of its relevance and significance, considering that in fact the investigation was not halted and at most, the investigation was not pursued with the same vigour as before, once the settlement negotiations were brought to the attention of Mulimina, together with a request by Greyling to halt the investigation pending the outcome of the settlement negotiations.

It follows from the above that Mulimina did not suck from his thumb this story of halting the investigation pending the finalization of the settlement negotiations. The idea to halt the investigation originated from Greyling and

was communicated to him by Greyling and was well-known at least to, Thambapilai, the first legal representative of the applicant, and probably to those following him namely Metcalfe and Barnard. None of them ever objected to the idea. Although Mulimina did not invent the idea, he used it as an excuse for not continuing the investigation with the required vigour. To justify this he told a half-truth, namely that he halted the investigation completely, whereas he only slowed down the pace.

In the review application before the High Court he explained:

> "As a result of this request and also because I did not want to unnecessarily spent thousands of dollars of taxpayers money on an unnecessary investigation, I decided to heed to the said request. I submit that I only did what any investigating officer would have done in the circumstances."

Mulimina in this affidavit also made it clear that he did in fact obtain some statements and other evidential material which were "easily available."

In the circumstances Mulimina's aforesaid *modus operandi* was not in bad faith or grossly unreasonable and/or grossly negligent. At most he was negligent in not pursuing the investigation with the necessary vigour during the period between beginning of July and end of November, a period of approximately four (4) months.

This modus operandi to slow down the pace of the investigation was not the correct course for an investigating officer to take, but it was understandable and mitigated by the attitude and conduct of the legal representatives of the complainant, in which the applicant's legal representatives apparently acquiesced.

His misrepresentation to the Court as contained in his affidavit filed in the State's remittal application on June 2001 and in the remitted proceedings itself to the effect that he had halted the investigation, wholly or in part, must be deprecated. The said misrepresentations, however, was not in itself the cause of any unreasonable delay.

The only other reference to the delay which followed from December 2000 is found in the reasons for the judgment of the Court *a quo* on 15th October 2001. The Court reasoned:

> "It was not until June 2001 that the investigation was completed and the earliest trial date that could be given was October 2001, some 16 months after the applicants arrest." That, the Court further found, is delay, which is presumptively prejudicial."

The Court concluded that "the trial of the applicant has not taken place within a reasonable time and she is entitled, to relief in terms of article 12 (1)(b)."

The mere length of the time which expired between arrest and trial, is only one of the factors to be considered, not a conclusive criterion.

I would have expected some analysis of the events following December 2001, such as the investigation undertaken during that period; the applications to Court on behalf of the applicant, and the finalization of these applications; whether or not the State was in position to proceed with the prosecution and the trial when applications and counter applications were pending and judgments were awaited during the period April 2001 – October 2001; whether, considering the scarcity of qualified manpower and skills to accomplish the massive task, following Namibian independence, particularly related to the increase in crime, the period of 6 months for the completion of the investigation was unreasonable and if unreasonable, was it caused by a deliberate stratagem by State officials or was it caused by incompetence and/or negligence and if negligence, was it gross negligence; was the accused person and/or his/her legal representatives to blame for some of the delay; did the accused and/or such representatives assert his/her rights to a trial within a reasonable time; how serious is the alleged crime and how complex the investigation; what is reasonable considering the fundamental rights and interest of the accused person weighed against that of the victim and generally, the public interest relating to the administration of justice.

The Court *a quo* dealt with the complexity of the case as follows:

> "I take account of the fact the case against the applicant is, in all probability, a complex one but that does not weigh too heavily with me."
> (My emphasis added).

The reason which the Court advanced for saying that the probability that the case is complex "does not weigh too heavily with me," appears from the following: "I respectfully agree with the following observation of Kriegler, in Sanderson v Attorney General, Eastern Cape, 1998 (1) SACR 227 at 243 f:

> "If a person has been charged very early in the complex case that has been inadequately prepared, and there is no compelling reason for this, a Court should not allow the complexity of the case to justify an over lengthy delay."

I respectfully also agree with this dictum, provided it is properly applied. The key words are "and there is no compelling reason for this", referring to the case, not having been adequately prepared.

In the instant case, the Court correctly found that the arrest of the applicant was a "pre-emptive strike." The reasons for this "pre-emptive strike" emerge clearly from the record and was to the following effect:

The complaint of the possible theft of about 2.8 million from the complainant was lodged with the police at a time when the applicant,

Malama-Kean, who was an Executive Director of the complainant and one of the suspects, was on the verge of leaving the country.

In the light of the fact that she was a Zambian citizen married to a British citizen, she would have been outside the jurisdiction of the Namibian Courts and police, once she left Namibia. This was the reason for the pre-emptive strike and appears to me as a good reason for her arrest, at a time when the complex case had been "inadequately prepared."

That being the case, the Court *a quo* in my respectful view misapplied the above quoted dictum in Sanderson. I must emphasize however, that the fact that the pre-emptive strike was justified in the circumstances, cannot in itself be a justification for not pursuing the investigation with vigour afterwards. The need for a pre-emptive strike indeed placed the duty on the investigators to pursue the investigation with increased vigour, and with all means at their disposal in order to ensure that a fair trial can take place within a reasonable time.

Although as I have stated supra, the notorious scarcity of qualified manpower and skills to accomplish the massive task following Namibian independence, particularly related to the increase in crime, is always a factor to be weighed in the scale when considering the reasonableness of any delay, this cannot become a justification for depriving a suspect or any accused of his/her right to a fair trial within a reasonable time. The duty to ensure this is placed by article 5 on the Executive, the Legislature, the Judiciary and all organs of the Government and its agencies.

The further reason advanced by the Court *a quo* for its decision reads as follows:

> "Next, there is the neglect on the part of the investigation officer to pursue the investigation with vigour. The ultimate responsibility for such neglect must rest with the State, not the applicant."

As indicated in my analysis *supra*, this accusation can at most apply to the period July 2000 to middle November 2000 and not to the period thereafter. Furthermore, even though there was some negligence in not pursuing the investigation during that period with the necessary vigour, the failure of the investigating officer to do so, was mitigated by the role played by the applicant and her legal advisers and the complainant and its legal advisers. This role was to endeavour to achieve a settlement between the accused Malama-Kean and the complainant and in that manner also achieve the withdrawal of the criminal charges; to request the investigating officer to suspend the criminal investigation until the negotiations for a settlement has been concluded; alternatively to put it to the investigating officer that there should be such a suspension and/or to acquiesce in such request or communication.

In addition to this, the applicant's lawyers did not assert her rights during this period by objecting to the postponements. In most cases the

postponements were granted pursuant to consultations between prosecutors and defence representatives.

Consequently it is not justified in all the circumstances to put the blame for the delay during this period exclusively on the State.

A Court making a value judgment, must consider all the relevant information before it to decide on the degree of complexity and how much time is reasonably required to complete the investigation.

In this case, Mulimina testified in the remitted proceedings on 26/6/2001 that the case was “of complex nature, since the offence was committed in 1997, 1998, 1999 up to May 2000. It was almost 3 years and 5 months. During April 2001, I informed the prosecutor Haindobo that I needed three months to complete my investigations as it was so difficult to trace witnesses. Some witnesses are in Katima Mulilo, Khomas, Rundu in Kavango Region, Ohangwena, Oshana and Oshakati and Omusati region. The kilometre from Oshakati to Katima Mulilo is 1300 (km).

It is so difficult because to trace these witnesses. The office in Rundu was closed during December 1998. It was now for us to trace the employees who were employed by that company and that was so difficult …. Oshana, Omusati and Oshakati we could not even finish investigations for four months as it was difficult to trace them. Some of them resigned.

If there was no intervention after the arrest of the accused, the investigation would already have been completed."

He also testified that his investigation has now been completed and the docket already with the Prosecutor-General for his decision.

Mulimina elaborated on the above in his supporting affidavit opposing the applicants review application where he said:

> "It would be evident from the investigation done and statements taken that I indeed during the said period (i.e. from date of arrest to November 2000,) obtained the following number of statements on the following dates, to wit:
>
> (a) 28th July 2000 – 6 statements;
>
> (b) 8th August 2000 – 6 statements;
>
> (c) 29th August 2000 – 1 statement.
>
> As also would be evident from the contents of the police docket the said investigation was an extensive one and comprised *inter alia*:
>
> (a) Approximately 46 statements;

(b) Hundreds of exhibits and/or documents which are filed in 6 arch files."

He then expressed the opinion that in his experience as a police officer, "a period of 12 months in any event would not have been unreasonable to complete the investigations herein. This I say in my experience as an investigating officer who has investigated hundreds of cases over a period of 15 years."

Advocate January, also a Deputy Prosecutor-General attached to the office of the Prosecutor-General in Windhoek, made the following statement in his affidavit in support of the opposition to applicant's review application:

"The case docket in the case of the State v Malama-Kean was assigned to me for decision on 23 March 2001. After perusal of the case docket I was of the opinion that *prima facie* there is a case against both the accused. At that point in time I was however informed that there were still investigations outstanding. I accordingly instructed the investigating officer to finalise the further investigations as a matter of urgency and forward all outstanding documents to our office.

I have received the outstanding documents and statements when the investigating officer and Advocate Imalwa attended the previous appeal proceedings around 12 to 13th June 2001. The

decision was eventually taken on 27th June 2001 and the instruction issued on 29th June 2001. An amended instruction was issued on 5th July 2001 as there was a mistake on the name of the second accused. …"

"The case involves an amount of N$2894 740.10 over a period of about 3½ years. Numerous cheques and documents are involved. In my experience, an investigation of this nature usually takes time to be finalised. Apart from the allegations that the investigation was partly delayed as a result of settlement agreements, I am of the view that a period of about 9 (nine) months is not an unreasonable time to finalise investigations of this magnitude.

The applicant in this matter elected to remain silent on her warning statement and did not provide any information to enable the investigating officer to investigate any justifiable defence that she might have or to assist the Prosecutor-General in his decision."

It should also be kept in mind that the applicant in her *viva voce* evidence on 9/4/2001, testified that her then legal representative Mr Metcalfe already suggested to her at an early stage that "if she couldn't wait for trial in 3 years I could reach an outside court agreement which involved the money…"

This indicates that Metcalfe at an early stage estimated the time it will take to get finality if there was no settlement with the complainant.

There was no evidence or other material before Court to rebut these opinions of Mulimina and January as to reasonableness of the delay.

These opinions, underline the need for the Court to be cautious in coming to a conclusion as to when the delay can be said to be unreasonable and caused by the State. Obviously ultimately the Court will also rely on its own experience in the Courts in making its difficult value judgment.

I have carefully considered the events during the period December 2000 – October 2001. In my opinion, applicant has also failed to prove any unreasonable delay for which the State was responsible during this period.

The Court *a quo* did not deal with any of the other complaints and alleged irregularities raised by or on behalf of the applicant. These were formulated as follows:

1. "(a) The investigating officer, Inspector Mulimina, never stopped with his investigation and therefore did not inform the respective prosecutors that the investigation was halted, alternatively;

   (b) The prosecutors who appeared in the Court (and who had knowledge of the fact that the investigation was stopped) failed to inform the Court about the fact that no investigation was being conducted. I point out that

> Inspector Mulimina testified during the trial proceedings that he did inform Prosecutor Imalwa that the investigation was halted. I accordingly submit that if that is true:
>
> (i) Imalwa knew about the fact that the investigation was halted during July already; and therefore
>
> (ii) Imalwa failed to inform the Court about such fact;
>
> (iii) Imalwa failed in her ethical duty to provide me with a fair trial."

I have fully dealt with the complaint against Mulimina and need not elaborate further on that.

The whole complaint is based on "the fact that no investigation was being conducted." But that turned out not to be a "fact" as the investigation was never stopped but at most, was not pursued with the necessary vigour.

Consequently the basis for the complaint fell away.

Ms Imalwa vehemently denied any misrepresentation on her part. The fact is that she herself did not appear for the State in most of the applications for postponement.

The next argument was that whereas she knew the contents of the investigation diary indicating that the investigation was never suspended, she became party to Mulimina's deception by using his affidavit in the State's remittal application, and again in support of the State's opposing affidavits in applicants review application, to the effect that the investigation was halted during the period July – November because of the intervention of the legal representatives of both applicant and complainant.

Again, the fact that the investigation was never stopped, deprives the complaint of most of its substance and cannot be used as a ground for the relief claimed.

No wonder that the learned judges in the Court *a quo* ignored this complaint and did not comment on it or the following complaint at all.

2. "The presiding magistrate was biased against the applicant."

This ground is not covered by the notice of appeal but was argued before us. Although it is therefore not necessary to decide this issue, some brief remarks may be appropriate.

In the notice of appeal before us, the alleged irregularities were referred to in a very general sense with only a specific reference to one alleged irregularity. In this regard the notice read:

> "In as far as the learned judges had a discretion once they found that the trial did not take place within a reasonable time, the learned Judges erred in not releasing the appellant from prosecution, particularly in circumstances where:
>
> (a) as a result of pre-trial irregularities, the misleading of the Court and the State and/or the prosecutors acting on behalf of the second respondent, it was an appropriate case to release the appellant without being necessary to determine whether or not the appellant will suffer trial related prejudice; …"

This complaint against the magistrate, as I understand it, is based on the alleged fact that she was before her elevation to the bench, a prosecutor, serving as such under Imalwa, the Deputy Prosecutor-General for the region, and her refusal to allow certain statements to be handed in by the defence whilst allowing others which were handed in by the State.

The fact is that the statements handed in by the State were handed in by consent and those by the defence were objected against. It could not be contended by counsel for the applicant that the statements which the defence wished to hand up, were admissible.

But it is not necessary to take the argument further except to say that this a flimsy argument to support a complaint of so serious an allegation against the presiding magistrate.

In any event, should the trial against the applicant proceed, it will take place before another Court, being the Regional Court, and another presiding magistrate. If there was any prejudice at all, it would relate to pre-trial prejudice in regard to the order relating to the conditions of bail made by the said magistrate in the remitted proceedings. It will not amount to trial related prejudice or exceptional circumstances, which standing alone or in conjunction with other grounds, justify an order by this Court for a permanent stay of the prosecution.

The appellant and her legal advisers had made much of the so called weakness of the case against her, mostly based on concessions made in cross-examination by the investigating officer Mulimina when he testified in the remittal proceedings. One must bear in mind that the appellant and her said adviser now purported to rely on a witness whom they have sought to discredit at the same time.

Furthermore the concessions he had made, may be due to lack of expert knowledge regarding legal questions and cannot be substituted for the view of Advocate January, the Deputy Prosecutor-General attached to the staff of the Prosecutor-General in Windhoek, who had the responsibility to evaluate the case when the investigation was completed. He stated in his affidavit in opposition to appellant review, that in his opinion there was a *prima facie* case.

Consequently the Prosecutor-General, who had the exclusive jurisdiction to decide whether to prosecute or not, decided to prosecute.

In July 2001 the State was ready to proceed on an available date and the trial was then set down for October 2001, after consultation with the legal advisors of both accused.

Appellant up to that time had refused to make a statement to the investigating officer, outlining her defence, and so assisting in the conclusion of the investigation and the decision to be taken by the Prosecutor-General.

The time was now opportune to be served with all the statements relied on by the State and to request further particulars. If the State did not comply satisfactorily with such request, the appellant could have made use of the means and remedies available in our law. If particulars were insufficient, or the charge as supplemented by particulars did not disclose a crime or offence, the applicant could apply to Court for the dismissal of the charge,

without going through the stress and expense of a trial. Furthermore, the applicant armed with these statements and further particulars, could apply for a permanent stay of the prosecution.

Ultimately, if it turns out that there was no case against the appellant, the trial could be brought to a speedy conclusion. The Prosecutor-General could even be sued for damages for malicious prosecution if it turns out that the prosecution was groundless and *mala fide*. If the trial runs its full course, the accused may be acquitted. If not and she is convicted and sentenced, the convictions and sentences may be set aside on appeal – not only on the merits, but on the grounds that the accused did not have a fair trial. Monetary compensation could then be applied for and ordered in terms of art. 25(4) of the Namibian Constitution.

If the applicant went through some of these stages, she would also have been in a much better position as at present to apply for a permanent stay of prosecution. Unfortunately, the applicant and her legal advisers applied for review without and before using the aforesaid procedures. They jumped the gun – idiomatically speaking and by doing so, have prolonged the delay and the agony involved in it.

SECTION E:

CONCLUSION

I am not satisfied that the applicant had proved that there was an unreasonable delay for which the State was responsible during the period July 2000, - October 2001. I must stress however, that a delay of 16 months

will in most cases, constitute an “unreasonable delay” provided the State is responsible for it. My conclusion in this case that unreasonable delay was not proved by the applicant is made in the light of all the unusual circumstances present in this case.

Although the appellant was allowed out on bail in due course after arrest, the conditions of bail regarding reporting twice a day, later reduced to once a day, and her continued separation from her husband and children during the whole period without being allowed to visit them in England was an extreme hardship throughout the whole period when appellant was awaiting trial. But no allegation was made or evidence produced that the husband of applicant and her children were deprived by state’s action or inaction to visit the applicant in Namibia during the period that she was awaiting trial.

On the other hand much of the prejudice suffered by the appellant was due to systemic delay, which was within reasonable limits and to which the appellant and her legal advisers had contributed.

I conclude that the prejudice suffered by the appellant was not irreparable trial related prejudice and that there are also no other exceptional circumstances entitling the appellant to a permanent stay of prosecution, whether in terms of article 12 (1)(b) or article 5 read with article 25.

It follows from the above findings and reasons that the applicant is not entitled to a permanent stay of prosecution in terms of art. 12(1)(b) or at all.

Applicant is also not entitled to the relief of being released from all the obligations of the pending trial under art. 12(1)(b) because applicant has not succeeded in proving that a trial referred to subparagraph 1(a) of art. 12, has not taken place within a reasonable time.

The final question then is whether or not the applicant is entitled to some relief at all. In my respectful view, the pre-trial hardship and a certain amount of prejudice was caused in part by the wrong and negligent conduct of the investigator.

In such circumstances, the Court would be entitled to make an appropriate order allowing some relief to the applicant, under article 25(3), read with art. 5 of the Namibian Constitution. The order made by the Court *a quo* appears to me to be an appropriate order in substance, except for the fact that it was based on art. 12(1)(b) of the Namibian Constitution and must be further adapted to provide for the lapse of time since the making of the order. The contemplated order could have been made by the magistrate's court or by the Court *a quo* on review or appeal to it, without having recourse to article 12(1)(b) or 25(3) read with art. 5 of the Namibian Constitution. Similarly, the Court *a quo* could have granted such an order under its wide discretionary powers in terms of art. 5 read with art. 25. And this Court can of course act under its ordinary powers on appeal to grant such an order without resorting to art. 25(3) read with art. 5.

A last question relates to the appropriate cost order. Counsel for the applicant, Mr. Heathcote, has argued that if the appeal succeeds, the order

for costs in the Court *a quo* should stand and the respondent should be ordered to pay the costs of appeal. Should the appeal however fail, the applicant should not be mulcted in having to pay the costs of appeal because it is a constitutional matter where an applicant should not be disadvantaged to take an arguable case to the highest court in Namibia.

Mr. Botes on the other hand argued that if the appeal is dismissed, the applicant should be ordered to pay the costs in both the Court *a quo* and the costs of appeal in this Court.

In my respectful view, the case was not only arguable, but extremely difficult. In the light of the conflicting decisions in the High Court in previous cases, it is in the interest of justice that this Court should give a binding decision.

Counsel for all the respondents placed very thorough and interesting argument before this Court. I wish to express my appreciation for their contributions.

I think that justice will be served if the parties are ordered to pay their own costs, not only on appeal, but also in regard to the Court *a quo*.

In the result the appeal fails in substance but the following order is substituted for that in the Court *a quo*:

1. The notice of motion is amended by the insertion of the words "and/or the decision of the first respondent on 5th July 2001" after the word "proceedings" in paragraph 2 thereof.

2. The case against the accused must be set down for trial on the earliest possible date following upon this judgment, after consultation with the applicant and/or her legal advisers as well as with the second accused and/or her legal advisers.

3. The order of the first respondent made in the magistrate's court, Oshakati, in case no. 491 B/2000 on 5th July 2001 refusing to release the applicant from the conditions of her bail is set aside and the following order substituted for it:

   "The accused is released on bail in the amount of N$50 000,00 on condition that she appears in the Regional Magistrate's Court at Oshakati on the new date and time set down for her trial, failing which she may be arrested and her bail cancelled and forfeited to the State."

4. The applicant is released from all her conditions of bail other than those contemplated in the order under par. 3, *supra*.

5. The order for costs against 2nd respondent in the Court *a quo* is set aside.

6. Each party has to pay his/her own costs, both in the Court *a quo* and in regard to this appeal.

_____

O'LINN, A.J.A

I agree

_____

STRYDOM, C.J.

I agree

_____

CHOMBA, A.J.A

/mv

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