



**REPORTABLE**  
CASE NO: SA 4/2019

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**PROSECUTOR-GENERAL OF NAMIBIA**

**Appellant**

and

**MARIEN NGOUABI NAMOLOH**

**First Respondent**

**THE MAGISTRATE OF KATUTURA**

**MAGISTRATE COURT**

**Second Respondent**

**THE INSPECTOR-GENERAL: NAMIBIAN POLICE**

**Third Respondent**

**Coram:** DAMASEB DCJ, MAINGA JA and ANGULA AJA

**Heard:** 13 July 2020

**Delivered:** 19 August 2020

**Summary:** The first respondent is a police officer against whom the Prosecutor-General (PG) withdrew criminal charges of corruption and extortion after the case had been pending in the Magistrate's Court for about 6 years. The charges were withdrawn after the magistrate refused the State a further remand. The PG took no further steps after the withdrawal and about four years after the charges were withdrawn the first respondent brought proceedings in the High Court for

permanent stay of prosecution on the ground that he was not tried within a reasonable time as contemplated in Art 12(1)(a) and (b) of the Namibian Constitution. Although satisfied that the first respondent contributed to the delay in material respects prior to the withdrawal and had not suffered trial related prejudice arising from the delay, the High Court found that there was actionable unreasonable delay by the PG in not reinstating charges after the withdrawal and that there were exceptional circumstances justifying permanent stay.

*On appeal to the Supreme Court*

*Held* that the withdrawal of charges in terms of s 6(a) of the Criminal Procedure Act 1977 had the consequence that the first respondent was no longer an accused as contemplated in Art 12(1)(b) of the Constitution, and therefore it was incompetent for the High Court to grant permanent stay as such an order can only extend to a person who is an accused.

*Held* order of stay set aside and replaced with one dismissing application and no order as to costs both *a quo* and on appeal.

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**APPEAL JUDGMENT**

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DAMASEB DCJ (MAINGA JA and ANGULA AJA concurring):

[1] In this appeal, the Prosecutor General of Namibia (the PG) challenges the High Court's conclusion that Mr Marien Ngouabi Namoloh (the first respondent) was entitled to a permanent stay of prosecution because he was not tried within a reasonable time as required by the Namibian Constitution (the Constitution). That order was granted because the PG failed to mount a fresh prosecution against the first respondent after withdrawing the initial charges in terms of s 6(a) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] Section 6(a) of the CPA states:

‘An attorney-general or any person conducting a prosecution at the instance of the State or anybody or person conducting a prosecution under section 8, may –

(a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge. . . .’

[3] According to Art 12(1)(a) of the Constitution, in the determination of criminal charges against them, a person ‘shall be entitled to a fair and public hearing by an independent, impartial and competent Court. . .’. In terms of sub-art (b) of Art 12(1):

‘A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.’ (My underlining).

[4] Where a criminal court, after having granted several postponements, declines a further postponement requested by the State and leaves the PG with no option but to withdraw criminal charges against an accused, is such a person an ‘accused’ as contemplated in sub-art (b) of Art 12(1) of the Constitution? That is the central question that falls for decision in this appeal.

[5] In *Van As & another v Prosecutor-General*<sup>1</sup> the High Court held that, for a person to be ‘released’ in terms of Art 12(1)(b), such person would not thereby be granted a permanent stay of prosecution. Casting aside doubt expressed in the past, this court has authoritatively laid down in *Myburgh*<sup>2</sup> that a ‘permanent stay of prosecution with prejudice’<sup>3</sup> is a competent order where a trial had not taken place

<sup>1</sup> 2000 NR 271 (HC). Compare: *S v Stowitzki* 1994 NR 265 (HC).

<sup>2</sup> *S v Myburgh* 2008 (2) NR 592 (SC). See also, *S v Heidenreich* 1995 NR 234 (HC); (1996 (2) SACR 171 at 241D (178d SACR).

<sup>3</sup> In the sense that such a prosecution may not again be instituted.

within a reasonable time and there was irreparable trial prejudice as a result, or there exist other exceptional circumstances justifying such a remedy.<sup>4</sup>

[6] As to the type of order a court may make where Art 12 (1)(b) finds application, O'Linn AJA held (Strydom CJ and Chomba AJA concurring) that the following forms of release are competent depending on (a) the degree of prejudice caused by the failure of the trial to take place within a reasonable time and (b) the jurisdiction of the court seized with the matter:

'(i) A release from the trial prior to a plea on the merits, which did not have the effect of a permanent stay of prosecution and was broadly tantamount to a withdrawal of the charges by the State before the accused had pleaded. This form of release would encompass: (a) unconditional release from detention if the accused was still in detention when the order was made for his or 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.'<sup>5</sup>

[7] The court in the *Myburgh* matter also held that when the issue of whether or not Art 12(1)(b) has been complied with is to be decided, time begins to run from the time a suspect has been arrested on a particular charge or when not arrested, from the time that he or she is 'officially informed by the police or prosecutor of the charge against him and some official action is taken against him in regard to the charge, such as a summons served upon him to appear in court on a specified

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<sup>4</sup> *Myburgh* at 624F.

<sup>5</sup> *Myburgh* at 623H-624B.

charge or given a warning to appear in court on a specified date on a specified charge'.<sup>6</sup>

[8] For reasons that need not occupy us, the High Court found that there was no unreasonable delay up until the point where the charges against the first respondent were withdrawn. That finding is not challenged by way of cross-appeal. The High Court found, however, that there was unreasonable delay to reinstate the prosecution after the withdrawal and that, in addition, there were exceptional circumstances justifying an order of permanent stay, in the PG's failure to reinstitute a criminal prosecution against the first respondent after the 'provisional' withdrawal of charges against him.

#### Common cause facts

[9] The first respondent is a warrant officer in the Namibian Police Force. He and other police officers were arrested on 26 June 2009 and charged on the allegation of corruption and extortion. It was alleged that they unlawfully took money from foreign nationals whom they had arrested on suspicion of 'illegal dealing in immoveable property'. The first court appearance before the Katutura Magistrate's Court was on 9 December 2009, where the charges were read to the accused persons. The first respondent was then released on bail after one week and has been out on bail until August 2014 when the PG withdrew the charges.

[10] Between the first appearance in 2009 and August 2014, the matter was remanded several times either at the request of the accused persons or the State,

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<sup>6</sup> *Myburgh* at 600D-E.

or by agreement. On 4 August 2014, the Regional Court (second respondent) refused a further remand whereupon the prosecutor on the authority of the PG withdrew the charges, apparently in terms of s 6(a) of the CPA.

[11] Following withdrawal of the charges, the first respondent, who was then on suspension was reinstated as a police officer. He resumed work and at some stage he was denied promotion on the ground that he was still to face criminal prosecution. With the assistance of his lawyer, he wrote several letters to the PG inquiring about the status of the threatened prosecution and made clear that the PG's inaction negatively impacted on his promotion prospects. Those letters all went unanswered by the PG. The PG also took no further action to reinstitute charges.

[12] The first respondent then launched proceedings in the High Court in November 2017 seeking an order of 'permanent stay of further prosecution as contemplated in terms of Art 12(1)(b) of the Namibian Constitution', with costs.

#### Proceedings in the High Court

[13] The salient allegations in support of the relief can be summarised as follows. According to the first respondent, the PG 'failed to finalise my case at my expense and further violating my right to a fair trial and to have my matter heard within a reasonable time as provided for in Article 12'. He alleged that if the matter were to proceed at this stage, he 'would have a grossly unfair trial as my trial would not have taken place within a reasonable time'. According to the first respondent, the 'matter has been affecting my life negatively, especially with

regards to it hampering my growth in my employment' and that 'because of the lengthy period that has passed, I have lost material documents that I intended to use in my trial to defend myself, had it proceeded then'.

[14] The first respondent further alleged that he had 'paid thousands of Namibia Dollars in legal representations' and 'any continuation of my trial hereafter will be unfair and will be incompatible with fair trial provisions under Art 12 of the Constitution'. The first respondent maintained that:

'A period of nine (9) years had passed since the opening of the police docket. This is in conflict with my right to a trial within a reasonable time guaranteed in terms of Article 12 of the Constitution. The prejudicial effect of the pending criminal case has had the effect of materially aggravating financial prejudice towards me, in light of hindering my promotions I would have received, which is accompanied by financial gain as well.'

[15] The PG opposed the relief sought by the first respondent and filed an answering affidavit. She denied any dereliction of duty in pursuing the prosecution and maintained that the delay was occasioned by the fact that the 'complainants are foreign nationals and as such could not attend every proceeding even if their presence at court could be secured at that stage'. She averred that the State had 'all the evidence' and that the matter was only 'provisionally withdrawn'. According to the PG, since the 'provisional withdrawal', all witnesses 'were traced and will be present once the trial commences'. She made clear that she intends to prosecute the first respondent. She denied that there was an unreasonable delay in the prosecution and maintained that the first respondent being a police officer, there was greater public interest in him being prosecuted.

[16] In the replying affidavit, the first respondent makes the following averment with respect to the effect of the withdrawal of the charges following the second respondent's refusal to grant a further remand:

'I wish to state that the fact the [magistrate] has found that the matter must be struck from the Roll and that the State was at fault and that there would not be a further remand, that decision of the [magistrate] remains extant and any placement of the matter on the roll without impugning the decision of the [magistrate] is fatal. The [magistrate's] decision is not being impugned in these proceedings, and it remains as a final decision. With that decision standing to this date I am therefore entitled to a permanent stay of prosecution to achieve certainty.'

#### The High Court's approach

[17] Relying on the *ratio* of *Myburgh*, the court *a quo* formulated the issues it had to determine as being, whether:

- (a) the applicant had proved that the trial had not taken place within a reasonable time;
- (b) the applicant proved that there is irreparable trial prejudice as a result, and/or
- (c) if the applicant proved exceptional circumstances justifying a permanent stay of prosecution.

[18] The learned judge *a quo* reasoned that an applicant seeking a release from trial in terms of Art 12 (1)(b) of the Constitution must prove at least either the first



and second requirements or the first requirement, and, in addition, exceptional circumstances justifying a permanent stay. If he could satisfy all three requirements, so much the better.

[19] As to the requirement of unreasonableness, the court considered the 10-year period from arrest on 26 June 2009 until the case was 'provisionally' withdrawn on 4 August 2014 against the backdrop that by the end of January 2019 no prosecution had occurred. The court cautioned itself that it could not just look at what seemed, at first glance, as an extra-ordinary long period of time that the matter dragged on, but that a proper inquiry involved consideration of the reasons for the delay and distinguishing between systemic delays and delays attributable to an accused.

[20] In his analysis, the learned judge *a quo* divided the entire period, throughout which the first respondent was faced with prosecution, into two periods, namely the period 26 June 2009 to 4 August 2014 and the period 4 August 2014 to the end of January 2019. The court held that up to the date of the 'provisional' withdrawal of the charges, in August 2014, the first respondent materially contributed to the initial period of delay, ie from August 2011 to July 2012. The court accordingly held that the initial period of delay did not amount to actionable unreasonable delay.

[21] The second part of the delay concerned the period from August 2014 up until the proceedings in the High Court. The judge's concern here was that the prosecution had not been re-instated despite the first respondent's protestations

and the PG's stance that all witnesses had in the interim been traced and would be available once the trial commences and that the co-accused who had gone to study abroad was to return to Namibia in 2018. The court found significance in the fact that a prosecution had not commenced despite the State being ready to proceed.

[22] It is that second part of the delay that, according to the judge *a quo*, is unreasonable and amounted to actionable unreasonable delay. With regard to the question whether the first respondent established irreparable trial prejudice, the learned judge reminded himself that the prejudice alleged must be trial related and found that the first respondent did not suffer any trial related prejudice. That finding is also not challenged by way of cross-appeal and since nothing turns thereon in this appeal, nothing further needs to be said about it.

[23] On the question whether there are exceptional circumstances, the court *a quo* held that the failure by the prosecution to re-commence the 'provisionally' withdrawn criminal proceedings constitutes such circumstances and that the first respondent established exceptional circumstances in addition to the unreasonable delay. As the learned judge observed at para [35] of the judgment:

'The lackadaisical prosecution which had initially brought with it the suspension of the applicant from active duty, now resulted in his reinstatement, after the provisional withdrawal of the charges, in August 2014. The effect of this must be laid at the door of the first respondent and the manner in which the prosecution has done its work which thus resulted in a situation where a police officer, suspected of corruption and extortion, was allowed to continue to work- now already for some further 4 and a half years- without the serious charges pending

against him being reinstated for determination by a court of law. If the prosecution would really have had the interests of the public and those of public safety and security at heart, one would have expected a prompt and vigorous resumption of the prosecution. The State has failed dismally in this regard.'

#### Grounds of appeal

[24] Amongst others, the grounds of appeal assert that the 'provisional withdrawal' of the charges constituted sufficient form of 'release' as contemplated in Art 12(1)(b) of the Constitution that the High Court misdirected itself in not so finding. The other ground of appeal is that the withdrawal of the charges against the first respondent had the effect that he was no longer 'an accused person before court'; that he was 'released from the conditions of bail', and that he was released from any obligation to stand trial on any specific charge, date and or time. In other words, in the absence of a decision by the PG to reinstate the criminal charges there existed no criminal charges and or hearing which had to take place within a reasonable time and therefore the subject of a permanent stay of prosecution. Accordingly, the first respondent did not have the necessary *locus standi* to bring an application for permanent stay of prosecution against the PG in terms of Art 12(1)(a) read with (b). In the absence of extant charges, the first respondent had not made out the case for a final interdict: (a) a clear and or established right, (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy. It follows that the High Court had no jurisdiction to entertain the relief sought by the first respondent.

[25] In light of the conclusion I have come to on this expanded ground of appeal, it is unnecessary to refer to the remaining grounds of appeal.

[26]

The parties' main submissions

*The PG*

[26] The thrust of the argument by Mr Botes on behalf of the PG is that in the wake of the withdrawal of the charges against the first respondent, he no longer is an accused as contemplated in Art 12(1)(b) and that the High Court, for that reason, lacked jurisdiction to grant the order of permanent stay. According to counsel, the effect of a withdrawal in terms of s 6(a) of the CPA is that the accused is 'released' from the charges and is no longer an 'accused' in terms of Art 12(1)(b).

[27] Mr Botes further developed the argument to the effect that although the withdrawal in terms of s 6(a) of the CPA does not entitle an accused to a verdict on the charges, such withdrawal is final, in the sense that the prosecution can only again commence after a decision is taken by the PG to charge such a person, on similar or other charges, and to institute criminal proceedings.

[28] As I understood Mr Botes during oral argument, the order made by the High Court in effect rendered meaningless the statutory prescription period of 20 years<sup>7</sup> within which the PG can still bring a fresh prosecution after withdrawal of charges. Regard being had to the fact that the prescription period had not run out in respect of the offences of which the first respondent is a suspect, he failed to establish any of the requirements for a final interdict.<sup>8</sup> In particular, the first respondent failed to prove an act of injury or interference with a right or that there is a reasonable apprehension that such an act will be committed having regard to the uncompleted

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<sup>7</sup> CPA, s 18.

<sup>8</sup> *Bahlsen v Nederloff & another* 2006 (2) NR 416 (HC) para [30].

prescription period in terms of s 18 of the CPA. Unless the first respondent could show injury in the form of an interference with or some other prejudice to a right, he lacked both *locus standi* and an essential ground for the granting of an interdict.

[29] As regards the alleged prejudice related to non-promotion at the workplace, counsel argued that the first respondent's alternative remedy was to seek remedies under the Labour Act<sup>9</sup> against the employer. Another argument made by Mr Botes, and, to the extent that the first respondent believed that the PG failed or neglected her duties to take a decision to prosecute, was to apply for a *mandamus* compelling her to take a decision whether to charge and call him to trial or to have waited for the PG to re-institute prosecution within the statutory prescription period. This submission finds support in an obiter observation by O'Linn AJA in *Myburgh*.<sup>10</sup> The issue does not need to be decided in this appeal and I reserve any comment whether indeed that is so.

[30] Mr Botes finally argued that there is an important public policy consideration why the approach contended for by the first respondent should be rejected; and it is this: Were it to be decided that a person against whom charges were withdrawn remains an accused who is entitled to the protection of sub-art 12(1)(b), it would open the floodgates for anyone against whom charges are withdrawn to seek permanent stay of prosecution and thus result in proliferation of litigation.

### *The first respondent*

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<sup>9</sup> 11 of 2007.

<sup>10</sup> 2008 (2) NR 592 (SC) at 598D-E.

[31] Mr Namandje for the first respondent supports the judgment and order of the High Court. According to counsel, the PG has confirmed under oath in her answering affidavit that she intends to reinstitute criminal proceedings against the first respondent. Permanent stay of prosecution is therefore the most appropriate remedy considering the prejudice that he has suffered on account of the unreasonable delay. This is reinforced by the principle that a party has *locus standi* both in respect of an actual violation of a fundamental right or upon a threat of its violation.<sup>11</sup> The first respondent is therefore covered by Art 12(1)(b).

[32] Mr Namandje also submitted that, in any event, it was never the case made *a quo* by the PG that the first respondent is not an accused within the meaning of sub-art 12(1)(b) and that the issue, being raised for the first time on appeal, should not be entertained.

[33] According to Mr Namandje, the PG is obligated to ensure that accused persons are not exposed to unreasonable delay in criminal prosecution. That means that both the prosecutor and the presiding officer in criminal proceedings must be mindful that they are constitutionally bound to prevent infringement of the right to a trial within a reasonable time. According to Mr Namandje, on the papers before court, there is no admissible evidence on the availability of witnesses, the materiality of their evidence and the prospects of securing such witnesses' attendance of the trial. In balancing the interests of both parties, permanent stay of prosecution is the most appropriate remedy on the facts of this case.<sup>12</sup>

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<sup>11</sup> *Alexander v Minister of Justice & others* 2010 (1) NR 328 (SC) paras 65 and 69 to 71.

<sup>12</sup> See *Wild & another v Hoffert NO & others* 1998 (3) SA 695 (CC).

[34] Mr Namandje submitted that there is no basis for this court to interfere with the order made by the court *a quo*. As a matter of fact, and law, the first respondent's trial did not proceed within a reasonable time and that was the basis of the second respondent's refusal to further remand the matter in August 2014. Counsel posited that the period of delay is exacerbated by the PG's failure to 're-enrol' the matter despite her proclaimed desire to do so. Maintaining that first respondent cannot be promoted at work while the charges remain 'provisionally' withdrawn, counsel submitted that the only appropriate remedy from which the first respondent will obtain practical benefit and to prevent further violation of his rights, is a permanent stay of prosecution.

#### Discussion

[35] As must be apparent from the summary of the grounds of appeal and argument on appeal, the gravamen of the PG's contention on appeal is that the first respondent was no longer an 'accused' when he brought the application in the High Court and that for that reason it was incompetent for the High Court to grant the order of permanent stay of prosecution predicated on Art 12(1)(b).

[36] In fairness to the learned judge *a quo*, in her answering affidavit the PG never alleged that the first respondent should not succeed because he had ceased to be an accused as contemplated in Art 12(1)(b) on account of the withdrawal of charges. It is, however, as Mr Botes correctly submits a legal question that is apparent on the papers.<sup>13</sup> Although not mentioned in express terms in the answering affidavit, the PG raised it in argument when the matter was heard *a*

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<sup>13</sup> Compare *CUSA v Tao Ying Metal Industries & others* 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) para [68].



*quo*. That much becomes apparent from the heads of argument included in the appeal record.<sup>14</sup>

[37] As I have already shown, the point was also squarely raised in the notice of appeal and the PG's heads of argument and the first respondent was afforded sufficient opportunity to deal with it and Mr Namandje did in fact deal with it.<sup>15</sup> In *Cole v Government of the Union of South Africa*,<sup>16</sup> Innes J stated as follows, (relying on the dictum by Lord Watson in *Connecticut Fire Insurance Co v Kavanagh*, A C 1892, p 481):

'The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset.'

[38] The facts upon which the issue falls to be determined are common cause and the matter is one of grave public importance and the first respondent was afforded sufficient opportunity to meet the argument. The issue is one therefore that this court may entertain not least because of its undoubted public importance.

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<sup>14</sup> *Vide*, Record, p. 117, para 3.1 to 3.2. It is permissible for heads of argument to be included in the appeal record if it is relevant to an appeal: See Rule 11(8)(a) of the Supreme Court rules.

<sup>15</sup> *Shill v Milner* 1937 AD 101 at 105.

<sup>16</sup> 1910 AD at 263.

Is the first respondent an accused?

[39] I did not understand Mr Namandje for the first respondent to resist the proposition made by Mr Botes for the PG that in order to receive the benefit of Art 12(1)(b) of the Constitution, the first respondent must be an 'accused'.

[40] Section 6(a) of the CPA empowers a prosecutor to withdraw a charge before plea. The most significant consequence of a withdrawal is that it does not entitle an accused to an acquittal. In other words, unless the statutory prescription sets in, such a person can again be charged. In both the pleadings and the heads of argument, both parties characterised the withdrawal power contained in s 6(a) as 'provisional'.

[41] The Constitution does not define the word 'accused'. Its dictionary meaning, however, is a person charged with a crime or fault.<sup>17</sup> When one has regard to the provisions of the CPA, it primarily refers to the accused person who will appear in court (after arrest by way of summons). Before a person appears in court, the CPA only refers to them as 'an offender'.<sup>18</sup>

[42] In all fairness, the adjective 'provisional' is generally loosely added in the discourse on the ambit of s 6(a) of the CPA. That casual insertion of the adjective 'provisional' in s 6 is partly to blame for the confusion that seems apparent from the debate that has occurred on appeal about that provision's proper ambit if considered in conjunction with Art 12(1)(a) and (b) of the Constitution.

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<sup>17</sup> Shorter Oxford English Dictionary on Historical Principles, 2007, sixth ed, Oxford University Press. See also *S v Baloyi* 2000 (1) SACR 81 (CC).

<sup>18</sup> See CPA, s 1 (ii).

[43] The legislature has not included such a word in the section. The section merely grants a prosecutor the power to withdraw a charge and the consequence thereof is that it does not entitle an accused to an acquittal. It certainly does not impose any obligation on the PG to reinstitute a prosecution. Thus considered, there is nothing provisional about a withdrawal in terms of s 6(a). For all practical and legal purposes, such a person is on no different footing than one who has not yet been charged. The effect of the withdrawal as far as the PG is concerned is that whilst the statutorily prescribed prescription period has not run out, the State can bring fresh charges against the person, either identical to those withdrawn or entirely different ones arising from the same factual matrix.

[44] As far as the accused is concerned, he or she remains free from any criminal accusation in the eyes of the law. That members of the public may consider that the person is under a threat of prosecution on some future date, is of no moment in law. How different is it compared to a person against whom a criminal complaint has been made under oath and no arrest or prosecution has yet occurred but the PG makes known that she intends to prosecute the alleged offender once all facts have been marshalled?

[45] Once the charges are withdrawn, whatever liability the accused stood to suffer under any limitation imposed on him or her ceases. If he or she was allowed on bail subject to conditions, for example, that obligation ceases. If bail was paid, it would be returned to the accused as indeed it was the case in respect of the first respondent.

[46] The status of an accused who remains on remand is not comparable to that of a person against whom charges have been withdrawn in terms of s 6(a) of the CPA. In the former case, the remand accused is obliged to comply with conditions attaching to his or her release on either bail<sup>19</sup> or on warning.<sup>20</sup> If he or she breaches any of those conditions he or she will be arrested on a warrant issued by the court.

[47] Not only that, where a person is admitted to bail, in terms of s 63 of the CPA, a court has the power, upon the application of the prosecutor, to increase the bail amount previously determined or to amend any condition attaching to bail. Where an accused has been released on warning, he or she commits an offence by not appearing at court in compliance with the warning.<sup>21</sup> That contrasts with a

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<sup>19</sup> Section 62 of the Criminal Procedure Act provides that: '(1) Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail - (a) with regard to the reporting in person by the accused at any specified time and place to any specified person or authority; (b) with regard to any place to which the accused is forbidden to go; (c) with regard to the prohibition of or control over communication by the accused with witnesses for the prosecution; (d) with regard to the place at which any document may be served on him under this Act; (e) which, in the opinion of the court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused. (2) If an accused who is in custody on a charge of rape is released on bail, the court shall, notwithstanding the provisions of subsection (1), add such further conditions of bail as will, in the opinion of the court, ensure that the accused does not make contact with the complainant concerned. (3) If an accused who is in custody on a charge of a domestic violence offence is released on bail, the court shall, notwithstanding the provisions of subsection (1), impose the following further conditions of bail, unless it finds special circumstances which would make any or all of these conditions inappropriate, which reasons must be entered in the record of the proceedings - (a) an order prohibiting any direct or indirect contact with the victim during the pendency of the proceedings; (b) an order prohibiting the possession of any firearm or other specified weapon; and (c) where the accused is legally liable to maintain the complainant or any child or other dependant of the complainant, an order requiring that the accused support the complainant and child or other dependant at the same or greater level as prior to the arrest.'

<sup>20</sup> See s 72 of the CPA.

<sup>21</sup> See s 72(2) of the CPA.

person against whom charges have been withdrawn in terms of s 6(a) of the CPA. Such a person stands no risk of being arrested and being brought back before court on the strength of charges instituted prior to the withdrawal. For him or her to come back before court under coercive circumstances, the PG must either have him or her re-arrested or summoned to appear before court in terms of s 54(1) of the CPA. That in my view, was recognised by O'Linn AJA in *Myburgh* as discussed in para [7] above.

[48] The consequence must be that once a charge has been withdrawn there is nothing to 'stay'. I come to the conclusion therefore that Mr Botes is correct in his submission that a person against whom charges have been withdrawn in terms of s 6(a) of the CPA is not an 'accused' in terms of Art 12(1)(b) of the Constitution.

[49] Mr Namandje on behalf of the first respondent argued with great force, an argument not seriously contested by Mr Botes for the PG, that in circumstances where a prosecutor withdraws charges against an accused because the court refuses to allow a further postponement, the prosecutor can only reinstitute a prosecution for good reason. I will assume, without deciding, that it is a correct statement of the law. That, it would appear to me, seems to be a sufficiently powerful disincentive for the PG to reinstitute a prosecution unless she is sure the matter can actually proceed to plea and trial.

[50] The floodgates argument made by Mr Botes is a particularly weighty consideration in adopting the approach that I have taken on the interpretation of

Art 12(1)(b). The floodgates concern is not a fanciful one and holds palpable dangers of the overall criminal justice system being overburdened by applications for permanent stay once there is a withdrawal of charges by the PG.

[51] Delay is not always a function of dereliction of duty by those responsible for criminal prosecutions. 'Limits on institutional resources' are just as responsible for delay. It is not a small matter therefore that courts in jurisdictions with whom we share the common-law heritage and progressive constitutions have recognised that systemic delay attributable to 'limits on institutional resources' is an important factor to be taken into account in the assessment of whether or not there was an unreasonable delay in bringing about a prosecution within a reasonable time.<sup>22</sup>

[52] I conclude therefore that the first respondent is not an accused and that it was not competent for the High Court to grant him an order for permanent stay of prosecution. His application should have been dismissed.

### Costs

[53] The first respondent approached court to ventilate one of the most important rights under our Constitution. That he did not act frivolously is borne out by the fact that he achieved success below in a very carefully considered judgment. It is apparent from the papers that he did not act frivolously. Relying on

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<sup>22</sup> See for example, the Canadian case of *R v Morin* 1992 (8) CRR (2d) 193 (71 CCC) (3d)1 at 196-7, cited with approval in *Myburgh* at 602A-G and at 603B-C.

the principles enunciated in *Biowatch Trust v Registrar, Genetic Resources & others*<sup>23</sup> this court has consistently applied the principle that in such circumstances a litigant should not be condemned in costs where he or she is unsuccessful.

[54] In *Standard Bank Namibia Limited & others v Maletzky & others*<sup>24</sup> this court reiterated that a litigant who *bona fide* but unsuccessfully seeks constitutional relief will not be ordered to pay costs.<sup>25</sup> In such cases, the court permits a departure from the ordinary costs rule that successful litigants should recover their costs. Such a departure, however, will only be permitted where a litigant has conducted the litigation in a reasonably proper manner - as I consider the first respondent did. The appropriate costs order in the circumstances would be that each party pay his or her own costs.

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<sup>23</sup> 2009 (6) SA 232 (CC).

<sup>24</sup> 2015 (3) NR 753 (SC).

<sup>25</sup> See, for example, *Minister of Home Affairs v Majiedt & others* 2007 (2) NR 475 (SC) para 53.

Order

[55] I accordingly order as follows:

(a) The appeal is allowed and the judgment and order of the High Court are hereby set aside and replaced with the following order:

‘The application is dismissed and there shall be no order as to costs.’

(b) There shall be no order as to costs in the appeal and each party shall pay his or her own costs.

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**DAMASEB DCJ**

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**MAINGA JA**

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**ANGULA AJA**



APPEARANCES

Appellant:

L C Botes

Instructed by the Government Attorney

Windhoek

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S Namandje

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Windhoek