CASE NO.: CC 32/2001

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CALVIN LISELI MALUMO & 118 OTHERS **APPLICANTS**

and

THE STATE **RESPONDENT**

CORAM: HOFF, J

Heard on: 2007.06.11

Delivered on: 2007.06.12

Reasons on: 2007.06.22

REASONS:

HOFF, J: [1] This Court is presently in the process of hearing evidence in a trial within a trial on the admissibility of statements allegedly made by the accused person Matheus Pangula (accused no. 59) to Chief Inspector Lifasi of the Namibian Police Force stationed at Katima Mulilo.

Chief Inspector Lifasi testified to the effect that accused no. 59 was a member of the Namibian Police Force during August 1999 and was at that stage under his command. Chief Inspector Lifasi related to this Court a conversation he had on 2 August 1999 in a passage within the Katima Mulilo police station where, according to Mr McNally, counsel appearing on behalf of accused no. 59 a confession was made by accused no. 59.

Subsequently the State called two further witnesses who testified regarding the circumstances prior to, during, and after the conversation between Chief Inspector and accused no. 59. The State hereafter called its fourth witness one Lubinda Mbumwae who had already during April 2007 testified on the merits of this case in the main trial. The testimony of Mbumwae at that stage (during April 2007) related to a conversation which he had with accused no. 59 in one of the police cells at the Katima Mulilo police station on 2 August 1999. Lubinda Mbumwae had at that stage been detained as a suspect.

[2] I gave a ruling (after an objection by defence counsel) on 4 June 2007 allowing the State to lead the evidene of Mr Mbumwae on condition that the witness does not during his evidence in the trial-within-a-trial revert to his evidence given on the merits of this case. Mr July who appears on behalf of the State had assured this Court that the purpose of testimony was not to lead evidence on an issue which had already been testified to by the witness but to the *"circumstances around the accused person Matheus Pangula".*

The hearing of the testimony of Mr Mbumwae was postponed to 11 June 2007 in order to give the State the opportunity to provide a statement of witness Mbumwae which had not previously been provided) to defence counsel in order to enable defence counsel to properly prepare his cross-examination.

When the proceedings resumed on 11 June 2007 Mr McNally asked permission to address this Court on the desirability of this Court hearing the intended testimony of witness Mbumwae and in essence suggested that this Court should reconsider its ruling given on 4 June 2007 (allowing the witness Mbumwae to testify subject to certain conditions). This Court granted him leave to address the Court on that topic. Mr McNally submitted that since the witness has already testified on the merits in the main trial and had after such testimony been excused as a witness by this Court, the State may not consult with this witness and may not call him again as a State witness. He submitted that the State is in effect recalling this witness and that in terms of the provisions of section 167 of Act 51 of 1977 the State may only apply that the Court recalls the witness and the Court would only do so, *inter alia*, if the evidence of the witness appear to the Court essential to the just decision of the case.

It was further submitted that the State has no carte blanche to recall a witness as many times as the State pleases; that the Court when acting in terms of section 167 must question the witness and not the State (or the defence); and that it is irregular for the State to be permitted to treat a recalled witness as a

State witness, even if the State had made an application to recall a witness and such application was successful.

[3] Mr July submitted, opposing the request to revisit my ruling, that no new facts have been presented by defence counsel which could form the basis which this Court may reconsider the ruling already made. Furthermore that this Court is in any event precluded from revisiting its ruling since that ruling was a final ruling and that this Court is *functus officio* in respect of that ruling. This Court was referred to case law in support of these submissions. It was finally submitted, on behalf of the State, that the evidence intended to be led has a bearing on the issue of the admissibility of evidence in a trial-within-a-trial and is not relevant to merits of the case in the main trial.

[4] It is in my view important to have regard to the provisions of section 167 of Act 51 of 1977 in order to decide the crucial issue namely whether the State is in effect *recalling* the witness.
Section 167 reads as follows:

> *"The Court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at*

the proceedings, and the court shall examine, or recall and re-examine the person concerned if his evidence appears to the court essential to the just decision of the case."

[5] The power given to a court to examine, recall, and re-examine a witness is a discretionary one which must be exercised judicially (*S v Gani 1958 (1) SA 102 (A)).* A court is however *obliged* (in contradistinction to its discretionary power) to recall and re-examine the person concerned, *if his or her evidence appears to the court essential to the just decision of the case.*

[6] In my view a Court would consider the *recalling* and *re-examining* of a witness in those circumstances where such a witness has already testified on the merits of the case and where it is necessary to attempt to discover the truth in order that substantial justice is done between the parties.
(S v Van der Berg 1996 (1) SACR 19 Nm).
Furthermore, in my considered view, it would also amount to a recalling *strictu sensu* in a case as the present where a witness who had already testified in a trial-within-a-trial, and had thereafter been cross-examined and excused by the court, and an application is subsequently brought to have that witness testify on any issue or to have such a witness re-examined in the *same* trial-within-a-trial.

[7] In this trial-within-a-trial the Court is required to rule on the admissibility of certain statements made by an accused person to a police officer and that the question of admissibility is determined separately from the question of guilt.

The nature of a trial-within-a trial was described as a *"watertight compartment, with no spill-over into the main trial, …"*

(S v Sithebe 1992 (1) SACR 47 (A) at 351 (a – b))

Thus the evidence presented in the trial-within-a-trial may not be used in order to determine issues in the main trial.

[8] In my view the State *in casu* is not *recalling* the witness as that word is understood in terms of the provisions of section 167 of the Criminal Procedure Act but is in essence *calling afresh* the witness in order to give evidence in a trial-within-a-trial.

[9] The dispute in the trial-within-a-trial is whether accused no. 59 had been assaulted prior to his conversation with Chief Inspector Lifasi, whilst the witness had testified in the main trial about a conversation he had with accused no. 59 at a stage when both of them had been detained in cell 4 at Katima Mulilo police station and in particular what had been conveyed by accused no. 59 to himself (i.e. to the witness).

The subject matter on what the witness had testified in the main trial is clearly, in my view, distinct and unrelated to the subject matter on what he is expected to testify in the trial-within-a-trial.

There can thus be no *recalling* or *re-examination* as those terms are to be understood in the context of the provisions of section 167 of Act 51 of 1977.
The present situation is in my view analogous to the position where a complainant is subpoenaed to testify against an accused person on the merits of the complainant and, after conviction but before sentence, is requested to testify again in the same case (either in mitigation of sentence or in order to present aggravating circumstances).

[10] It was on the basis of the reason mentioned *(supra),* i.e. that the witness is not being *recalled* in term of the provisions of section 167 Act 51 of 1977, that I allowed the State to call the witness in this trial-within-a-trial.

[11] In view of my finding *(supra)* I need not consider and decide the submission on behalf of the State that once a Court has given a ruling it is *functus officio* and may only rescind its order or judgment if new facts are put before it which it ignored or failed to take into consideration. Although this submission was countered by defence counsel on the basis that a ruling in a trial-within-a-trial is interlocutory I need to put the principle that a ruling in a trial-within-a-trial is interlocutory in perspective.

The ruling which is interlocutory is the ruling on *admissibility* evidence (i.e. of an admission or a confession) in a trial-within-a-trial. The ruling which was made to allow a witness (already called as a witness) was not a ruling on the admissibility of evidence. This (interlocutory) ruling will only be given at the conclusion of the trial-within-a-trial.

[12] I have already indicated *(supra)* the reason why I ruled that the witness would be allowed to testify and for that reason did not deem it necessary at this stage to deviate from that ruling.

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HOFF, J

ON BEHALF OF THE APPLICANTS (DEFENCE): MR McNALLY

(TRIAL WITHIN A TRIAL-ACCD NO. 59 M M PANGULA-

RECALLING OF STATE WITNESS-LUBINDA

MBUMWAE)

Instructed by: DIRECTORATE OF LEGAL AID

ON BEHALF OF THE RESPONDENT (STATE): ADV. JULY

Instructed by: OFFICE OF THE PROSECUTOR-GENERAL