

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING ON ADMISSIBILITY OF EXHIBITS

CC 20/2013

In the matter between:

**THE STATE**

and

**DIRK HENDRIK CONRADIE**

**FIRST ACCUSED**

**SARA NGENOHANDI DAMASES**

**SECOND ACCUSED**

**Neutral Citation:** *S v Conradie & Another* (CC 20/2013) [2023] NAHCMD  
524 (25 August 2023)

**CORAM:** MASUKU J

**Heard:** 4 August 2023

**Delivered:** 25 August 2023

**Flynote:** Criminal Law – The Law of Evidence – Receiving of exhibits – Onus on State to prove that evidence sought to be admitted in evidence is reliable, authentic and accurate – Constitution – Article 12(1)(d) – Fair trial rights – Death of a State witness deprives the accused persons the right to cross examine that witness on the authenticity, reliability and accuracy of the exhibits in question.

**Summary:** The accused persons were jointly charged with the contravention of provisions of the Anti-Corruption Act 6 of 2003. The first accused was additionally charged with a single count of contravening section 242 of the Companies Act 28 of 2008. At the early stages of the proceedings, the court, after an agreement by the parties, allowed the provisional admission of two exhibits, being a Compact Disc and a transcript of the contents of the said disc. The defence was entitled to challenge the final admissibility of the said exhibits in due course. Later in the trial, the witness who was to testify regarding the said exhibits passed away and the State sought an order finally admitting the exhibits, which was opposed by the defence.

*Held:* That the admission of the exhibits conditionally by the court meant that the State still bore the burden to show that the said exhibits met the requirements of authenticity, reliability and accuracy.

*Held that:* The witness Dr Ludik, who passed on during the course of the trial, is the one who had decoded the CD from a witness' mobile telephone and it was thus his duty to tender evidence before the court to show that the exhibits met the standards of authenticity, reliability and accuracy.

*Held further that:* If the exhibits were admitted finally into evidence, without calling the person who had decoded and produced the CD and transcript, the accused persons' fair trial rights enshrined in Art 12(1)(d) of the Constitution would have been violated in that they would not have been afforded an opportunity to cross examine that person.

The State's application to finally admit the exhibits into evidence refused.

---

**ORDER**

---

1. The application by the State for the admission of Exhibit '1' and Exhibit 'A', provisionally so marked, as evidence, is hereby refused.
2. A warrant of arrest for the apprehension of the second accused Ms Sara Ngenohandi Damases is hereby issued and stood over to **21 September 2023** at **8h30** for the said accused to explain her non-appearance on the date hereof.
3. The matter is postponed to **21 September 2023** at **8h30** for directions regarding the continuation of trial.

---

## RULING

---

### MASUKU J:

#### Introduction

[1] At the nascent stage of this criminal trial, on 21 May 2018, to be precise, the parties agreed to the receipt of a compact disk, ('CD'), (Exhibit 1) and a transcript of the contents of the said compact disk, (Exhibit A), as evidence provisionally. The admission of these exhibits was subject to the final admission of the said exhibits being challenged by the defence in due course.

[2] The question presently confronting this court at this twilight stage of the State's case, is whether the two exhibits ('the exhibits') mentioned above, should be finally admitted into evidence in this trial.

[3] The State's application at this stage, is that these exhibits be admitted finally into evidence. This application is met with stern and unyielding opposition by the defence. Consequently, and as a result of the discordant positions adopted by the parties to the application, the question falling for determination, is whether all the facts and circumstances, including the law

applicable, properly considered, this is a proper case in which to admit the exhibits as evidence as prayed for by the State.

### Background

[4] It is perhaps necessary that I should preface this portion of the judgment by mentioning that it is necessary that I veer from the normal practice I follow in drafting judgments and rulings. I will, for purposes of completeness, engage in some detail some of the key events in this matter. I do so, for the reason that the need to do so, though not yet apparent, may become plain as the ruling unfolds. To this end, it will be necessary to, even at this stage, quote excerpts from the record. Having said this, I proceed to deal with the necessary background.

[5] The two accused persons, Mr Dirk Henrik Conradie and Ms Sara Ngenohani Damases, were arraigned before this court charged with three counts of contravening sections 42, 43(1), 46 of the Anti-Corruption Act 8 of 2003. Additionally, the first accused is charged with the contravention of certain provisions of s 242 the Companies Act 28 of 2004.

[6] On 21 May 2018, in the course of the State leading evidence against the accused persons, an application was made by the State for the admission of the exhibits in terms of s 212(4) of the Criminal Procedure Act 51 of 1977, ('the CPA'). The parties' agreement, in part, and which was sanctioned by the court regarding the provisional admission of the exhibits, is recorded below, as summarised by Mr Soni for the first accused during the trial:<sup>1</sup>

'But My Lord, purely for the purposes of getting the trial on the go, seeing that my Learned Friend has had to get Witnesses who are not readily available, we have decided that we will adopt the following approach: My Learned Friend would be entitled to have the evidence relating to what happened at the meeting admitted

---

<sup>1</sup> Page 313 line 29 to page 315 of the record of proceedings.

provisionally and the witness will then say what happened at the meeting to the extent that it is necessary and that we would then, having provisionally accepted what was said at the meeting, reserving our right to challenge its acceptance by Your Lordship as evidence, not the correctness of the evidence, that we will then say that the evidence should be excluded. In order to promote the facilitation of the trial we have decided to adopt this approach. Ordinarily, what would have happened, My Lord. My Learned Friend would have had to say well, the recording took place here, it is given to Mr X, Mr X did this, Mr X did that, here is the recording all that chain of events would have had to be here for another day or two dealing with that chain and then we are not going to the Witness who testified to it. So, out of consideration for the administration of justice, we adopted this stance, but I must emphasise, My Lord, purely on the basis that we have the right to challenge its final admissibility and whether Your Lordship should take it.

COURT: Yes.

MR SONI: My Lord, in order to move in that direction, I have suggested to my Learned Friend that what we would do is, there is the recording, the audio recording and there is a transcript of the same. Unfortunately, and this is not a criticism, it is just an observation, there are three versions typed by different people. We just want to know which version the State will rely on in the trial and then measure that version with the actual audio recording so we all are working from the same words to determine whether the Accused are guilty or not. So, we would then spend part of the today at least measuring the two. My Learned Friend is going to bring the Witness forward first, as I understand, just to say that he recorded it and then we will listen to the recording. My Lord, just one further point, that I suggested is that rather than listening to the entire recording and then saying, "well, we disagree with this and this and this", we would appropriate intervals stop the recording and say, "are we all agreed that it corresponds with what was transcribed?". And if there is any changes to be made it would be made and then that would be binding on all the parties.'

[7] The suggestion expressed by Mr Soni, as an agreement by the parties, was accepted by the court as the *modus operandi* that would be followed in dealing with the said exhibits. The said agreement, as endorsed by the court, was followed accordingly as the parties who were present when the recording allegedly took place, being Mr Mark Bongers and Ms Kim Field, testified in

relation to the recording. It was agreed that the exhibits would then be admitted in final fashion at a later stage of the trial, subject to the defence challenging the admissibility thereof at the latter stages of the trial.

[8] At the trial, and on the day when the agreement recorded above took place, Mr Maroneddze, for the State, had his say too. He stated the following:<sup>2</sup>

‘We tender to hear the CD which was downloaded by the witness Ludik who will testify, if need be, for the National Forensic, provisionally be admitted into evidence and then played for the court to hear and with that, if I may ask that the Court may allow the witness to be seated.’

[9] It is accordingly plain that Mr Maroneddze also identified himself with the sentiments and agreement conveyed to the court and made an order of court as relayed by Mr Soni. The court, for its part, in dealing with the application and subsequently making the order it deemed appropriate, stated the following:<sup>3</sup>

‘Yes, but maybe what I should then do is maybe make a ruling in light of the submissions that were made, that the evidence will be admitted provisionally subject to the Accused persons’ legal representatives challenging the admissibility of that evidence and I think that would be a matter that would have to be argued at the appropriate time and which the State will also have an opportunity to deal with, so that for now we just deal with the evidence and then the admissibility would be dealt with at an appropriate stage.’

[10] It should be mentioned, as seen in para [7] above, that the State had intimated that it would call Dr Ludik, from the Forensic Laboratory, to tender his testimony regarding two exhibits. As fate would have it, Dr Ludik, was unwell at some stage when he was supposed to come and tender his evidence, including his handling of the exhibits. An application for a postponement was applied for and granted by this court, in the hope that Dr Ludik would regain his health and be available to testify later. That did not

---

<sup>2</sup> Page 317, lines 22-23 of the record of proceedings.

<sup>3</sup> Page 316 of the record, lines 4-13.

however happen, as Dr Ludik unfortunately exited this jurisdiction and was translated to the celestial jurisdiction without having adduced his evidence regarding the exhibits, in particular.

[11] When the trial resumed on 10 October 2022, after the demise of Dr Ludik, the State filed an application for the admission of the exhibits, which it is common cause, were prepared by Dr Ludik. This was done in terms of s 212 of the CPA. The defence strenuously opposed this application. This attempt appears to have been aborted, as the State did not proceed with this application. The matter was postponed to 23 February 2023 for continuation of trial.

[12] On that date, the State filed an affidavit of Inspector Katanga, and attempted to have that affidavit handed in. The defence again opposed the said application. The defence strongly submitted that the provisions of s 212 of the CPA, had not been satisfied and that for that reason, this was an improper case in which to invoke the said provisions. The defence filed their legal bases for the opposition. This resulted in the State no longer pursuing that particular application.

[13] The present application is the latest attempt by the State, to have the court finally admit the exhibits. Needless to mention, the defence team again opposes the application on grounds that will be enumerated below. It is that application that is the basis for the present ruling.

[14] It is with the above background facts in mind that the application will be considered and decided. To that end, I will deal with the law applicable and where appropriate, to deal with the submissions made on behalf of the protagonists in this matter on the issue of the final admission of the exhibits.

#### The State's submissions

[15] Mr Maronedze, in his forceful submissions, urged the court to accept the exhibits finally as part of the evidence in the matter. He argued that the

witnesses, who testified in relation to the exhibits, being Mr Bongers and Ms Field, were cross-examined extensively on the events at the meeting as recorded in the CD and the transcript. He submitted that at no stage during cross-examination of these witnesses was it ever suggested that the recording of the conversation during that meeting violated the accused persons' constitutional rights in any manner.

[16] Mr Maroneddze further submitted that the court was privileged to sit, see and hear the relevant witnesses in chief and under cross-examination. The court, further listened to the audio recording and had the opportunity to compare the transcript to the recording. What has not happened yet, is for the accused persons to themselves place their version before court as to why the exhibits should not be admitted in evidence. That, Mr Maroneddze submitted, would be the proper juncture at which the court could make a proper determination whether the exhibits should finally be admitted in evidence.

[17] It was the State's case that it would be tantamount to a travesty of justice for the court to deal with this case without regard to the exhibits. 'It is submitted that this task cannot be exercised judiciously and in the interests of justice without the two exhibits'.

[18] Mr Maroneddze was also at pains to argue that the exhibits in this matter were not tainted in any manner, as they were not comparable with what is referred to as 'traps' in legal parlance. This is where a person is deliberately induced to say something that incriminates him or her and which is later used in evidence against that person. It was his argument that the witnesses in this matter found it queer that the first accused would invite them to a meeting when the tender by their company with MTC, was still under consideration. The purpose of recording the events was to gather evidence in case they are later questioned as to why they attended the said meeting, fully aware that they were not supposed to have done so.

[19] It was further submitted for the State that the issue for determination, relates to the question of authenticity of the exhibits. It was submitted that for



the court to return an answer to that question, it was necessary to listen to the voices in the recording – and there is no dispute raised that it was the accused persons who spoke, together with Mr Bongers and Ms Field. That being the case, there is no basis to say that the accused persons did not participate in the conversation contained in the exhibits. The exhibits, the court was urged, must therefore be admitted finally into evidence.

[20] Mr Marondedze further submitted that according to the evidence led, Mr Niels Becker testified that he took Mr Bongers's mobile telephone and took it to the Forensic Laboratory, where it was decoded by Dr Ludik, who has sadly passed on. It was the State's case that Dr Ludik was not to be called to confirm the authenticity of the recording. As such, the court was fully entitled, taking all the circumstances into consideration, to admit the exhibits.

#### The defence's arguments

[21] I should perhaps mention that the defence, although they filed two separate sets of heads of argument, their argument was largely similar. Furthermore, the cases they relied on in support of the opposition to the application, were by and large similar. I will, in that regard, deal with the arguments advanced in a composite manner. This is not in any way to minimise the argument advanced by each counsel.

[22] The mainstay of the defence's opposition was that proper regard had to the application, there is no proper basis stated and on which the application is grounded legally speaking. It was submitted that in the circumstances, the defence is placed in an invidious position in properly mounting a proper challenge in the absence of the legal basis for the present application.

[23] Second, the defence, per Mr Soni, in particular, argued that when proper regard is had to the evidence led, Mr Bongers testified that after recording the conversation on his mobile telephone, he downloaded the recording into a memory stick and from which he copied two CDs. These were handed to Mr Becker of the Anti-Corruption Commission (ACC).

[24] Mr Soni argued that in the circumstances, it is clear that there were a number of CDs available none of which is the original. He argued that with these events in mind, it is not clear which one is the original, regard had to Mr Bongers' evidence that he transferred a copy of the recording of the meeting from iPhone to his laptop.<sup>4</sup> His attorney then made a copy of the recording on a CD from the witness' laptop.<sup>5</sup> From his laptop, he had put that recording onto a memory stick and that a transcript of that was thereafter made.<sup>6</sup> In the circumstances, it is not clear whether the CDs onto which Mr Becker downloaded from Mr Bongers' mobile telephone were original. Furthermore, a question arises regarding the status of the transcript, which was provisionally admitted in evidence and its authenticity.

[25] It was accordingly argued that it is only Dr Ludik, who could, in the circumstances, inform the court as to the true status of the CD provisionally received in evidence, relative to its authenticity, reliability and accuracy. The same would apply in relation to the transcript. In this regard, Mr Soni continued to argue that the State, in any event, had the obligation to lead evidence regarding the propriety of receiving the CD in evidence and if it is the original, the category under which it can be properly classified for the purpose of its admission into evidence.

[26] It was accordingly argued for the defence by Mr Soni that the issue of the recording had always been a live issue and as such, it was necessary for the State to lead evidence, which would throw a light on the authenticity, reliability and accuracy of the exhibits eventually tendered albeit provisionally as evidence. In this connection, he further submitted, the defence had been made to believe that Dr Ludik was the witness earmarked for that particular purpose.

---

<sup>4</sup> Page 339 lines 12-16 of the record of proceedings.

<sup>5</sup> Page 339 lines 21-25 of the record of proceedings.

<sup>6</sup> Page 340 lines 20-31 of the record of proceedings.

[27] It was argued for the defence that when regard is had to the *lacunae* and questions raised by the evidence, in the absence of the evidence of Dr Ludik, the exhibits should not be admitted because the admission would violate the accused persons' right to a fair trial enshrined in Art 12(1)(d) of the Constitution.

[28] In this particular regard, it was submitted that the accused persons had been denied the right to cross-examine Dr Ludik, in order to test the cogency of his evidence regarding the exhibits. The issue of the admissibility of the exhibits had not been led by the State. For that reason, where, as in this case, no evidence is led to show that the requirements for admissibility were met, it was submitted that the application ought to be dismissed.

[29] A reading of the written submissions of the second accused, shows that the thrust adopted, was geared mainly to dealing with the cases that may assist the court in dealing with this matter. In this regard, reference was made to cases such as *S v Singh and Another*;<sup>7</sup> *S v Ramgobin and Others*,<sup>8</sup> *S v Baleka and Others*,<sup>9</sup> *S v Baleka*,<sup>10</sup> *S v Niewoudt*<sup>11</sup> and *S v Mapumlo and Others*.<sup>12</sup>

[30] Having briefly summarised the arguments advanced on behalf of the parties, it is clear that the main question that the court has to answer is whether the court should be satisfied that the exhibits be admitted in evidence and that appropriate evidence has been led by the State that shows that the said exhibits are authentic, reliable and therefor admissible. I proceed to deal with the determination of these questions below.

### Determination

---

<sup>7</sup> *S v Singh and Another* 1975 (1) SA 3 (N).

<sup>8</sup> *S v Ramgobin and Others* 1996 (4) SA 117 (N).

<sup>9</sup> *S v Baleka and Others* 1986 (4) SA 192 (T)

<sup>10</sup> *S v Baleka* 1986 (4) SA 1005 (T).

<sup>11</sup> *S v Niewoudt* 1990 ZASCA 74; 1990 (4) SA 217 (A).

<sup>12</sup> *S v Mapumlo and Others* 1986 (3) SA 485 (E).

[31] I must first mention that one difficulty that the court faces, as correctly submitted by Mr Soni, is the basis on which the application is moved. It does not appear, at this juncture, that the application for the admission of the documents is moved in pursuance of any provision legislation or procedural rule. There is presently no written application in which the bases of the application are set out for both the court and the defence to appreciate and appreciably assist the court in deciding whether the application ought to be granted or not.

[32] In this wise, it must be recalled that the intention exhibited by the State, was to call Dr Ludik at a later stage. That stage was eventually set for him to appear before the court to testify on the exhibits in question, among other things. He was, however reported ill, necessitating a postponement of the matter, with the fervent hope that he would recover. Due to his unfortunate passing, an application in terms of s 212 of the CPA, was moved and which the defence opposed. That application was not proceeded with for reasons that are not apparent to the court. The court does not, in any event need to conduct an enquiry where a party decides to withdraw its application.

[33] The court is presently faced with an application, whose legal underpinnings are not known. It therefor becomes difficult to know what standards must be employed in gauging the propriety of the application in the circumstances.

[34] The court was referred by the parties to the *Malumo* case, where this court had to decide the admissibility of certain photographs. At p 638D, Hoff J stated the following:

‘The authorities are clear that a photograph is regarded as a document, despite the fact that it may also be classified as real evidence, and thus the admissibility requirements in respect of documents are applicable.’

[35] At para 49, the learned Judge stated that ‘The State, *in casu*, must prove, *inter alia*, that the photographs in exhibit BAR are original and

authentic. The best evidence rule must be complied with.’ I move on to consider a little of what is contained in *Ramgobin (supra)*.

[36] In that case, the court was called upon to determine the admissibility of certain exhibits, which included audio and video recordings and the propriety of allowing the State, to re-open its case. The latter aspect, is of no moment in the instant case. Milne JP, who presided over the matter observed, stated the following as a precaution:

‘In discussions of this subject in cases and legal text books, one finds it said that tape recordings are receivable in evidence, but reservations are expressed or conditions for admissibility are suggested because of a feature that is, to some extent at least, peculiar to tape recordings. This is that they can be altered (and materially altered), *in such a way that even experts cannot detect the alteration.*’

[37] At p122F-G, the learned Judge continued and observed that, ‘Tape recordings are, therefore dangerous from an evidential point of view by reason of these factors, unless certain precautions are taken. It is important to be aware of this danger because, when one is dealing with tape recordings, one is faced with what is, on the face of it, highly convincing proof of his guilt: there is his accent, his tone of voice, his tricks of speech, his oral idiosyncrasies, all building up to an apparently overwhelmingly authentic picture. It is even more convincing when one adds pictures suiting “the action to the word”.

[38] Although nothing may have been raised during cross-examination to Mr Bongers and Ms Field, there is no guarantee that issues of the authenticity, reliability and accuracy of the exhibits would not have been raised with Dr Ludik, who it appears common cause that he dealt with the exhibits and decoded the information from Mr Bongers’ iPhone. He would have been able to fortify and mention with a degree of finality what he did with the exhibits and would have possibly excluded possibilities of interference and manipulation of the exhibits. He would also have been expected to clear any

issues regarding the authenticity, accuracy and reliability of the exhibits that Mr Soni raised.

[39] I am of the considered view that in the instant case, the onus was on the State to discharge the burden regarding the authenticity, reliability and accuracy of the recording. This did not happen in the instant case, perhaps due to the unfortunate passing of Dr Ludik. Evidence regarding issues of the integrity and storage of the device, and the manner in which the recording was extracted, to exclude any interference or manipulation, must be placed before court by the prosecution. This was, probably not done due to any neglect or remissness on the part of the prosecution but the conspiracy of death intervened in the present matter.

[40] I am of the considered view that the agreement by the parties, which culminated in the provisional acceptance of the exhibits, did not, in any manner, shape or form, relieve the State of the burden of proving the authenticity, reliability and accuracy of the exhibits. In my considered view, the agreement preceding the order was clear. In that regard, the court, as quoted elsewhere above, stated that 'the evidence will be admitted provisionally subject to the accused persons' legal representatives challenging the admissibility of that evidence.' What this meant is that the State was not, by the mere provisional admission of the exhibits, relieved of the burden which rests on it throughout a trial, namely of proving that the exhibits sought to be introduced in evidence, meet all the evidential standards of reliability, authenticity and accuracy.

[41] In the premises, I am of the considered view that the provisions of Art 12(1)(d), are implicated. That article deals with fair trial rights and provides that 'All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.'

[42] It is clear that if the exhibits were to be finally admitted in evidence in this matter, in the present circumstances, the accused persons' fair trial rights

would have been infringed because Dr Ludik's evidence, which is crucial, would not have been led. As a result, the accused would not be afforded the right cross-examine him on the exhibits and other issues that he might have been minded or prompted to raise in his evidence.

### Conclusion

[43] In the premises, I am of the considered view that the application for the admission of the exhibits in question in evidence, must for the reasons stated above, be refused. As stated earlier, there is no fault that should be attributed to the State. The death of Dr Ludik, is the one that has unfortunately led to this result at this juncture. I cannot foretell and need not, whether the outcome would have been different had Dr Ludik been called. The court would in that event, at least have had an opportunity to hear his evidence and make proper judgment call thereon.

### Order

[44] In the premises, the following order is issued:

1. The application by the State for the admission of Exhibit '1' and Exhibit 'A', provisionally so marked, as evidence, is hereby refused.
2. A warrant of arrest for the apprehension of the second accused Ms Sara Ngenohandi Damases is hereby issued and stood over to **21 September 2023** at **8h30** for the said accused to explain her non-appearance on the date hereof.
3. The matter is postponed to **21 September 2023** at **8h30** for directions regarding the continuation of trial.

---

T S MASUKU  
Judge

## APPEARANCES

STATE: E. E. Marondedze  
Of Office of the Prosecutor-General

ACCUSED 1: V Soni SC Assisted by S. Makando  
Instructed by: Conradie & Damaseb Legal Practitioners

ACCUSED 2: V Uanivi  
Of Uanivi Gaes Incorporated