

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-MOT-GEN-2023/00118

In the matter between:

**NIKODEMUS URIKHOB**

**APPLICANT**

and

**THE STATE REPUBLIC OF NAMIBIA**

**RESPONDENT**

**Neutral citation:** *Urikhob v The State Republic of Namibia* (HC-MD-CIV-MOT-GEN-2023/00118) [2024] NAHCMD 59 (15 February 2024)

**Coram:** USIKU J

**Heard:** 28 September 2023

**Delivered:** 15 February 2024

**Flynote:** Practice – Applications and motions – Applicant required to make out its case in the founding affidavit which must contain sufficient facts upon which a court may find in the applicant's favour – Applicant's founding affidavit lacking such facts – Applicant's application dismissed.

**Summary:** The applicant, a lay-litigant, lodged an application praying for an order allowing him to place certain material before the court, for the purpose of disproving the respondent's case in respect of certain criminal proceedings in which the

applicant was convicted and sentenced to prison. The applicant also sought an order requiring the respondent to furnish him certain original documents.

*Held that* the guilt of the applicant was already determined in the criminal proceedings and same cannot be entertained in the present proceedings.

*Held further that* insofar as the applicant prays for an order requiring the respondent to furnish him certain original documents, same cannot be granted in that the Prosecutor General has a direct and substantial interest in the subject matter of the proceedings but has not been cited as a party to the present proceedings.

*Held further that* due to multiple defects affecting the application, the appropriate order in the circumstances, is to dismiss the application as opposed to striking the matter from the roll, insofar as the legal point of non-joinder is concerned.

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### ORDER

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1. The applicant's application is dismissed.
  2. The applicant is ordered to pay the costs of the respondent.
  3. The matter is removed from the roll and is regarded finalised.
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### JUDGMENT

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USIKU J:

#### Introduction

[1] This is an application brought by the applicant against the respondent seeking an order in the following terms:

'1. That this court allows the applicant to place his case accordingly before the court, and that the submitted and/or attached documents and marked as exhibits 1-8 and summary of facts, and case no: HC-MD-CIV-MOT-GEN-2021/00448, delivered on 3<sup>rd</sup>

November 2022 bears reference hereto. Kindly be informed that the Applicant has adopted paragraph 3 of the judgment in the above-indicated case.

2. Further the Applicant makes a special request to this Honourable Court in case the Respondent indicates that the Applicant is misusing this and or wasting the court's time and tax payers resources as was their argument in the past, that the Respondent being ordered to furnish the Applicant with the original police docket, the original foliens and the POL31's allegedly have been used for comparing the alleged fingerprints of the Applicant.

3. Failure of which the Applicant request this Hounourable Court to order that the Applicant's conviction and sentence be set aside and Applicant be released with immediate effect.

4. And that founding affidavit of the applicant will be used in support hereof.

5. Further or alternative relief as the court may deem fit under circumstances.'

[2] The applicant is an adult male lay-litigant who is an inmate at the Windhoek Collectional Facility. The respondent is cited as 'The State Republic of Namibia'. It appears that the notice of motion together with the accompanying papers were served by the applicant at the Office of the Government Attorney, Windhoek.

[3] The relief sought by the applicant herein is difficult to understand, however, from the papers filed and the oral argument presented by the applicant, it appears that applicant seeks relief in the following terms:

(a) that the applicant be allowed to place before court evidence of certain exhibits marked 1-8 and a 'summary of facts' relating to those exhibits;

(b) that the court orders the respondent to furnish the applicant with the original police docket, the original 'foliens' and the POL31, which were used to compare the fingerprints of the applicant during the criminal trial that led to his conviction and imprisonment;

(c) in the event of the respondent not furnishing the original documents referred to above, the court is requested to set aside applicant's conviction and sentence and order his immediate release.

[4] The application is opposed by the respondent. The respondent raised several questions of law, in terms of Rule 66(1) (c) and set out same.

#### The applicant's application

[5] The founding affidavit is deposed to by the applicant himself. In that affidavit, the applicant asserts that the High Court and the Supreme Court of Namibia have acted frivolously, unfairly and unconstitutionally in the criminal case against him, by conducting themselves in the following manner:

(a) on 9 June 2000, the Magistrates' Court of Okahandja did not inform him of his legal rights before he took his plea in terms of s 119, which is contrary to the provisions of the Criminal Procedure Act (Act 51 of 1977) and the Namibian Constitution;

(b) the High Court has refused the applicant opportunity to call his expert witness on the issue of fingerprints;

(c) the Supreme Court has failed to hear the applicant's appeal against his conviction or has failed to provide reasons, (in the event that the appeal against conviction was found to be unsuccessful). Instead, the Supreme Court joined the applicant to an appeal against sentence which was lodged by his co-accused some time after he had lodged the appeal against conviction;

(d) the High Court and the Supreme Court believed that fingerprints were obtained on 2 April 2000 at the crime scene. However, the evidence in court indicated that no fingerprints belonging to the applicant were obtained at the scene of crime on 2 April 2000.

[6] The applicant submits that he is ready to place before this court, evidence that will disprove the version of the respondent. The applicant further avers that the respondent has failed to provide him with the original documents and foliens which he requested seven days after his trial. He states that he needed those original documents for his appeal against his conviction and also for his private fingerprint experts.

[7] The applicant requests the court to set aside both his conviction and sentence and to order his release with immediate effect.

[8] In opposition to the application, the respondent raises a number of legal points, including the following:

(a) improper citation or citation of a no-existent party: the respondent contends that the applicant sues an entity called 'the State Republic of Namibia', which has no legal capacity to answer to the application. The respondent further argues that it has not been properly identified and therefore the application should be dismissed with costs.

(b) lack of jurisdiction: the respondent argues that the prayers sought by the applicant are criminal in nature and the cause of action relates to a criminal matter and therefore a civil court has no jurisdiction over that cause of action and that the application should be dismissed with costs on that basis.

(c) non-joinder of necessary parties: the respondent contends that insofar as the applicant prays for an order setting aside his conviction and sentence and ordering his release, the applicant has not cited the National Release Board, the Commissioner-General of Correctional Service, the Minister of Home Affairs, the Prosecutor General etc;

(d) non-compliance with Rule 8(1) relating to service of process: the respondent contends the application was not served on the Government Attorney by the deputy-sheriff as required by rule 8(1) and that the service is therefore defective. As a result, the respondent prays for the dismissal of the application with costs.

(e) abuse of court process/*res judicata*: the respondent argues that the cause of action arising from his application has already been adjudicated and decided upon. The respondent asserts that the applicant was convicted and sentenced on 8 February 2002. He appealed to the Supreme Court. The Supreme Court considered the applicant's appeal in respect of the sentence only, effectively confirming the High Court's conviction. The respondent therefore submits that the High Court is *functus officio* in respect of the applicant's conviction.

### Analysis

[9] In motion proceedings the affidavit(s) constitute both the pleadings and the evidence. A party is therefore required to ensure that all the evidence necessary to support its case is included in the affidavit.<sup>1</sup> Every other party likely to be affected by the relief sought by an applicant, must know precisely the case it is expected to meet.

[10] In the present matter, the applicant's first prayer is to the effect that the court allows him to place before it his case as well as documents marked as exhibits 1-8 and the summary facts attached to the application. The documents marked as exhibits 1-2 comprise of a copy of an affidavit by Detective Sergeant Johan Nico Green in which he stated, among other things, that he compared the fingerprints found at a crime scene with a set of fingerprints of the applicant and found them to be identical. Exhibits 3 contains the fingerprint impressions allegedly belonging to the applicant. Exhibits 4-7 contains 'foliens' and comparisons of the fingerprints allegedly found at the crime scene and those which belong to the applicant. Exhibit 8 consists of a document relating to 'foliens' with various inscriptions inserted therein. A document titled 'summary of facts relating to foliens and fingerprints', is authored by the applicant and comprises of applicant's view on Exhibits 1-8, to the effect that the evidence on the crime scene was tampered with.

[11] According to the applicant's founding affidavit, the applicant wishes to place the foregoing evidence before this court in order to disprove the version of the respondent. The version referred to is one that led to his criminal conviction and sentence.

[12] Having regard to the purpose for which the applicant wishes to place his case and evidence before this court, I am of the view that the first prayer of the applicant cannot be granted. The present matter is not an appeal against the criminal conviction of the applicant. In any event, this court cannot entertain a hearing in respect of criminal issues which were already determined by this court, and for which the applicant was already sentenced to prison. It therefore follows that the first prayer stands to be dismissed.

[13] In regard to the second prayer, the applicant prays for an order directing the respondent to furnish the applicant with the original police docket, the original 'foliens'

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<sup>1</sup> *Nelumbu v Hikumwah* 2017 2 NR 433 (SC) para 40.

and the POL31 which were used for comparing the fingerprints of the applicant with those prints found at the scene of crime. The founding affidavit alleges that the respondent failed to provide those original documents to the applicant, which the applicant had requested seven days after his trial. There is no further information as to whether the request was oral or in writing. Nor is there further information as to whom the request was addressed.

[14] In terms of the provisions of Article 88 of the Namibian Constitution, criminal proceedings are prosecuted in the name of the Republic of Namibia by the Prosecutor General. It appears that the criminal proceedings which led to the conviction and sentence of the applicant and in respect of which the applicant now requires the original documents in issue, were prosecuted by the Prosecutor General in the name of the Republic of Namibia. It is common cause that the Prosecutor General is not a party to the present proceedings. I am of the view that the Prosecutor General has a direct and substantial interest in the subject matter of the litigation and the outcome of the proceedings. If the applicant were to be granted the order compelling the respondent to furnish the original documents to him, such order would prejudice the Prosecutor General who is not a party to the present proceedings and who has not been afforded opportunity to be heard on the issue. For the foregoing reasons, prayer two as set out in the applicant's notice of motion stands to be refused.

[15] In prayer three, the applicant requests that in the event of failure by the respondent to furnish the required documents to the applicant, the court should set aside this conviction and sentence and order his immediate release. For reasons set out in the foregoing paragraphs this prayer cannot be entertained and stands to be dismissed.

[16] In regard to the legal points raised by the respondent, I find that the points relating to the non-joinder of the Prosecutor General, non-compliance with Rule 8 (1) relating to service of process, *res judicata* (insofar as applicant seeks to have his conviction and sentence set aside), have merit and same are upheld. Insofar as the issue of non-joinder and the request for documents are concerned, I have considered whether the appropriate order should be strike the application from the roll for non-joinder or whether to dismiss the application. Due to many defects affecting the

application, as set out in the legal points set out above, I am of the view that the appropriate order, in the circumstances, is to dismiss the application.

[17] Insofar as the issue of costs is concerned, the respondent has been successful and there is no reason to depart from the general rule relating to costs. I shall therefore grant a costs order in favour of the respondent.

[18] In the result, I make the following order:

1. The applicant's application is dismissed.
2. The applicant is ordered to pay the costs of the respondent.
3. The matter is removed from the roll and is regarded finalised.

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B USIKU  
Judge



## APPEARANCES

PLAINTIFF: N Urikhob (self-represented)  
Windhoek

DEFENDANT: N Ilovu  
Of Office of the Government Attorney, Windhoek