



**CASE NO.: CC 32/2001**

NOT REPORTABLE

**IN THE HIGH COURT OF NAMIBIA**

**HELD AT WINDHOEK**

In the matter between:

**THE STATE**

**APPLICANT**

and

**CALVIN LISELI MALUMO & 111 OTHERS**

**RESPONDENTS**

**CORAM:**           **HOFF, J**

Heard on:           17 - 18 January 2012

Delivered on:       23 January 2012

Reasons on:        30 January 2012

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**JUDGMENT**

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**HOFF, J:**   [1]   This Court gave a ruling on 23 January 2012 and indicated that reasons would be provided at a later stage. These are the reasons.

[2]   This is an application by the State to call a witness from whom no statement had been recorded and obviously no statement could have been made available to the defence prior to the intended calling of the witness.

[3]   Defence counsel objected against the intended calling of this individual as a state witness. Mr January on behalf of the State informed the Court that the

purpose of calling this witness, was in order to explain the circumstances under which some of the accused persons had been arrested in Zambia.

### **Background**

[4] On 8 November 2011 the State was leading the evidence of one of the investigating officers, then sergeant Evans Simasiku (now holding the rank of Detective Chief Inspector) regarding entries made in an exhibit register (Pol 7) when Mr Dube raised an objection regarding the admissibility of the evidence relating to certain entries. The objection related to entries Pol 7-7/9/2000 and Pol 7-7/10/2000.

He submitted that alleged pointings-out by accused persons which relate to the entries referred to were disguised as if the accused persons identified certain fire-arms to the investigating officer. He submitted in addition that those pointings-out are inadmissible since it was not made voluntarily in the sense that the accused persons had been mentally tortured, threatened with death, had not been informed of their constitutional rights, their entitlement to legal aid, and not warned in terms of the Judges Rules prior to such pointing-out.

Mr John Samboma, one of the undefended accused persons raised similar objections to an entry in the Pol 7 - register relating to himself.

[5] Mr January then correctly indicated that the appropriate course to deal with the objection against the admissibility of evidence would be to proceed with a trial-within-a-trial. Mr January requested that since all the persons who were implicated by counsel and Mr Samboma were not available to proceed with the

trial-within-a-trial at that stage to continue to lead the evidence in chief of Detective Chief Inspector Simasiku on the merits. This request was granted.

[6] On 15 November 2011 Mr January informed the Court that the State “without abandoning the issue” would not go into a trial-within-a-trial since he was of the view that it was an issue which could be dealt with during the merits of the case.

[7] The State concluded the evidence of Detective Chief Inspector Simasiku and thereafter led the evidence of another investigating officer, namely Detective Warrant Officer Eimo Popyeinawa. Thereafter the Court went into recess.

[8] When the Court resumed proceedings on 17 January 2012 the State applied to Court to call the witness who had arrested accused persons in Zambia.

[9] It is common cause that this present application directly stems from the objections raised on 8 November 2011 by counsel Mr Dube and Mr John Samboma.

[10] The State in support of its application to call this witness, called Deputy Commissioner Maasdorp, the chief investigating officer in this case.

[11] Deputy Commissioner Maasdorp testified that on 6 November 1999 he was present when certain individuals (it is not in dispute that these individuals were Messers John Samboma, Andreas Mulupa, John Samati, Richard Musuha and Oscar

Puteho) were handed over by members of the Zambian Defence Force to members of the Namibian Defence Force (including Colonel Ndokotola) and that members of the Namibian Police Force, including himself, were mere bystanders. These individuals were then transported to the Namibian Defence Force military base at Grootfontein.

[12] He further testified that a certain Colonel Sibeso attached at that stage to the Zambian Defence Force had arrested the individuals referred to aforementioned at some stage prior to the 6<sup>th</sup> of November 1999 inside Zambia.

[13] Mr January had prior to the testimony of Deputy Commissioner Maasdorp, informed this Court that the purpose of calling Colonel Sibeso, should this Court allow the application, would be to testify about the circumstances surrounding the arrests of afore-mentioned individuals also referred to as the Samboma group.

[14] Deputy Commissioner Maasdorp further testified that the calling of Colonel Sibeso would have no effect on any of the accused persons since Colonel Sibeso would merely corroborate the evidence by Lieutenant Colonel Ndokotola of the Namibian Defence Force.

[15] During cross-examination by Mr Dube Deputy Commissioner Maasdorp stated that the reason why he did not investigate the circumstances of the arrest of the Samboma group was that "top officials" who were directly involved with the negotiations and arrangements of the handing over of the Samboma group had submitted their statements and had already testified in this Court regarding that.

[16] Furthermore he only came to know about the name of the officer who had arrested the Samboma group in Zambia during last week since that information was never conveyed to them (i.e. the investigating team) by the Namibian Defence Force.

[17] Lieutenant Colonel Ndokotola, who testified on 11 November 2003, stated that he was given the task by his superiors to receive four individuals who had been apprehended by the Zambian authorities and to return these individuals to Grootfontein Military Base. On 6 November 1999 he departed with the regional commander for the Caprivi region, Chief Inspector Goraseb, a member of the Namibian Police Force together with others to the Wanela border post between Zambia and Namibia. The members of the Namibian Police Force met their counterparts. When they returned with these individuals, the regional commander informed him that these individuals have arrived and he, i.e. Ndokotola then loaded them into a vehicle.

Colonel Ndokotola further testified that the regional commander had informed him that they have their weapons. He, i.e. Colonel Ndokotola got their weapons and all their belongings and then drove off to Grootfontein military base. One of these individuals was Mr John Samboma. The first thing he did when he arrived at Grootfontein military base was "to register their belongings" and thereafter he questioned these individuals since he wanted to know how they happened to be in Zambia and whether they were really part of the attack on Katima Mulilo on 2 August 1999.

He testified that these individuals co-operated very well since they told him what they knew and what they did.

[18] During cross-examination Colonel Ndokotola insisted that these individuals had been handed over to the Namibia Police and not to members of the Namibian Defence Force and that he was not aware whom from Zambian authorities handed these individuals over to the regional commander of the Namibian Police Force.

[19] The testimonies of Chief Inspector Goraseb and Deputy Commissioner Maasdorp in contrast were that members of the Namibian Police Force, including themselves, never played any active role in the reception of the four individuals from the Zambian authorities, that these individuals were handed over to members of the Namibian Defence Force, that Colonel Ndokotola was in charge of the operation and that they, i.e. members of the Namibian Police Force, were mere bystanders and did not take part in the handing over ceremony.

[20] Chief Inspector Goraseb testified that the reason why he had accompanied Colonel Ndokotola to Wanela border post was to ensure the unhindered access to Zambia by the Colonel and his return to Namibian in view of the fact at that time of night the border post had been manned by members of the Namibian Police Force under his command.

[21] This Court also heard the testimony of Colonel Kaleji a member of the Zambian Defence Force and the Regional Commander for the Western Region in

Zambia which borders Namibia who testified on 20 January 2004. His relevant testimony regarding this application was that he received intelligence reports indicating that there were “foreign elements” inside Zambia. He directed his troops to make a sweep of those affected areas and subsequently some people were apprehended. Three groups of people were apprehended. In one group he could recall the name of one of the arrested persons namely Samboma. This group consisted of four persons who were eventually handed over to the Namibian authorities since they were regarded as illegal immigrants. This group was found by Zambian troops illegally in possession of fire-arms. According to him he had personally seen these fire-arms - AK 47's.

[22] During cross-examination he conceded that he was not present at the stage when these Namibians were arrested in Zambia but persisted that he can testify about the weapons which had been found since the officers who found these illegal immigrants (Namibians) reported directly to him and thus he was in a position to know what was found on them. He further testified that these arresting officers were in Mungu, Zambia at that stage. Since these officers had not been called as State witnesses the evidence of Colonel Kaleji on what was found on these individuals during their arrest amounted to hearsay evidence which is inadmissible evidence.

[23] Mr January submitted that one of the charges which the accused persons face is the common law offence of high treason and that part of the State's case is that some of the accused persons fled to Zambia.



[24] Should the State prove that the accused persons were found in possession of weapons of war (assault rifles) that is a fact from which this Court may draw an inference regarding these accused persons' participation in the commission of the crime of high treason.

In the alternative it was submitted that this Court may in terms of the provisions of section 186 of the Criminal Procedure Act, Act 51 of 1977 call any witness if the testimony of such witness would in the opinion of the Court be necessary for the just adjudication of the case.

[25] The dilemma which the State faces is because of the conflicting evidence between Colonel Ndokotola and that of the police officers (Chief Inspector Goraseb and Deputy Commissioner Maasdorp) there is in the first instance no plausible evidence at this stage that anyone of the Samboma group was in possession of any fire-arm when they were handed over to Colonel Ndokotola.

Colonel Ndokotola testified he received the Samboma group together with their belongings which included assault rifles from the Namibian Police. This was denied by Chief Inspector Goraseb and Deputy Commissioner Maasdorp. Therefore it follows logically if Colonel Ndokolota did not receive any weapons from members of the Namibian Police from where did the weapons which he testified he had registered originate from ?

I have indicated that Colonel Kajeli's evidence regarding the possession of AK 47's by the Samboma group when they were arrested is hearsay evidence in the absence of testimony of the arresting officers.

[26] Secondly should one accept for the sake of argument that assault rifles had been found in possession of the Samboma group, there is in my view no evidence which link those weapons so found to the weapons referred to in the exhibit register (Pol 7) as testified to by then Sergeant Evans Simasiku.

[27] Should the aim of the State in this application be to prove the mere fact that weapons found in possession by the Samboma group in Zambia it would be necessary to call more witnesses than just Colonel Sibeso in order to complete the causal link between evidence of them being found in possession of assault rifles and the entries made by Sergeant Evans Simasiku in the Pol 7-register. This in turn will inevitably prolong this trial and will render it *prima facie* unfair.

[28] I must pause to observe that if the aim of the State in bringing this application is as testified by Deputy Commissioner Maasdorp namely to corroborate the evidence of Colonel Ndokotola then it all will serve no purpose to call Colonel Sibeso from Zambia. It will serve no purpose since Colonel Ndokotola's evidence is contradicted by two senior police officers who testified on behalf of the State and there is no reason why this Court should at this stage reject the evidence of these police officers or why the testimony of Colonel Ndokotola should be preferred to the testimonies of these two police officers. The contradiction will remain.

[29] In my view in the light of the dilemma referred to (*supra*) it also cannot be argued that the testimony of Colonel Sibeso will augment the testimony of Colonel Ndokotola. The only plausible explanation why the testimony of Colonel

Sibeso is necessary is to introduce *new evidence* namely the mere fact that at the time of the arrest of the Samboma group some individuals had been found in possession of weapons of war (without trying to link those weapons to the weapons referred to in the Pol 7-register).

[30] Defence counsel, Mr Dube submitted that the State has the onus in this application to prove beyond reasonable doubt that the admission of the testimony of the requested witness will not render the trial unfair.

[31] In this regard it was submitted that the State must inform the Court of the content of the evidence the State intends to lead in the first instance. Secondly, it must be shown that the accused persons will not be prejudiced by the admission of evidence the State intends to present, and thirdly, the State must give a reasonable explanation why a statement was not recorded from this particular witness i.e. from Colonel Sibeso.

It was submitted in respect of all these three requirements that the State has failed in discharging its onus.

[32] In considering the first issue it is common cause that the intended witness did not depose to an affidavit and this Court does not know what this witness will testify in spite of the address by Mr January that the witness will be called to testify about the circumstances under which the individuals referred to (*supra*) had been arrested inside Zambia. What is the effect of this situation then ?

[33] In *S v Mwandle* 1999 (2) SACR 471 (CKHK) Ebrahim J in considering an application to challenge the right of the State to continue with its investigations remarked as follows on 476 g - h:

“It is manifest, too, that the court must have insight into such evidence before it can be in a position to determine its impact on the accused’s right to a fair trial and whether it is admissible or not. An order which interdicts and restrains the State from conducting further investigations and debars it from presenting the evidence obtained in pursuance thereof, has far-reaching consequences. In my view, it would be ill-advised, if not impossible for a court to decide on the admissibility of such evidence without it having been placed before the court for consideration.”

This *dictum* was quoted with approval in the case of *Du Toit en Andere v Direkteur van Openbare Vervolging, Transvaal*; *In re S v Du Toit en Andere* 2004 (2) SACR 584 (TPD) at 598 i - j - 599 (a).

[34] This Court has not been placed in such a position and is thus not able to consider the application.

This itself should dispose of the application.

Regarding the second issue it was submitted by Mr Dube that the accused persons would be prejudiced and the trial would be rendered unfair in the sense that witnesses who had already testified would have to be recalled and be cross-examined. This may be so depending on the testimony of the witness the State intends to call.

[35] There is no statement of this witness. Should such a witness only testify in respect of the circumstances surrounding the arrest of the Samboma group then in my view there would be no need for recalling State witnesses since he would testify about an incident removed in time and space from and not connected to, the time and day this group had been handed over to the Namibian authorities. There is however a likelihood of prejudice of a different nature to the accused persons to which I shall return shortly.

[36] Regarding the third issue the evidence of Deputy Commissioner Maasdorp, who was called in support of this application, seems to suggest that the State was caught off guard when counsel objected to the admissibility of evidence regarding the inscriptions in the Pol 7-register and that the State had only at that stage been alerted to the fact that that evidence was disputed by the defence.

[37] If one examines the record of the proceedings and the testimonies of State witnesses the following is apparent in so far as it is relevant to this application, namely that:

the accused persons pleaded not guilty to all charges and as such disputed all the allegations in all the charge sheets during the proceedings in which thirteen accused persons challenged the jurisdiction of this Court to adjudicate upon the issues (i.e. during the end of 2003 and beginning of 2004);

the conflicting versions of State witnesses referred to (*supra*) had surfaced and it was during these proceedings that the possession of weapons by the Samboma group was first mentioned;

there was evidence that the Samboma group had been arrested allegedly with AK 47 assault rifles in their possession; and

that the whereabouts of the person or persons who had effected the arrests had been known to Colonel Kajeli of the Zambian Defence Force.

[38] It was during these proceedings in which the jurisdiction of this Court was challenged that Colonel Ndokotola of the Namibian Defence Force distanced himself from playing any active role when the Samboma group was handed over to the Namibian authorities.

It was during these very same proceedings that Chief Inspector Goraseb and Deputy Commissioner Maasdorp, members of the Namibian Police Force equally distanced themselves from playing any active role during the handing over ceremony.

[39] This should have, in my view, alerted the investigating team as well as the prosecuting team to the fact of the inconclusiveness of the evidence regarding the issue of weapons of war allegedly found in possession of the Samboma group at the stage when they had been arrested inside Zambia and when they had been handed over to the Namibian authorities.

[40] To approach this Court 8 years later with the explanation that the dispute referred to (*supra*) was not anticipated because of reliance on the testimony of Colonel Ndokotola is no plausible explanation. It is not plausible since this “new evidence” referred to (*supra*) by this Court is not new in the sense that the investigating team or the prosecution had been unaware thereof or that it surfaced unexpectedly and as a complete surprise to the State.

[41] It was submitted by Mr Dube that the failure to record a statement from the witness the State intends to call, under the circumstances of this case, was a deliberate one, if not an extreme case of negligence and that this Court should

not come to the aid of a party who deliberately neglects its duty. This submission is debatable.

[42] I have alluded (*supra*) that the accused persons may be prejudiced in a different way as was submitted by Mr Dube and that relates to the very real risk of contamination of the evidence of the potential State witness. This concern was also raised by Mr Dube during his address namely that it would be difficult for the defence by means of cross-examination “to pierce through and distinguish what the witness might have gathered through secondary information or what he has personally seen”

[43] This case from its inception attracted wide media attention and it was conceded by Deputy Commissioner Maasdorp during cross-examination that there is a real likelihood that Colonel Sibeso during the course of time, had access to both electronic and printed media concerning the development of this case.

I agree with counsel, that given the circumstances of this particular case, it may be virtually impossible for this Court to distinguish between original knowledge (i.e. what this witness may independently recollect regarding the circumstances of the arrest of these individuals especially having regard to the number of years that have lapsed) and secondary knowledge (i.e. where he would testify not from what he can still remember but from knowledge obtain from other sources).

What weight, if any, can this Court then attach to the evidence of such a witness? Should the Court allow such testimony it would create a real trial related prejudice which would be very difficult to neutralise or to disprove.

[44] This application to call a witness at this stage may indeed fit the case where Kerans JA in *R v Antinello* reported in the Canadian Rights Reporter Vol. 28 CRR (2d) 65 dated 8 March 1995 at paragraph 11 said the following in relation to the disclosure of witness statements:

“But the failure to make a timely disclosure is, nonetheless a failure to disclose. It may breach the constitutional right of the accused to a fair trial if that failure denies to the accused a reasonable opportunity to prepare his defence.”

[45] I wish to reiterate what was said by this Court in its ruling on 24 February 2011 in an application to introduce new statements and witnesses namely that the right of the State to present evidence obtained by way of continuous investigation during the course of the trial must be limited by the right of accused persons to a fair trial.

[46] I am of the view that in addition to the reason expressed in paragraph 33, this application should fail because to allow it would prejudice the accused persons and render the trial unfair.

[47] In respect of the alternative request by the State that the Court should call the witness identified by the State one needs to look at the provisions of section 186 of the Criminal Procedure Act, Act 51 of 1977 which provides as follows:

“The Court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the Court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such a witness appears to the Court essential to the just decision of the case”



[48] In his *Commentary on the Criminal Procedure Act*, Hiemstra divides the section in two parts namely a “may” and a “shall” part. The first part is discretionary and the second part is mandatory. The discretion, though wide, must be exercised judicially and in a limited manner. The second part places a duty on the Court to call the witness once the Court deems the evidence essential to the just adjudication of the case and it is the judicial officer’s responsibility to assess whether the evidence is essential.

Hiemstra with reference to *S v Matthys* 1999 (1) SACR 117 C cautions that a presiding officer may not take over the prosecution and must be alive to the fact that a witness who is called at a late stage may be aware of evidence which has already been given and might also have been coached before testifying.

[49] At this juncture it is indeed a late stage in the presentation of evidence by the State and the State has expressed its intention to close its case soon and Hiemstra expressed the same concern, put differently, what this Court referred to (*supra*) as the danger of contaminated evidence.

[50] All that I need to say at this stage regarding the exercise of the Court’s discretion in terms of the provisions of section 186 is that for the reasons mentioned in the main application this Court refused to exercise its discretion in favour of calling the potential witness requested by the State.

Furthermore, it follows in respect of the mandatory part of section 186 for the same reasons mentioned in the main application and in particular the real danger of prejudice to the accused persons rendering the trial unfair, this Court is of the

view that it is not essential for the just adjudication of the case to call the potential witness.

[51] These are the reasons why this Court refused the application by the State to lead the mentioned witness:

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**HOFF, J**

**ON BEHALF OF THE APPLICANT:**

**MR JANUARY**

*(Application by State - to call a witness (Colonel Sibeso)*

*from whom no statement was obtained and no disclosure made  
to defence counsel)*

**Instructed by:**  
**GENERAL**

**OFFICE OF THE PROSECUTOR-**

**ON BEHALF OF THE RESPONDENTS:**

**MR**

**DUBE**

**MR**

**SAMUKANGE**

**MR**

**KRUGER**

**MR NEVES**

**MR**

**NYONI**

**MR**

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**Instructed by:**

**DIRECTORATE OF LEGAL AID**