

HIGH COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

Case No: CC 19/2010

RAYNOLDT
APPLICANT

WINDSTAAN

And

THE PROSECUTOR-GENERAL	1 st RESPONDENT
MINISTRY OF SAFETY AND SECURITY	2 nd RESPONDENT
INSPECTOR GENERAL OF THE NAMIBIAN POLICE	3 rd RESPONDENT
COMMISSIONER-GENERAL OF THE CORRECTIONAL SERVICES	4 th RESPONDENT
ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA	5 th RESPONDENT
JOHANNES EIXAB	6 th RESPONDENT

Neutral citation: *Windstaan v The Prosecutor-General and 5 Others* (CC 19/2010)[2016] NAHCMD 28 (16 February 2016)

Coram: SHIVUTE, J

Heard: 08 February 2016

Delivered: 16 February 2016

ORDER

1. There is no proper application before this Court.
 2. The application is therefore struck off the roll.
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RULING ON APPLICATION TO STAY PROSECUTION

SHIVUTE J:

[1] In these criminal proceedings the applicant is represented by Mr Mbaeva on the instructions of the Director of Legal Aid. He has brought an application for the stay of prosecution on behalf of the applicant 'in terms of the general provisions of this Court and in particular s 16 of the High Court Act.'

The applicant who is accused 1 is jointly charged with the 6th respondent with two counts of murder and one count of defeating or obstructing or attempting to defeat or obstruct the course of justice. The crimes were allegedly committed during the period 16 – 18 July 2005. The trial had commenced and this Court was busy with a trial-within-a-trial to determine the admissibility of the alleged confession and pointing out when counsel moved the application.

[2] The application is on notice of motion in which the following orders are sought.

- (a) Ordering the Prosecutor-General and/or her representative to stay the prosecution or proceedings in respect of the applicant.
- (b) Discharging the applicant from the instance or proceedings, and

- (c) Authorizing the Commissioner-General of the Namibian Correctional Services to release the applicant from the Windhoek Correctional Facility or any other centre of detention in which the applicant may find himself.'

[3] Mr Moyo assisted by Mr Marondedze who appeared on behalf of the 1st respondent opposed the application. No appearance in respect of the 2nd and 3rd respondents. Mr Shipena from Government Attorney conducted a watching brief on behalf of the 4th and 5th respondents. Whilst Mr Kaumbi who is instructed by the Director of Legal Aid did so on behalf of the 6th respondent.

[4] Counsel for the applicant has premised the application on the grounds that 'the applicant was actually not formally arrested or lawfully charged with the offence for which he stood trial.' Furthermore, counsel stated in his affidavit that whilst the applicant was testifying in a trial-within-a-trial it transpired that there was no warning statement in respect of the Applicant except for the extract of the investigation diary that indicates the warning statement was marked as an exhibit. Counsel argued that since there was no warning statement the applicant was not properly informed of his rights, therefore, he was not properly before this Court. I pause to observe that in his affidavit counsel *inter alia* impermissibly made contentions and submissions based on the record of proceedings in a trial-within-a trial.

[5] Counsel for the 1st respondent opposed the application and raised a number of points *in limine*. The court has decided to hear arguments and decide the matter on these points only.

In the first place it was contended that the evidence was hearsay and therefore inadmissible.

Counsel argued in this respect that the founding affidavit in support of the application was deposed to by the applicant's legal practitioner and not by the applicant himself. According to counsel, the applicant's legal representative does not have personal knowledge of the material facts in question as these happened before he was engaged by the applicant. Therefore, whatever he deposed to is inadmissible hearsay. Counsel argued that if the inadmissible hearsay evidence is struck out nothing would remain to support the purported stay application and the application will have no leg to stand on.

Secondly, it was argued that counsel for the applicant lacks *locus standi* to bring the application.

Counsel for the 1st respondent went on to argue that although the stay application cites accused 1, Raynoldt Windstaan, as the 'Applicant' there is no founding affidavit from him. On this premise, so counsel contends, the applicant's legal practitioner has no *locus standi* to depose to the founding affidavit. Neither does he have personal interest in the substance of the application. He is also not an aggrieved person as envisaged by Article 25(2) of the Namibian Constitution.

Thirdly, the application was said not to amount to irregular proceedings as contemplated in section 317 of the Criminal Procedure Act 51 of 1977 (the Act).

Counsel rightly pointed out that it was conceded that the purported stay application is not in terms of s 317 of the Act as it is not couched as such and it is also not premised on Article 12(1)(b) of the Namibian Constitution. Therefore, in the submission of counsel, it has no legal basis. Counsel argued that on the points in *limine* raised the application should be dismissed.

[6] On the other hand, counsel for the applicant, handed up from the Bar a purported confirmatory affidavit from the applicant. Counsel for the applicant

alleged that it has been a practice in this Court for legal practitioners to depose to affidavits on behalf of their clients.

[7] Concerning the points in *limine* raised, counsel for the applicant argued that in respect of alleged inadmissible hearsay evidence, he does not claim to have personal knowledge of the facts in this case as his affidavit is based on the extract of the case record. He does not claim to have been present when the applicant was arrested.

[8] Regarding the issue of *locus standi*, counsel argued that Article 25(2) of the Namibian Constitution states that anybody with the authority of the aggrieved person can depose to an affidavit on behalf of the applicant unless the applicant had stood up in Court and stated that he did not authorise his legal practitioner to move the application. Counsel argued that in any event the applicant has not only deposed to a confirmatory affidavit, but that in terms of Practice Directions which he did not specify, legal practitioners are permitted to depose to affidavits on behalf of their clients. Although counsel alleged that Article 25(2) of the Namibian Constitution makes the above provisions that is not correct.

Article 25(2) reads as follows:

'Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.'

[9] As to contention of the proceedings are not brought on the basis of being irregular, counsel argued that the application has been necessitated by the fact that during the trial-within-a-trial it came to the knowledge of the applicant's legal practitioner that the applicant was not properly before this Court, he was not

arrested because there was no warning statement in respect of the applicant. Counsel further argued that the application is interlocutory as in his understanding interlocutory means 'in between' two types of proceedings.

[10] It will be recalled that this application is said to have been brought before this Court 'in terms of the general rules of Court' and s 16 of the High Court Act 16 of 1990. Section 16 of the High Court Act under the heading 'Persons over whom and matters in relation to which the High Court has jurisdiction' reads as follows:

'The High Court has jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance and shall in addition to any powers of jurisdiction which may be vested in it by law, have power –

- '(a) to hear and determine appeals from lower courts in Namibia;
- (b) to review the proceedings of all such courts;
- (c) ...
- (d) in its discretion, and at the instance of any interested person, to enquire into and determine any existing future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

Although this application is explicitly brought in terms of s 16 of the High Court Act, I fail to comprehend how counsel can possibly rely on this section as it has nothing to do with applications for the stay of prosecution. Concerning the submission that counsel is relying on the general provisions of the Rules of the Court as well as Practice Directions, this submission is too vague. Surely a legal practitioner worth his or her salt should be able to state the specific rule or practice direction he or she is relying upon rather than making generalised submissions that are of very little value or no assistance to the court.

[11] Rule 65(1) of the Rules of the High Court sets out the requirements of an application as follows:

'Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief...'

[12] Counsel for the 1st Respondent rightly pointed out that the application is premised on inadmissible hearsay evidence as the founding affidavit was deposed to by the legal practitioner. The founding affidavit by the legal practitioner contains some material allegations and contentions that are not within his personal knowledge. In an apparent attempt to deal with the points in limine raised in the 1st respondent's answering affidavit, counsel for the applicant handed up from the Bar a confirmatory affidavit from the applicant. This was deposed to on the date of the hearing while the founding affidavit was deposed to some five months earlier. In my view, this confirmatory affidavit by the applicant does not take the application any further. An applicant must stand or fall by his or her founding papers. *Pinkster Gemeente van Namibia v Navolgers van Christus Kerk van SA and another* 1997 NR 82 (HC) at head note. In any case, the normal sequence of affidavits is that the applicant should have filed the founding affidavit and the legal representative a confirmatory one and not vice versa.

[13] As a general rule hearsay evidence in affidavits in a court application is only permitted in interlocutory or urgent applications and this application is not one of such instances as the relief it seeks is final in effect, namely the permanent stay of proceedings and the discharge of the applicant. *Mahamat v First National Bank of Namibia Ltd* 1995 NR 199 (HC)

[14] Some of the material allegations and contentions made in the founding affidavit amount to inadmissible hearsay evidence. Furthermore, the legal practitioner has no direct or personal interest in the application. A direct or

personal interest has to be shown in the founding affidavit and no such interest has been shown in this application. In the circumstances of this case, the legal representative does not qualify in terms of Article 25(2) of the Namibian Constitution to depose to a founding affidavit as he is not an aggrieved person.

[15] Counsel for the 1st Respondent has raised a third point in *limine*. I do not find it necessary to decide that point as the application can be disposed off by the first two points in *limine* discussed above.

[16] I am not persuaded that the applicant can bring his application in terms of s 16 of the High Court Act. I am also not persuaded that counsel for the applicant has the *locus standi* to depose to the founding affidavit, which in any case contains inadmissible hearsay and the application has failed to comply with the rules of this Court.

[17] In the premises the following order is made:

1. There is no proper application before this Court.
2. The application is therefore struck off the roll.

N N Shivute
Judge

APPEARANCES

APPLICANT: Mr Mbaeva
Instructed by Legal Aid

1ST RESPONDENT: Mr Moyo & Mr Maroneddze
Office of the Prosecutor-General

4TH & 5TH RESPONDENTS: Mr Shipena

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Office of the Attorney-General

6th RESPONDENT:

Mr Kaumbi

Instructed by Legal Aid