



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

CASE NO: CA 60/2014

In the matter between:

THE STATE

APPELLANT

and

MAGNUS NANGOMBE

FIRST RESPONDENT

NICODEMUS MINGELIUS

SECOND RESPONDENT

PHILEMON H. KANIME

THIRD RESPONDENT

Neutral citation: *S v Nangombe* (CA 60/2014)[2017]NAHCMD 330 (21 November 2017)

Coram: LIEBENBERG J and SIBOLEKA J

Heard on: 10 November 2017

Delivered on: 21 November 2017

Flynote: Criminal law – A prima facie case – an overall requirement to put an accused on his defence at the close of the prosecution case was correctly satisfied. The discharge of the three respondents is set aside.

Summary: Regina Mbala, Head Data typist and Nico Mingelius, Chief Systems Administrative were the only two officials in the Electoral Commission capable of printing out voter's rolls. Regina Mbala printed out two blue covered voters' rolls comprising of 1586 voters for Omuthiya which did not include Magnus Nangombe (the first respondent). She gave one copy to Shigwedha to take along to Omuthiya and the other copy she personally handed over to Philemon Kanime, the then Director of Elections (the third respondent). When Mbala later went to Omuthiya for the elections she came across a third yellow covered voters roll comprising of 1587 voters wherein Magnus Nangombe (the first respondent) was included. Mbala rechecked the voters' applications forms for registration at Omuthiya on the strength of which she printed the said two copies. She found that Magnus Nangombe (the first respondent) was indeed not one of the applicants, and was hence correctly not included.

Held: The prosecution witnesses placed a solid prima facie case against the three (accused) respondents at the close of its case which should have disabled the trial Court from granting them a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977.

ORDER

In the result I make the following order:

The discharge of the three (accused) respondents at the close of the State's case in terms of Section 174 of the Criminal Procedure Act 51 of 1977 on 24 January 2014 is set aside.

The three respondents must be subpoenaed to appear before the same Regional Court Magistrate, Katutura, for the continuation of the trial on this matter.

In the event of the said Magistrate's unavailability, the matter to start de novo before another Regional Court Magistrate.

APPEAL JUDGMENT

SIBOLEKA J (LIEBENBERG J concurring):

[1] The three respondents (accused) appeared before the Regional Court Magistrate, Katutura on the following charges:

- a. Count 1 – Forgery (In respect of first and second Respondents).
Alternatively C/s 96(1)(c) as read with s 96(2) of the Electoral Act 1992 (Act 24 of 1992) as amended.
- b. Count 2 – Uttering a forged document. (In respect of first and second Respondents). Alternatively C/s 96(1)(c) as read with s 96(2) of the Electoral Act. 1992 (Act 24 of 1992) as amended.
- c. Count 3 – Fraud. (In respect of all the respondents)

[2] The charges against the respondents, both in the main and in the alternative, arose from events that allegedly occurred during the period which had been gazetted for the registration of voters for the Omuthiya Local Elections and the period shortly thereafter. The State was alleging that the First Respondent (Magnus Nangombe) had failed to register as a voter during the gazetted period. The First Respondent and/or with the assistance of the Second Respondent had subsequently and after the dates of registration had elapsed, forged a registration form number 2004305280 to appear as if he had been registered by one Esther Nangombe (who was an accredited voters registration officer for the Omuthiya Constituency). Thereafter all the accused acting in concert and/or one of them had enrolled the First Respondent on the voters roll on the basis of the forged voters registration form. This was done after the voters roll had already been printed by one Regina Mbala who was the designated official at the Electoral Commission of Namibia to print a voters roll, resulting in the Respondent's producing a third voters' roll which included the name of the

First Respondent.

[3] At the close of the State's case, counsel for the three (accused) respondents successfully applied and secured their discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977. That ruling did not sit well with the prosecution hence the appeal before this Court.

[4] The prosecution evidence is as follows:

[5] Regina Mbala testified that in 2008 she was employed at the Electoral Commission Data Centre as the Chief Data typist. She only came to know the first respondent at the start of the proceedings on this matter in 2008. The second respondent is well known to her, as he was her co-employee at the Electoral Commission, serving as the Systems Administrator. He was the Head of the Electoral Commission Data Centre. His duty was the creation of passwords for all the Data Centre employees which they use during the capturing of data and processing thereof. The second respondent was the overall head of the Voters Roll system itself at the time. Apart from Regina Mbala, the second respondent's capacity as the Systems Administrator also enabled him to print out a voters roll. It was therefore only Regina Mbala and Nico Mingelius, the second respondent, who could perform the function of printing of voters' rolls at the Electoral Data Centre.

[6] The third respondent is also well known to her as he was the Director of the Electoral Commission at the time. As a Data typist Regina Mbala was also in charge of the voters roll printing process. The Data Centre is where all the voters' rolls are compiled after each registration. Regina Mbala receives all the application forms for the registration of voters at the end of the registration exercise. Together with her team she captures all the information thereon and compiles a voters' roll.

[7] On this matter she received all the application forms for the supplementary

registration at Omuthiya. As usual she prepared the voters roll by printing out two copies comprising of 1586 voters. She sent one copy to Omuthiya through the late Shigwedha, and personally handed the second copy to the third respondent in his capacity as the Director of Elections. She later left for Omuthiya and while already there she came across a copy of a yellow voters' roll comprising of 1587 voters. She started to investigate how it came about. Her investigation also included the recounting of all the application forms for the supplementary registration. She found that she had correctly counted the applications and all had been properly accounted for. The first respondent Magnus Nangombe did not have an application form for registration as a voter at Omuthiya. That is why he did not appear on the two voter's rolls she had personally printed out. He only appeared on the yellow voters roll comprising of 1587 voters whose author she did not know.

[8] Mbala further testified that she printed the two copies of the Omuthiya supplementary voter's roll on 8 February 2008 and the other strange copy was printed on 12 February 2008. She confirmed that all three copies were printed out from their own system at the Electoral Data Centre in Windhoek.

[9] Esther Tera Nangombe testified that in 2008 she was at Omuthiya registering/writing out the voter's registration cards for the residents of that place as a registering officer. She was filling in/completing the forms of eligible people there between the 4th to the 8th of February 2008. Her team was operating from a tent next to Engen Service Station inside Omuthiya. According to her, the rules of registration are that she must personally complete the voter's registration form all in capital letters; each letter in its own block, on behalf of the voter. This duty was peremptory as no voter is allowed to fill in the voters registration forms for herself; the voter must be 18 years of age and above; a resident of Omuthiya for the past 12 months. The form had to be allocated with a number by the Clerk completing it. She registered a lot of people but does not remember seeing the first respondent at her registration point. Two voters' forms are used to register

one person, and each must be completed on both sides.

[10] The voters forms that she completed starts with the voters registration number 051 whereas the disputed voters forms she did not complete starts with the number 050. She testified that she did not complete the voters' registration forms exhibit B2 and B4 where the names of the first respondent Magnus Nangombe are appearing, and it is not known who completed the said forms. She stated that although her own names were appearing on the said forms, the signature and the handwriting thereon is not hers at all. The official stamp on the voters forms she had completed on 05 February 2008 differs from the one used on the first respondent's forms. After completion the form is given to the next official dealing with finger printing. From there it goes through the process. Before a voter's form is finally sent to the Electoral Commission of Namibia offices in Windhoek for safekeeping it must have been handled by more than one official. The registration as a voter is a process that goes through the hands of several E.C.N. officials before a voter is finally registered. The voters' forms handled by her team had only the words (Feb) inscribed on them and nothing else. The registration of voters was between the 4th to the 8th of February 2008. It is only the dated that changed but the month (Feb) remained the same right through on all the registration forms.

[11] Esther Nangombe conceded during 'cross-examination' that the appearance of the names of the first respondent on the voters registration roll was indicative of the fact that it was indeed submitted to the Electoral Commission of Namibia officials who registered him. Also conceded was the fact that the first respondent's forms to be a voter were properly completed just like those that this witness herself had personally completed. According to Nangombe all the voters' registration forms she completed had the registration no. 051 whereas the other forms completed by the unknown person has 050 as the registration number. Ruusa Enkungka used a date stamp during the

registering exercise and one form had to be completed on both sides. She recognized some of the forms she had completed such as exhibits B6 and B7 belonging to Michael Tobias and B8 to Etna Bertha. She testified that she did not complete the forms B2 and B4 whereon the first respondent's names (Magnus Nangombe) are appearing. It is not known who completed these forms. The name of the official reflected on Magnus Nangombe's forms are hers, but the handwriting as well as the signature are not hers at all. There is also a difference between the official stamp she personally used on the forms she completed on 5 February 2008 and the one appearing on Magnus Nangombe's forms which were completed on 12 February 2008. The same date of 12 February 2008 appears on the changes leading to the actual printing out of a yellow voters' roll comprising of 1587 voters where the same names were again appearing.

[12] When asked to look at Magnus Nangombe's forms and comment, Esther Nangombe said she had not seen anything wrong with them. She confirmed that all that the first respondent required to do in order to be registered as a voter at Omuthiya is to produce his Identity document; a municipal bill such as a telephone bill; or if these were not there, he should have brought in a person who knew him and who would confirm that indeed he was a resident of Omuthiya for the past 12 months. The date stamp on first respondent's application is 11 July 2008. On the first respondent's voter registration card, exhibits B2 and B4, she said if he had the right to register and he produced the required documents there was nothing that could have prevented him from being registered as a voter at Omuthiya. Regarding the second and third respondents the witness conceded in cross-examination that none of them were at Omuthiya during the registration process. The second respondent was only at Omuthiya after the registration. He only went there on 20 February 2008 during the training process to set up the computers for the election itself, while the third respondent was there on 25 February 2008. She said she does not know a person by the name of Nekwaya.

[13] Maria Ndapewa Iлека testified that she was temporarily employed by The

Electoral Commission at Omuthiya between the 4th to the 8th of February 2008 as a Team Leader operating from a tent next to Engen Service Station at Omuthiya. Under her leadership were Esther Nangombe, Ruusa Enkungka, Helvi Ipinge, Jonas Kamati, Shikongo Salome and another whose name she could not remember. Her duties were to receive and to sign off all election materials. She also had to make sure that those who came for registration had the following requirements: an identity document; electricity/water bill. If these were not there, somebody who knew the voter could act as a representative. After all the voters forms were filled in, it was her duty to physically verify whether all were written into the register forms. She testified that she does not know the first respondent and neither did she see him at Omuthiya during the registration of voters. She was shown the first respondent's voter registration forms. She found that the date stamp on the disputed forms did not have the same logo as the stamp they were using. Their date stamp started with the date followed by the month and last the year. The date stamp on the disputed forms begins with the year, month and ends with the date. According to Ileka all the voter's registration forms which they handled as a team were allocated with a number starting with 051 while the first respondent's forms were allocated the number 050. She stated that the above clearly shows that the first respondent was not registered by her team at Omuthiya. Ileka's team indicated their registration point as "tent next to Engen" or "Tent . Engen". There was no registered voter whose details were not captured in the register.

[14] Theofalls Mujoro testified that he is and was the Director for Operations at the Electoral Commission of Namibia at the time of the incident. He came to know the first respondent at the beginning of this case. He knows the second respondent as the Systems Administrative, in Charge of IT Division, the third respondent he knew as the Director of the Electoral Commission of Namibia. This witness's duties are the establishment of polling stations, or registration points for elections. He had to make sure that there is sufficient quantity of all needed election materials; the appointing of registration and returning officers

and other polling officials. He also oversees the issuing of polling vehicle. He must see to it that all polling stations are up in running and functional. The putting together of a voter's register is not his work. He does not recall being contacted by the second respondent, but such contact cannot be overruled because in the main the IT Department provides the support functions to the operations department he is in charge of. There was however no particular incident where he was called to attend at the request of the second respondent. Mujoro could also not exclude having contacted Van Staden as the officer responsible for the design of the ECN's current system which forms the base upon which the voters' registers are produced and managed. During cross-examination he confirmed that the process of voters' registration is conducted by the ECN officials.

[15] Christophina Kotumbela testified she knows the first respondent for ± 20 years as a friend. Respondents 2 and 3 are her former colleagues at ECN during the time she was appointed as a Returning Officer in the Omuthiya local elections. During the said elections her duties entailed the registration of all forty co-parties participating in the Omuthiya elections; the controlling of voters' rolls as well as the supervision of all registration and election points. She received a call from the late Hiskia asking her to go and fetch the voters' roll books at Ondangwa Nam Courier which she did. She collected one big envelope which she opened in front of a Relief Magistrate in Ondangwa (she could not recall her name). Inside the big envelope were two blue voters' rolls destined to Kotumbela himself. Together with these was another big envelope containing a yellow voters' roll wherein the number of voters were more by one person than those in the blue voters' rolls. Included in the envelope was a T-shirt meant for the Relief Magistrate. Nico Mingelines, the second respondent whose number and voice she knows very well from working together, called Kotumbela asking her whether she has received the voter's rolls, which she confirmed. The second respondent then told her that he will send another updated voters' roll the next day, which he in fact did. This was also a yellow voters' roll similar to the one that was sent to the Relief Magistrate in Ondangwa which had the first respondent's name on.

[16] Kotumbela confirmed the receipt of the updated yellow book to the second respondent. She noticed that the voter's number allocated to the first respondent on the red form does not correspond with the registration number. She kept this copy for herself at the office. She took along the two blue voter's rolls and displayed one at the Police Station to enable all those who participated in the voters' registration to see whether their names are there or not. She kept the other copy for herself.

[17] On the 12th of February 2008, the Co-Ordinator of RDP party's activities during the registration at Omuthiya told Kotumbela that the first respondent did not register because he was hospitalized in Cape Town. Kotumbela reduced the request in writing and faxed it to the third respondent (Director of Elections in Windhoek). However, later in the afternoon of that same day the Co-Ordinator again called Kotumbela asking her that she should not remove the first respondent from the roll because he has registered, and he will provide the VRC number to her the next day which he did. Kotumbela indeed received it accordingly.

[18] Setikien Sekoja Jahanika testified that she was the private secretary to the Director of Elections, the third respondent at the time of the incident. The second respondent was the Chief Systems Administrator. She came to know the first respondent only from beginning of the trial on this matter. The third respondent gave her a yellow voters' roll book to give to the late Shigwedha which she did, but the latter said it did not belong to him. Shigwedha handed the book back to her. Jahanika took the book back to the third respondent and told him what happened. The third respondent told Jahanika to again take the book back to Shigwedha which she again did, and this time she left the book in Shigwedha's office at his table. Jahanika and other officials left for Omuthiya where they were called to a meeting related to the yellow voters' roll. It was during that meeting where the third respondent denied knowledge of the blue voter's roll which

Regina Mbala personally gave to him.

[19] Daniel Dry testified that he is a Detective Chief Inspector, Unit Commander of The Criminal Record Centre in Windhoek. He is a finger print expert at the Criminal Record Centre working with prints for the last 20 years. He attended courses presented by trained fingerprint officers at the scene of Crime Unit in Windhoek. These courses included searching, developing, lifting, identifying of finger, palm and footprints at crime scenes as well as the comparison of fingerprints to determine identity. He testified that he was presented with two voter's cards, exhibits B2 and B4 to determine whether the fingerprints on them belonged to the same person or not. He had to compare the left thumb print on both forms to determine whether they belonged to the same person or not. He first enlarged them and drew a graph for it. He found ten points of similarity, and concluded that the fingerprints on two exhibits belonged to the same person by the name, Magnus Nangombe the first respondent on this matter.

[20] The names Magnus Nangombe were first created on the voter's roll on 27 March 2003 with the help of the username Nekwaya. Nangombe's address was 253 Khomasdal, the Constituency register was 06044, the local authority was 28. According to Paul Ludik the forensic and handwriting expert the changes related to the incorporation of the first respondent's names on the Omuthiya voters' roll were directly done on the ECN server. He testified that he examined the handwriting on the voters' registration form no. 2004305280 which was used as application to register the first respondent as a voter on one hand and the other forms filled in and completed by Esther Nangombe on the other hand. He found that the fingerprint on the voters' registration exhibit forms B2 and B4 belonged to the first respondent.

[21] The trial Court's reasons for a discharge:

1. On the alternative to count 1 the trial Court found that the onus was on the State to prove or at least make out a prima facie case that accused one and two unlawfully, falsely, with intent to defraud, duplicated copies, falsified or fabricated, a voters' registration card or any document purporting to be a voter's card or uttered or was in possession of the above. Only then would it have been required accused one and two to respond or remain silent. The trial Court concluded that there was no evidence.
2. On count 2 the State failed to prove that accused one and two unlawfully, falsely and with intent to defraud, offered, uttered and put off the forged document described in count 1 well knowing it to have been forged. In the understanding of the trial Court there was no case.
3. Alternative count to count 2 the State should have proved that accused one and two wrongfully and unlawfully not being an officer or a Magistrate or other person acting within the course of his duties for purposes of the Electoral Act issued a voter card or destroyed it or manipulated it. The trial Court found that there was no proof or a prima facie case and therefore no case.
4. On count 3 the onus was on the State to prove or at least make out a prima facie case that accused one, two and three wrongfully and falsely with intent to defraud gave out and pretended to the Electoral Commission that accused one was on 6 February 2008 lawfully and properly registered as a voter at Omuthiya to take part in the elections. Further it should have been proved that the three accused should have given out and pretended that the first respondent's name was lawfully registered and included on the voters' roll. There was also no evidence before Court showing that accused one was not entitled to be registered as a voter at Omuthiya. According to the trial Court, up to

the end of the prosecution case, it did not know who forged the first respondent's voter application.

5. The trial Court finally found the three accused not guilty and discharged them on all the three main and alternative counts.

[22] The prima facie case in brief:

Before closing its case on this matter the Prosecution had placed the following undisputed circumstantial evidence before the trial Court:

1. The fingerprints on exhibits B2 and B4 voters' registration forms belonged to the first respondent, Magnus Nangombe.
2. The second respondent was the Systems Administrative; the Head of the Electoral Commission's Data Centre, as well as the overall head of the Voter's roll system itself. His duties entailed the creation of passwords for all Data Centre employees which they used in data capturing and processing. The second respondent's capacity as the Systems Administrative enabled him to print out voters rolls, a function he shared only with Regina Mbala.
3. Maria Ndapewa Iлека was at the same station with Esther Nangombe at the tent that was near the Engen Service Station. She testified to prove the fraudulent nature of the voters' registration form No. 2004305280 which was used for the application to register the first respondent as a voter. The official ECN date stamp allocated to their team started with the date, month written "Feb" in words and ended with the year. Whereas the date stamp that was used to stamp the first respondent's registration forms started with the year, month, and ended with the date, everything was in digits. This evidence was confirmed by the handwriting expert Paul Stephan Ludik.

4. Maria Ndapewa Iлека; Kristophina Ujombala and their team mate Esther Nangombe testified that their team next to the Service Station was allocated with the prefixed digits 051 as their applicant's voter number; whereas the voters' numbers for the first respondent was prefixed with the digits 050. Their team also wrote the word "tent" in reference to a "tent next to Engen Service Station", as their registration point, there was no such a word on the first respondent's forms.
5. After the registration of all voters these details were collected, Regina Mbala left for the ECN Data Centre offices in Windhoek. There she fed the said details into the data base of the Electoral Commission and she generated/printed out two blue covered voters' rolls comprising of 1586 voters whereon the names of the first respondent were not reflected. She personally handed one copy to the third respondent in his capacity as the CEO of the Electoral Commission of Namibia. The absence of the first respondent's names on these blue voter's rolls is confirmed by Kristophona Ujombala who stated that a representative of UPD party for which the first respondent was supposed to contest the Omuthiya election asked her to replace him as their candidate because during the registration period he did not register, he was admitted sick in a Cape Town hospital.
6. According to the evidence of Kristophina Ujombala the late Shigwedha couriered a big envelope to her which she opened in the presence of a Magistrate in Ondangwa. Inside it were two blue covered voters rolls. Another envelope had one yellow covered voter's roll and the Magistrate's T-shirt. She checked and found that the names of the first respondent appeared only in the one yellow covered voter's roll but not in the two blue voters rolls. On that same day the second respondent called her on her cellphone telling her that he will courier her an

updated voters' roll the next day, which was in fact done. This was the second yellow voter's roll also containing the first respondent's names. On whether she knew the second respondent she confirmed saying that she has worked with him for a long time and they had spoken over the phone on several occasions prior to that day. She knew his voice and his cellphone number.

7. On 12 February 2008 many changes were directly made on the server from 16h09 to 16h35. The first respondent's residential address was changed from 253 Khomasdal Windhoek to Omuthiya, and so was his constituency also changed to Omuthiya. All the above changes were done by the user name EC508 and ECN/Administrator who had the right of access to everything. The Administrator was the only person who could physically log on to the server of ECN 0151. The System Administrator is the head of the Data Base with full access to whatever he wants to do. He is the supervisor of everything. The authority to do all the above in the context of the prosecution evidence vests only in the second respondent.
8. On 19 February 2008 the account user name N. Mingelines (the second respondent) changed the voter registration form number from 2000441785 to 2004305280 directly manipulating the database. According to Van Staden, even if the second respondent's user name may be known by others, his password was not known to anyone, making it impossible for another person to manipulate the database, because the second respondent's user name and his password need to be used simultaneously.
9. As the person who administered the administrator account, the second respondent remains to be the one who should have made the fraudulent entries in the server relating to the first respondent's

registration as a voter. Dr. Ludik is the Director of National Forensic Science Institute of Namibia and a fingerprint expert. His investigation entailed going to the Electoral Commission server itself where he found that the yellow covered voters' roll comprising of 1587 voters was directly generated/printed in the server on the 12th of February 2008.

10. During the hearing of arguments on his matter, counsel for the respondents submitted that at the close of the prosecution case there was merely circumstantial evidence upon which more than one inference could legitimately be drawn. According to this counsel that was the reason why the trial Court found it difficult to decline the discharge of the accused (respondents) in terms of section 174 of the Criminal Procedure Act 51 of 1977. It is my considered view that the mere existence of circumstantial evidence pointing to the alleged wrong doing done by the accused automatically disentitles him to a discharge at the close of the prosecution case. This is a prima facie case which requires the trial Court to place the accused on his defence in order for him to furnish answers to the allegations. Even if the circumstantial allegations are disputed during cross-examination, they will not as such be regarded as completely displaced, because the accused is required to repeat what he has placed in dispute in his evidence under oath so that the same can be tested by way of cross-examination.

11. At the close of the prosecution case the trial Court is not entitled to decide whether the requirements for convicting the accused on circumstantial evidence have been satisfied or not because that exercise relates to the credibility of witnesses which should only take place at the end of the trial when both parties have placed their

respective sides of the story before Court. See *S v Nakale*¹.

12. On this matter before Court the crucial question which the trial Court should have asked itself when confronted with an application for a discharge in terms of section 174 is the following:

'If the proceedings were to be halted there and then could a reasonable Court acting carefully have convicted the three (accused) respondents on the evidence placed before it?'

It is crystal clear from the evidence that the trial Court could have convicted all the three (accused) respondents. The reason being that in the absence of the accused's side of the story, the undisputed circumstantial evidence tendered by the prosecution would have become proof of their guilt beyond reasonable doubt.

13. Section 174 of the Criminal Procedure Act 51 of 1977 was endorsed in several matters including *S v Nakale*². It states the following:

"If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty".

14. A prima facie case upon which a reasonable Court acting carefully may have convicted the three respondents on this matter has been established.

[23] When regard is had to the above it is my considered view that the discharge of the three (accused) respondents cannot be allowed to stand.

¹ *S v Nakale and Others* 2006 NR455 at 458B-C.

² *S v Nakale and Others* 2006 NR455 at 456F-G.

In the result I make the following order:

The discharge of the three (accused) respondents at the close of the State's case in terms of section 174 of the Criminal Procedure Act 51 of 1977 on 24 January 2014 is set aside.

The three respondents must be subpoenaed to appear before the Regional Court Magistrate, Katutura, for the continuation of the trial on this matter.

In the event of the said Magistrate's unavailability, the matter to start de novo before another Regional Court Magistrate.

A M SIBOLEKA
Judge

J C LIEBENBERG
Judge

APPEARANCES:

STATE: Mr. E. E. Maronedze
 Office of the Prosecutor-General, Windhoek

RESPONDENTS: Mr. J. A. N. Strydom, Instructed by
 Theunissen, Louw & Partners, Windhoek