REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 11/2010

In the matter between:

THE STATE **APPLICANT**

v

TECKLA NANDJILA LAMECK **FIRST RESPONDENT**
YAN FAN **SECOND RESPONDENT**
JEROBEAM KONGO MOKAXWA **THIRD RESPONDENT**

Neutral citation: *S v Lameck* (CC 11/2010) [2019] NAHCMD 25 (19 February 2019)

Coram: LIEBENBERG, J
Heard: **30 January 2019**
Delivered: **19 February 2019**

Flynote: **Appea**l – Trial-within-a-trial – Admissibility – Notices ('summonses') issued by Director-General for Anti-Corruption Commission

under section 21(5) of the Anti-Corruption Act, 2003 – Court required to make a determination on the applicable section – Court interpreted sections 21(5) and 27 of the Anti-Corruption Act, 2003 – Court ruled five documents relied on by Anti-Corruption commission were to be issued under section 27.

Appeal – Leave to Appeal by State in terms of s 316A of Act 51 of 1977 – State relied on s 26 (c) (d) of the Anti-Corruption Act, 2003 in oral submissions and not notice of appeal – State's reliance on this section at this late stage deprived court of hearing evidence in trial-within-a-trial – Admissibility of the summonses not tested against the provisions set out in this section.

Appeal – Leave to Appeal – Trial-within-a-trial – Admissibility of summonses interlocutory in nature and thus alterable by the court itself – New event crops up – The court's concession that it erred on the facts in respect of the ruling on some of the summonses constitutes a new event – Court may order a second trial-within-a-trial before completion of main trial – Application for leave to appeal refused.

Summary: This is an application by the State in terms of s 316A of the Criminal Procedure Act, 1977 in which leave to appeal is sought against the court's ruling in a trial-within-a-trial concerning the admissibility of five 'summonses' issued by the Director-General of the Anti-Corruption Commission under s 21(5) of the Anti-Corruption Act, 2003 ruling 'summonses' inadmissible. The court subsequent to its ruling conceding that it erred on the facts as regards dates on which some of the 'summonses' were issued and served. The State at no stage prior to the application for leave to appeal relied on the provisions of section 26(c) and (d) of the latter Act.

Held, that, the State's reliance on this section at a late stage deprived the court of hearing evidence or considering any argument for or against counsel's submission during the trial-within-a-trial hearing.

Held, further that, the court's concession together with the late reliance by the State on a section of the Act which had not been argued before the court constituted a new event which may be decided in a further trial-within-a-trial.

ORDER

---

1. The State's application for leave to appeal in terms of s 316A of the Criminal Procedure Act 51 of 1977 is dismissed.
2. The admissibility of Exhibits 'T2 – T5' to be decided in a second trial-within-a-trial.

JUDGMENT

(Application for Leave to Appeal)

LIEBENBERG, J:

[1] This is an application by the State in terms of s 316A of the Criminal Procedure Act, 1977,[1] in which leave is sought to appeal against the court's ruling in a trial-within-a-trial delivered on 24th January 2019 which concerned the admissibility of five documents,[2] generally referred to in the trial as 'summonses' issued by the Director-General (DG) of the Anti-Corruption Commission (the ACC) under s 21(5) of the Anti-Corruption Act, 2003 (the ACA).[3]

[2] From information made available by counsel, these five documents were representative of a large number of similar documents drawn and acted upon in the same way by the ACC, or obtained during an investigation instituted against the three respondents. To this end it is clear that, whatever the conclusion reached by the court is on the admissibility or otherwise of the

---

[1] Act No 51 of 1977.
[2] Exhibits 'T1 – T5'.
[3] Act No 8 of 2003.

documents ('summonses') under consideration, it is likely to have a significant impact on the manner the State will present its case.

[3] In essence, in the trial-within-a-trial the court was called upon to decide the following objections raised by the defence:

(a) Whether the issuing of 'summonses'[4] in terms of s 21(5) satisfied the requirements of the law; and
(b) Whether the summonses should not have been issued in terms of s 27 for which the investigating officer, Mr Lloyd, had to be authorised in writing by the DG to obtain the required information and documents from the three banking institutions as provided for in the section.
(c) That the summonses were issued in a manner inconsistent with the doctrine of legality and do not comply with the requirements of intelligibility.

[4] The State led the evidence of the DG, Mr Noa, and the investigating officer, Mr Lloyd whose evidence is summarised in the court's ruling and need not be repeated, suffice it to say that on the strength of Mr Noa's evidence, the investigation started after the Chief: Investigation and Prosecution of the ACC, Mr Becker, had deposed to and filed his affidavit in the afternoon of 11th June 2009. Furthermore evident from his testimony is that, for purposes of the issuing of the summonses under consideration, he solely acted on authority given to him in terms of s 21(5) of the ACA, which he considered to be 'all embracing'.

[5] Mr Lloyd elaborated on the issuing and serving of the summonses and confirmed that the first summons (Exhibit 'T-1') was served on Bank Windhoek in the morning of 11th June 2009. I pause to observe that I

[4] Though s 21(5) provides that the DG may 'summon' any person to appear before him, no format or process is prescribed in the Act as to how the person's presence must be secured. The documents used in this instance are styled 'SUMMONS ISSUED IN TERMS OF SECTION 21(5) READ WITH SECTION 26 OF THE ANTI-CORRUPTION ACT, 2003 (ACT NO.8 OF 2003).

understood from his evidence that all five summonses were issued and served on the same day. This likely came about by the use of the word 'summonses' (plural) by counsel when leading evidence. From the court record it is however clear that Mr Lloyd only referred to the one summons served on Bank Windhoek on the 11th of June 2009. Unfortunately, the court record was not available when preparing the judgment in the trial-within-a-trial.

[6] However, after the court ruled on the matter it was brought to my attention that it was only Exhibit 'T1' that was issued and served on that day, while the other summonses, Exhibits 'T2 – T5', were issued and served on later dates. Upon realising that there was an error of fact on my part as regards the dates and which clearly had an effect on the court ruling, I acknowledged this to counsel in chambers. I did however maintain my position that under s 27 the three summonses served on the banks remained inadmissible, for reasons set out in paras 24 – 27 of the judgment. It is against this backdrop that the State lodged the application for leave to appeal against the ruling.

[7] Three grounds enumerated in the notice of appeal concern the court's interpretation of ss 21(5) and 27, while the fourth ground relates to the dates of issuing of Exhibits 'T2 – T5'.

[8] Evident from the notice is that the State does not challenge the court's finding that the issuing of Exhibit 'T1' in respect of Bank Windhoek was invalid, rendering evidence emanating therefrom unlawfully obtained and thus inadmissible.

[9] Mr *Lisulo,* counsel for the State, during his oral submissions changed course as far as the State earlier relied solely on the provisions of s 21(5) as authority for the issuing of the summonses, having only now drawn the court's attention to the heading of the document where it reads that the section must be read with s 26 of the Act.[5] Though correct, this came as a total surprise to

[5] See *fn* 4 supra.

the court as at no stage prior to the present application for leave to appeal was any mention made of the section. He now argues that the ACC was entitled to issue summonses to banking institutions in order to obtain statements and other information under s 26 (c) and (d).

[10] The State's reliance on this section at this late stage deprived the court of hearing evidence or considering any argument for or against counsel's submission during the trial-within-a-trial hearing. At no stage during the evidence of Mr Noa, not even when specifically asked on what authority he acted, did he say that he relied on the provisions of s 26(c) and (d) when issuing any of the summonses. On the contrary, the witness was adamant that s 21(5) was the 'all embracing' section on which he relied. Looking at the body of the summons, there is further nothing showing that reference was made to the provisions set out in s 26. On the contrary, the penalty clause inserted in the summons refers to s 21(5) and not as provided for in s 26 of the Act. A person who is summoned to appear before the D-G in terms of s 21(5) and fails to comply with the provisions set out in s 29(1)*(f)*(i) and (ii) is liable to a fine not exceeding N$100 000.[6] In turn, s 26(3) reads that a person who unreasonably fails to comply with the requirements of a notice issued under s 26 is liable to a fine not exceeding N$50 000. This clearly shows that, despite reference being made to s 26 in the heading of the document, the ACC did not rely on this section when issuing the summonses. It chose to rely on s 21(5) throughout and to rely on it now for purposes of this application, clearly came as an afterthought; probably when realising that s 21(5) did not provide the necessary authorisation; at least as far as it concerned statements of accounts held at the respective banks.

[11] For purposes of the ruling on the admissibility of the summonses, the court was not specifically called upon to interpret the provisions of s 26 and therefore only focussed on ss 21(5) and 27, on which the ruling is founded. From a reading of s 26 it would appear that s 26(c) and (d) provides the necessary power to the DG to obtain information '*by notice in writing'* from the

[6] Section 29(3).

manager of a bank and other financial institution. The relevant part of s 26(1) reads:

'**26 Power to obtain information concerning assets**

(1) If, in the course of an investigation into an alleged corrupt practice, the Director-General is satisfied that it could assist or expedite the investigation, the Director-General may, by notice in writing, require-

(a) ….

(b) ….

(c) any person to furnish, notwithstanding the provisions of any other law to the contrary, any information in that person's possession relating to the affairs of any suspected person and to produce any document or certified true copy of any document relating to such suspected person which is in the possession or under the control of the person required to furnish the information;

(d) the manager or other person in charge of any bank, building society or other financial institution, in addition to furnishing any information specified in paragraph (c), to furnish any information or the originals, or certified true copies of the accounts or the statements of account at the bank, building society or financial institution of any suspected person notwithstanding the provisions of any other law to the contrary.'

[12] After familiarising myself with the provisions of s 26(c) and (d), it appears to me that the admissibility of the summonses under consideration should have been tested against the provisions set out in this section. To this end the court agreed with Mr *Namandje's* and (regrettably) utilised s 27 for that purpose, while s 27 seems to authorise the requiring of (physical) access to a bank account. This clearly exceeds the acquisition of copies of accounts or statements of accounts at the bank under s 26(d) of the Act. Had the court's attention timeously been drawn to the provisions of s 26, the interpretation given to s 27 would obviously have been different. On the present facts, s 27 does not appear to me to find application.

[13] The court in *Kauesa v Minister of Home Affairs and Other*[7] stated that judicial officers should not rely for their decisions on matters not put before

[7] 1995 NR 175 (Nm Sc).

them by litigants either in evidence, or in oral submissions. Though stated in the context of civil litigation the court's finding, in my view, equally finds application in criminal proceedings. The following is stated at 183E-G:

'It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and to invite them to submit arguments either for or against the Judge's point. It is undesirable for a Court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel.'

[14] Mindful of the court's ruling made in the trial-within-a-trial being interlocutory and thus alterable by the court itself, it was submitted by Mr *Lisulo* that the ruling on admissibility was final and that no evidence could be led by the State to change that. Whether that holds true is difficult to tell at this stage, but what is clear is that the five documents are representative of several similar documents acquired during the investigation of a corruption complaint, the admissibility of which being challenged mainly because the ACC allegedly exceeded its powers during the investigation, or that the requirements of the relevant sections governing such powers, have not been met. It would however appear to me that the admissibility or otherwise of these documents, already at an early stage of the trial, is crucial to the State case in order to decide how to approach and prove its case, and which documents may be relied on for that purpose.

[15] It is permissible for the court to reconsider its trial-within-a-trial finding at the end of the main trial and come to a different conclusion on the admissibility of evidence.[8] Generally this would concern the admissibility of statements, confessions or a pointing out made by an accused. In my view the present case is distinguishable from these cases in that the State case seems to hinge on a large number of contested documents and not only on

[8] *S v Malumo and Others* 2010(2) NR 595 (SC).

those placed before court for purposes of the trial-within-a-trial. Also the concession made by the court and the State having moved the goal post.

[16] In the present instance the challenge is based on the interpretation by the court of specific sections of the ACA, determining the admissibility of the impugned documents. I earlier alluded to the fact that the State at no stage prior to this application relied on s 26 (except for referring to it in the heading of the 'summonses'); neither is it stated as a ground of appeal in the application for leave to appeal. In light of the court's concession that it erred on the facts as regards Exhibits 'T2 – T5' when ruling same inadmissible; and the court not previously required to consider the applicability of s 26(c) and (d), I am unable to see how another court would come to a different conclusion.

[17] In the authoritative work of *Hiemstra's Criminal Procedure* at 24-61 the learned author comments that 'If something new crops up after the completion of the trial-within-a-trial (which is unlikely) the court could possibly be entitled to order a second trial-within-a-trial'. In *S v Ramgobin and Others*[9] it is stated at 178G-I:

'It may be argued that, once a trial within a trial has been held in respect of a statement, it is not competent to hold a further trial within a trial relating to the same statement at a later stage. All that happens is, that the Judge, at the end of the trial, on the totality of the evidence led at the trial can, if he considers it appropriate, reverse his earlier decision. That was the view taken in *S v Steyn en Andere* 1981 (3) SA 1050 (C). The correctness of this view was doubted in *S v Leepile and Others (2)* 1986 (2) SA 346 (W) at 350H - J. In my view, however, the Court would not permit a matter which had been fully canvassed before it to be recanvassed immediately after it had made an interlocutory order, particularly where the evidence tendered in respect of such a recanvassing was tendered by the party on whom the onus lay. It would be a different matter where further evidence came to light during the course of either party's advancing his case by evidence which that party was entitled, as of right, to lead.'

(Emphasis provided)

[9] 1986 (4) SA 117 (N).

[18] The court as per Ackermann J in *S v Leepile and Others (2)* (supra) stated the following with reference to the *Steyn* case at 350I-J:

'I must say that I have some difficulty in seeing why notionally it is not proper to hold a second trial within a trial. Nevertheless, assuming the correctness of this judgment, I do not think that such a conclusion on procedure, as was made in the judgment, is helpful in determining the matter presently to be decided.'
(Emphasis provided)

[19] I find the principles set out above persuasive and when applied to the present case, I am satisfied that:

(a) The court's ruling on the admissibility of Exhibit 'T1', even though made interlocutory, has a final and definitive effect and is *res judicata* and cannot be corrected or altered. The court's finding in this regard did not come under attack in the State's application for leave to appeal.
(b) The court's concession that it erred on the facts in respect of the ruling on Exhibits 'T2 – T5' can be construed as something new that emerged after the completion of the trial-within-a-trial which essentially 'reset' the issue for determination as the admissibility of these exhibits remains undecided.
(c) The State belatedly argued that the admissibility of the impugned documents falls to be decided on the interpretation of s 26(c) and (d), and not s 27 which the court was called upon by the defence to interpret and apply to the present facts. The application of s 26 has not yet been considered or ruled on.
(d) Had the court's attention earlier been drawn to the provisions of s 26 during the trial-within-a-trial, its interpretation of s 27 would in all likelihood have been different.
(e) Because of the course taken by the court when finding the impugned documents inadmissible on another basis, the objection

> as to whether it satisfied the requirements of legality and intelligibility was not decided.[10]

[20] In view of the above, it is my considered opinion that it would be premature to refer the matter for appeal to the Supreme Court if the question of admissibility of the impugned documents can still be decided in a second trial-within-a-trial. Mindful of not compartmentalising the trial into multiple subdivisions, I deem this an instance where the final decision on admissibility should not stand over until the end of the case.

[21] In the result, it is ordered that:

1. The State's application for leave to appeal in terms of s 316A of the Criminal Procedure Act 51 of 1977 is dismissed.
2. The admissibility of Exhibits 'T2 – T5' to be decided in a second trial-within-a-trial.

_____

JC LIEBENBERG

JUDGE

APPEARANCES:

[10] See par 32 of judgment.

STATE	D Lisulo (assisted by C Moyo) Of the Office of the Prosecutor-General, Windhoek.
ACCUSED NO 1 – 3	S Namandje Sisa Namandje & Co, Windhoek.