REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 11/2010

In the matter between:

THE STATE

and

TECKLA NANDJILA LAMECK	**ACCUSED NO 1**
YANG FAN	**ACCUSED NO 2**
JEROBEAM KONGO MOKAXWA	**ACCUSED NO 3**

Neutral citation: *S v Lameck* (CC 11/2010) [2018] NAHCMD 333 (09 September 2019)

Coram: LIEBENBERG, J.
Heard: 04 – 05 September 2019.
Delivered: 09 September 2019

ORDER

The application by the state for a postponement of proceedings is refused.

JUDGMENT

Ruling

LIEBENBERG J:

Introduction

[1] In order to place the state's application to have proceedings adjourned at this stage in context, it seems necessary to briefly give some background of the matter in which the accused persons are before this court.

[2] The accused were brought before the High Court, then differently constituted, as far back as 2009 and progressed up to the stage where the presiding judge was compelled to recuse himself from the proceedings. This led to the matter having to start *de novo* before this court with proceedings commencing on the 14th of May 2018. The charges preferred against the accused are set out in the indictment containing 18 counts (and alternatives thereto) ranging from fraud; contraventions under the Immigration Control Act, 1993; contraventions under the Prevention of Organised Crime Act, 2004; contraventions under the Anti-Corruption Act, 2003; contraventions under the Close Corporations Act, 1988; and contraventions under the Valued Added tax Act, 2000. The accused pleaded not guilty on all counts.

[3] Whilst several state witnesses have already testified in the main trial, stages were reached in the trial where the admissibility of evidence were challenged and which were decided in three separate inner-trials (trial-within-a-trial) and one application for leave to appeal by the state against one of the rulings. There is no need to discuss the nature or outcome of these inner-trials for purposes of this application. Due to a congested court roll, continued trial dates were arranged well in advance before the matter is set down for hearing. Unfortunately some of these dates were utilised for the inner-trial in January 2019 (delivered on 24 January 2019), followed by the application for leave to appeal delivered on 19 February 2019 and the second inner-trial delivered on 22 August 2019. It must be noted that the latter inner-trials exclusively relates to evidence obtained from three banking institutions, the service provider MTC and the Ministry of Home Affairs and Immigration.

[4] As per the court order of 30 January 2019 the matter was set down for continuation of trial for the periods 22 – 26 July and 02 – 13 September 2019. Due to the intermittent interruption in the main trial by inner-trials, the court throughout made it clear to counsel that irrespective of the outcome of the inner-trials, the parties should come to court prepared to proceed with the main trial. As from 02 – 04 September the state continued leading the evidence of five more witnesses and then intimated to the court that it would bring an application to have proceedings adjourned. The defence opposed the application.

Application by the state for postponement

[5] Mr *Lisulo,* for the state, identified (what could be divided into three categories) those witnesses whose attendance the state sought to secure through different means, to wit, five local witnesses who were subpoenaed for court but who were not in attendance; four Chinese nationals living outside the borders of Namibia; the former State President; and a Namibian official currently doing duty in Cuba.

[6] As for the five witnesses who were subpoenaed but not in attendance, the state sought warrants of arrest which were granted on the basis of the returns of service filed showing that they were personally served. The court was subsequently informed that some of the witnesses eventually turned up at court later.

[7] I pause here to observe that in order for a subpoena to be valid, it must satisfy the requirements of rule 114(7) of the Rules of the High Court of Namibia which makes plain that the chief clerk to the Prosecutor-General '*must* sue *out of the office of the registrar any subpoena or process for procuring the attendance of a person before the court to give evidence in a criminal case …'.* As will be shown below, this process was not followed in all instances where documents purporting to be subpoenas issued by court were relied on by the office of the Prosecutor-General to secure the attendance of witnesses.

[8] This would in particular apply to subpoenas forwarded to Mr Zambwe in the Ministry of Justice: Division Legal Services with the request to facilitate the presence of four Chinese nationals living in the Peoples Republic of China. In fact, the copies of subpoenas forwarded bear no stamp at all, rendering it invalid. Notwithstanding, according to the witness this was the practice between the office of the Prosecutor-General and the Ministry of Justice. This practice is a dangerous one and should immediately be stopped as it is likely to create situations where the state could be held liable for damages suffered as a result of court process irregularly used and acted upon detrimental to others. Be that as it may, the purported subpoenas relied on by the Ministry of Justice in preparing the request is further flawed in that section 328 of the Criminal Procedure Act, 1977 makes plain that *'Any warrant, subpoena, summons or other process relating to any criminal matter shall be*

of force throughout the Republic and may be executed anywhere within the Republic.' (Emphasis provided)

[9] The requests by the Prosecutor-General on 21 August 2018 and again on 21 February 2019 to have the attached subpoenas served on foreign witnesses were for the foregoing reasons, thus irregular and of no consequence. This notwithstanding, the Ministry of Justice through the involvement of Mr Zambwe had the request translated and prepared as required for countries in which the English language is not accepted for official purposes. Although the witnesses were required to be in Namibia for court during the period 16 January – 02 February 2019, this was changed subsequently (21 February 2019) to 02 – 13 September 2019. According to Mr Zambwe the translated version of the request and accompanying subpoenas were obtained in May 2019.

[10] Mindful of the burdensome process of following prescribed diplomatic channels, Mr Zambwe on the 11th of January 2019 took the initiative to approach Mr Jan Wessels[1] by email with the request to informally assist in transmitting the request to his client (Nuctech) to secure their attendance at court for the session of 16 January – 02 February 2019. It is common cause that the four Chinese nationals were either directors or employees of Nuctech during the relevant period. Though no formal reply by Mr Wessels was handed up, the Prosecutor-General, according to the testimony of Mr Zambwe, tried to engage the resident Ambassador for China with a request to trace these witnesses. The reason for this was that the witnesses were no longer employed by or attached to Nuctech and their forwarding addresses were unknown. The only contact details the state had of these witnesses were their work address at Nuctech.

[1] Mr Wessels is a practicing legal practitioner doing a watching brief for Nuctech.

[11] In addition Mr Zambwe on the 11th of January 2019 sent two emails directly to two of the Chinese nationals (Mr Li Huayu and Mr Wang Liming) to the Nuctech address, requesting them to attend court as witnesses in the present case. To date, he received no response to the request directly made to the witnesses. With regards to the alleged attempts made by the Prosecutor-General to get the resident embassy engaged, there is nothing on record showing that they even responded to, or followed up on the request.

[12] During oral submissions Mr *Lisulo* submitted that the office of the Prosecutor-General throughout remained active in following up with the local embassy on progress made with the request and referred the court to a letter (undated and unsigned) in which the assistance of the Embassy of the People's Republic of China is sought in securing the attendance of the four witnesses. Bearing in mind that this was for purposes of the trial period from 16 January – 02 February 2019, this letter was likely drafted already in 2018 and not as a follow-up by the Prosecutor-General on the diplomatic route engaged in only in May 2019, as submitted by state counsel. In paragraph 5 of the letter is stated that (already back then) the state has learned through Mr Wessels that '*the stated witnesses were no longer employed by Nuctech and their respective addresses residential or business is unknown. The last known contact was via email'.*

[13] Mr Gerhard Theron is a Director in the Legal Directorate of the Ministry of Internal relations and Co-operation and his testimony mainly deals with the request received from the Ministry of Justice which was delivered to the resident Chinese Embassy in May 2019. To date there was no response and up to the stage of his testimony, he had received no request from either the Ministry of Justice or the office of the Prosecutor-General to follow up on the request. It was only on the previous day (4th) that he spoke to a Mr Zu from the Embassy who promised to get a response, though the status of the request remains unknown.

[14] According to Mr *Lisulo* there were several correspondence between the Prosecutor-General and the contact person at the Chinese Embassy trying to implore the Ambassador that their diplomatic mission must assist in securing the attendance of the Chinese nationals. As to whether any replies were received on these letters, counsel was unable to establish any for reasons that the file in their office could not be found.

[15] It is trite that there is no international agreement between the People's Republic of China and Namibia regarding the exchange of witnesses in criminal court cases. Mention was made of a process of 'mutual legal assistance' (MLA) where a request is made in the hope of getting assistance from the requested country. The need for an international instrument or agreement to cater for a situation as the present, is borne out by the wrong procedure currently adopted by the Ministry of Justice as provided for in section 7 of the Foreign Court Evidence Act 2 of 1995. Under this section the attendance of witnesses can be arranged as provided for in the section but only in respect of a country mentioned in the Second Schedule of the Act, with the Republic of South Africa being the only country so listed. It was accordingly wrong and misleading for the Ministry of Justice to inform the Ministry of International Relations and Co-operation in para 6 of its letter dated 14 may 2019 that the subpoenas have been issued in accordance with section 7 of the Foreign Court Evidence Act, 1995 for service in the People's Republic of China.

[16] From the afore-stated it is evident that there is no international agreement or formal arrangements in place on which the state could remotely rely in securing the attendance of witnesses being Chinese nationals during these proceedings. There are no guarantees and giving the lack of interest shown by the foreign country on whose assistance is drawn, there is simply

nothing to go on when looking at the prospects of success in obtaining the attendance of the four Chinese nationals as witnesses in this trial.

[17] Against this background, it further boggles the mind why the office of the Prosecutor-General would insist in getting subpoenas served on four Chinese nationals whose current whereabouts has been unknown since 2018. Armed with reliable information from the employer company that the proposed witnesses were no longer in their employ and emails directly sent to two of the persons remaining unanswered, and any further address of these persons being to date unknown, the prospects of having subpoenas serves on these witnesses, at this stage, appears to be non-existent. Mr Zambwe's suggestion that the Chinese authority could hand over the search of the witnesses to Interpol is respectfully misplaced. These are witnesses and not fugitive criminals.

[18] I am accordingly satisfied that there are no prospects of success to have the intended subpoenas served on the four Chinese nationals, or securing their attendance in court as witnesses in the foreseeable future. This basis relied on by the state in support of its application for a postponement of the trial is accordingly found to be unmeritorious.

The former State President

[19] On the 6th of December 2018 the Prosecutor-General directed a letter (Exhibit 'Z') to the Attorney-General in connection with the approaching court session from the 16th January to the 2nd February 2019, during which the attendance of the esteemed witnesses mentioned were required at court. These were his Excellency Hifikepunye Pohamba, the former President; Right Honourable Prime Minister, Sara Kuugongelwa-Amadhila; Honourable Tjekero Tweya, Minister of Trade and SME Development; and Honourable Dr

George Simataa, Secretary to Cabinet. In para 5 of the letter it is stated that the purpose of the letter was to inform the esteemed listed witnesses of the 'impeding subpoenas' to be served on them by members of the Anti-Corruption Commission. The Attorney-General's office was further implored to facilitate for consultative meetings with each of the witnesses at their convenient times and the prosecutors. There is no proof that these subpoenas were ever issued or served on the esteemed witnesses as envisaged for any of the court sessions.

[20] As far as this application is concerned, Mr *Lisulo* made the state's intention known to only call his Excellency, former President Pohamba and none of the other esteemed witnesses listed. He (informally) placed on record that a person by the name of Nangombe had been identified as the liaise person who at that stage informed him that at least two months' notice should be given due to the former President's other engagements. According to Mr *Lisulo* notice was orally given around March and a subpoena issued for the court session of 22 – 26 July 2019. Unfortunately the July session was utilised for another inner-trial and upon enquiry whether the court will sit, Mr *Lisulo* explained about the inner-trial that were to take place and would confirm after delivery of the judgment. The inner-trial was heard on 22 – 23 July and the ruling delivered on the 22nd of August 2019.

[21] Upon a question of the court as to what was done to secure the attendance of the former President during the current session, Mr *Lisulo* conceded that he had not again established contact with Nangombe to make enquiries as to the President's availability. Mr Nangombe was not called to explain whether or not it would have been possible for the former President to attend court during any day of the current session.

[22] What seems incomprehensible is why Mr *Lisulo* deemed it necessary to wait until the outcome of the inner-trial *before* he would initiate contact between him and Mr Nangombe (which to date has not happened) if there is nothing remotely suggesting any connection between the evidence the former President were to give and the admissibility of documents decided in the inner-trial. The necessary arrangements could have been made already in July, prior to the court's ruling which would have satisfied the warning period of two months. As the matter stands, absolute nothing on the part of the prosecution was done to even attempt to secure the presence of the former President for this session. It is against this background that a postponement of the trial is sought.

[23] As for the other esteemed witnesses, no explanation was advanced that the state still intends calling them as witnesses. Their availability or otherwise is therefore not a consideration for purposes of deciding the application.

Witness Hendrik Goagoseb

[24] During the testimony of the current investigating officer, Ms Justine Kanyangela, she related to a witness by the name of Samuel Hendrik Goagoseb who was subpoenaed as a witness. After registering the subpoena at the office of the Anti-Corruption Commission, she handed it to Sergeant Shipena who were to serve it on the witness. She does not know what happened to it thereafter; neither was it placed on record when this was done and for which day(s) was the subpoena valid.

[25] Mr *Lisulo* informed the court that this gentleman was the former Permanent Secretary at the Ministry of Home Affairs but, in the meantime, was deployed to Namibia's Diplomatic Mission in Cuba. In view of no

evidence having been led about possible attempts made through the relevant ministry to secure the attendance of this witness during this session, the court posed the question whether any process had been set in motion to achieve this. Mr *Lisulo* responded saying that he only learned about the witness's unavailability when the return of service was returned to the state in July 2019 where after nothing was done in that regard except for learning that a request should be processed through the Ministry of International Relations and Co-operation. Surprisingly, Mr *Lisulo* responded that the investigating officer had not yet set in motion this process, whilst this initiative was supposed to have come from the office of the Prosecutor-General, not an officer of the Anti-Corruption Commission. Failure to do so seems to hint at remissness on the part of the prosecution.

The law

[26] As stated in *S v Acheson*[2] (at 8B-C) an adjournment of a criminal trial is not to be had for the asking and must be motivated on grounds that it would be necessary or expedient to do so (s 168 of the Criminal Procedure Act, 1977). The court is required to exercise its discretion, regard being had to all the circumstances of the case. This discretion is mainly guided by two principles namely, (a) that it is in the interest of society that guilty men should not escape conviction by reason of oversight or mistakes that can be remedied; and (b) that an accused person who is deemed innocent is entitled to be tried with expedition.

[27] The court, when considering an application of this nature would ordinarily wish to satisfy itself firstly, that the witnesses the state in this instance seeks to call are material witnesses; secondly, is there a reasonable expectation that the attendance of such witnesses will be procured on the adjourned date?

[2] 1991 NR 1 (HC).

[28] During this session where the matter was set down for hearing over a period of 14 days, the state already on the third day brought the application for postponement on grounds that state witnesses are not available. Prior thereto there has been no indication by the state on any of the mutually agreed dates of set down that it is in the process of securing the attendance of witnesses outside the country, or that a warning period was required for some witnesses to avail themselves. Throughout the trial and mainly due to the number of inner-trials the court had to rule on, the court constantly alerted the parties to be ready to proceed with the main trial without delay. Both parties undertook to adhere thereto. The state's request three days into the current session therefore came as a surprise to all.

[29] As shown above, the remissness on the part of the state in securing the attendance of its witnesses is gross and weighs heavily against its *bona fides* when bringing this application for postponement. Except for the haphazard way it went about by not satisfying the basic requirements of issuing subpoenas to the esteemed witnesses it intends calling, it simply failed when bringing the application to inform the court why their evidence was material to the charges brought against the accused persons. Besides forewarning them by letter from the Prosecutor-General that their attendance is sought, no steps were taken to secure such attendance. At least, no evidence to that effect had been adduced.

[30] As for the foreign witnesses, in light of all the information placed before court and the time lapse since a request was made with the Embassy of the People's Republic of China to assist in securing the attendance of four witnesses the state intends calling, and without receiving any feedback, it is evident that there are no prospects of getting these witnesses to court in the near future. To pursue the avenues followed by the state seems to me an exercise in futility.

[31] As for the witness Goagoseb, there is no basis for this court to positively consider a further postponement as nothing has been done to secure his attendance at court during this session. For the state to submit that the duty to do so lies with the investigating officer, is a dereliction of the prosecution's duty to secure the attendance of its witnesses, a process in which the investigating officer could only be instrumental by assisting.

[32] When looking at the legitimate and reasonable needs and concerns of the accused persons, it is compelling to take into account that this matter is on this court's roll for several years, but even more compelling, is the fact that accused no 2, a Chinese national, is forced to remain in Namibia since 2009 because of bail conditions. He is obviously without income and it is not known how he makes a livelihood. Any delay in bringing the trial to finality would impact severely on his personal circumstances, a factor weighing heavily with the court in considering the application.

[33] The court is furthermore alive to the seriousness of the charges faced by the accused persons and that the public has an interest in the matter.

Conclusion

[34] When applying the afore-stated principles to the present circumstances, I have given due consideration to the basis for bringing the application, considered against all the circumstances of the case and has come to the conclusion that it would not be advantageous, proper or suitable to adjourn the proceedings for the reasons given. To grant the application for postponement of proceedings at this stage of the trial, would not be in the interest of the administration of justice and is accordingly refused.

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JC LIEBENBERG

JUDGE

APPEARANCES:

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.