

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2020/00080

In the matter between:

MATHEW SIMON

APPLICANT

and

THE PROSECUTOR-GENERAL OF NAMIBIA

1ST RESPONDENT

THE CHAIRPERSON OF THE

MAGISTRATES' COMMISSION OF NAMIBIA

2ND RESPONDENT

THE INSPECTOR-GENERAL OF NAMIBIA

3RD RESPONDENT

Neutral citation: *Simon v The Prosecutor-General of Namibia* (HC-MD-CIV-MOT-GEN-2020/00080) [2020] NAHCMD 221 (12 June 2020)

Coram: SIBEYA AJ

Heard: 27 May 2020

Delivered: 12 June 2020

Reasons: 6 July 2020

Flynote: Applications – Urgency – Requirements prescribed by rule 73(4) of the rules of court – Applicant should explicitly set out the circumstances justifying urgency as well as reasons why he cannot be afforded substantial redress in due course – The hearing of the urgent application was impeded by Covid 19 Regulations which made it impossible for applicant to be visited in order to prepare

and file a replying affidavit – The procedure to be followed in applications where there are disputes of facts revisited – Confirmatory affidavit not challenged resulting in the confirming portions of the answering affidavit – Court records are necessary for justice to be attained – Parties and counsels should be collegial to one another – The Magistrates Commission did not explain its failure to appoint a magistrate – Accused in custody to be brought to court for trial without fail – No order as to costs ordered.

Summary: The applicant set in motion these proceedings to be heard on an urgent basis. The applicant sought a declarator that his constitutional rights provided for in article 12(1)(d) of the Namibian Constitution were violated, as his criminal trial did not commence within a reasonable time. The applicant further sought an order for a permanent stay of prosecution and his immediate release from custody, alternatively, to be released pending his prosecution. The hearing of the application was impeded by the promulgation of the Covid 19 Regulations which made it impossible for inmates to be consulted by outsiders. The application is opposed.

Held that, the procedure applicable to motion proceedings where factual disputes exist revisited. *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-5 applied.

Held further that, failure to challenge a confirmatory affidavit renders the impugned portions of the attacked affidavit, which are confirmed, not to be inadmissible hearsay evidence. The application to strike lacks merit.

Held further that, Where the applicant does not waive the filing of the record, court records becomes key in resolving disputes. Records aide courts in adjudicating matters in order to attain justice.

Held further that, parties and counsels in court proceedings, should be collegial to each other for the honour of our profession. The use of derogatory language may therefore, attract sanctions in punitive costs.

Held further that, the Magistrates Commission offered no explanation for failure to appoint a trial magistrate, notwithstanding same contributing to the delay in the commencement of the trial.

Held further that, Government functionaries should ensure that accused persons who are in custody are brought to court whenever required to speed up their trial.

Held further that, in the exercise of discretion, and in rebuking the conduct of all respondents, costs are not to follow the cause. There is no order as to costs.

ORDER

1. The application to strike out is refused.
 2. The applicant's main application is dismissed.
 3. There is no order as to costs.
 4. The matter is removed from the roll and is regarded as finalised.
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JUDGMENT

SIBEYA AJ:

[1] This application was filed with the court on 13 March 2020 to be heard on an urgent basis on 19 March 2020. At the hearing, the respondents were not in attendance and the court expressed concern with the manner in which the respondents were served with the application. The papers directed at the respondents were all served on the Office of the Government Attorney. On 19 March 2020, the court ordered the applicant to serve the entire application directly on the respective respondents and postponed the hearing to 26 March 2020.

[2] In the interim, the applicant served the application on the respondents as directed. All the respondents opposed the application but only the 1st respondent filed an answering affidavit.

[3] The applicant did not file his replying affidavit in time for hearing on 26 March 2020. The applicant is an inmate at Oshakati police station awaiting trial. With the declaration of the lockdown as a precautionary measure to curb the spread of

COVID 19, outside persons were prohibited from visiting inmates. Consequently, the applicant, due to no fault on his part, could only file his replying affidavit after the lockdown was lifted. The application was therefore heard on 27 May 2020. On 12 June 2020, an order in the following terms was delivered:

- 3.1 The application to strike out is refused.
- 3.2 The applicant's main application is dismissed.
- 3.3 There is no order as to costs.
- 3.4 The matter is removed from the roll and regarded as finalized.

[4] What follows hereunder are the reasons for the order delivered by the court on 12 June 2020.

[5] The applicant sought the following relief:

'1 Condoning the applicant's non-compliance with the Rules of this Court pertaining to time periods and service of the application, as well as giving notice to parties, as contemplated in terms of Rule 73 of the Rules of this Court; and directing the application to be heard on an urgent basis; and should there be one of the respondents that is not served by the date of the hearing, that such respondent be served with the interim order together with copies of the application.

2 Declaring that the applicants rights as contemplated by article 12 (1) (b) of the Namibian Constitution have been violated in that the trial has failed to commence within a reasonable time.

3. Directing that the prosecution of the applicant on CR 172/10/2016 be permanently stayed and that applicant be immediately released from custody.

4. Alternatively in the event where the Court does not grant pray number 3, directing that the applicant be immediately released from custody on CR 172/10/2016 pending his prosecution.

5. Permitting the applicants legal practitioner, *Mr. Amoomo* to attend to service of the Founding Affidavit as well as Notice of Motion on all three respondents, and alternatively in the events where the respondents are not served permitting that the First, Second and Third

respondents be served at an alternative date or in accordance with directives that may be prescribed by this court.'

The parties

[6] The applicant is an adult male Namibian. He is detained at Oshakati Police Station, Oshana Region on a criminal matter registered under Oshakati Cr 172/10/2016. The 1st respondent is the Prosecutor-General of Namibia. The 2nd respondent is the chairperson of the Magistrates' Commission. The 3rd respondent is the Inspector-General of the Namibia Police. All the above-mentioned respondents are duly represented by the Office of the Government Attorney. I shall refer to the respective respondents as per their positions cited herein, and will, collectively, refer to them as 'the respondents'.

[7] *Mr. Amoomo* appears for the applicant while *Mr. Khupe* assisted by *Ms. Tjahikika* appears for the respondents.

Background

[8] The facts of this matter are that the applicant was arrested on 25 October 2016 under Oshakati Cr 172/10/2018. He was charged together with others for robbery with aggravating circumstances under case number OSH-CRM-2592/2018. The case was transferred to the Regional Court for trial. From the 25 June 2018, the matter has been ripe for trial, but was marred by numerous postponements. The applicant brought a bail application, which was refused by the Regional Court magistrate on 31 July 2019. Subsequently, his case was postponed to 18 December 2019 for plea and trial. On 18 December 2019, the trial did not take place. Up to the date of hearing of this application, the commencement of trial was nowhere in sight.

Condonation

[9] The 1st respondent filed her answering affidavit outside time ordered by this court. The respondents' heads of arguments were also filed out of time. In both

instances, 1st respondent sought condonation for late filing. The application for condonation was not opposed by the applicant and was accordingly granted.

[10] The applicant on the other hand sought to have his application heard on an urgent basis, as stated *supra*. The respondents did not oppose the urgency of the application. The court considered the application, condoned the non-compliance with rule 73 and heard the matter as one of urgency.

Applicant's case

[11] The applicant has been in police custody awaiting trial from the date of his arrest on 25 October 2016. Investigations are said to have been finalized in 2018 and the matter ready for trial, but trial is yet to be realized. Following the refusal of bail by the Regional court magistrate on 31 July 2019, the magistrate who heard the bail application recused himself from presiding over the trial and postponed the case to 18 December 2019 for plea and trial. On 18 December 2019, the trial could not commence as no magistrate was appointed to conduct the trial.

[12] The applicant then attempted to bring a bail application based on the new fact that the trial could not proceed on the scheduled date. This application was not heard as there was no magistrate appointed to deal with this matter. The case was then postponed to 05 February 2020 to fix a date for trial but still no magistrate was appointed and it was postponed to 6 March 2020 for trial. On 6 March 2020 the matter was postponed to 9 April 2020 still for a trial magistrate to be appointed. By the date of hearing of this application, no magistrate had been appointed to preside over the trial.

[13] The applicant alleges that the cumulative conduct of the respondents violated his right to be tried within a reasonable time guaranteed by article 12(1)(a) and 12(1)(b) of the Constitution.¹

¹ 12(1)(a) 'In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.'

[14] A closer reading of the applicant's founding affidavit appears to place the blame for the non-starting of his trial at the door of the 2nd respondent. It is common cause that on 31 July 2019, the Regional Court magistrate recused himself from the matter and that no magistrate was appointed to conduct the trial up to the date of the hearing of this application.

Respondents' case

[15] As alluded to previously, only the 1st respondent filed an answering affidavit. The 1st respondent admits that the applicant was arrested on 25 October 2016 and was charged together with three other persons on several charges, *inter alia*, robbery with aggravating circumstances. She further admits that the criminal case was ready for plea and trial by 25 June 2018 when it appeared in the regional court for the first time. She however repels the applicant's attack by redirecting the blame for the delay in commencing the trial back to him and his co-accused persons.

[16] In explaining her counter attack, 1st respondent stated, *inter alia*, that:

16.1 On 25 June 2018, the trial did not commence and the matter was postponed to 29 August 2018 to enable accused 4 to apply for legal aid; accused 2 and 3 who were not brought to court by the police to be in court attendance and for the police docket which was not available, to be brought to court.

16.2 On 29 August 2018, all accused persons were in court and the docket was available. The applicant informed the court that he will engage a private legal representative to represent him in the trial. Accused 2 and 3 opted to conduct their own defence, while accused 4 was awaiting the outcome of his legal aid application. The case was postponed to 30 October 2018.

16.3 On 30 October 2018, the applicant was not taken to court by the police as he was in the police cells of Okahandja. Accused 4 was yet to receive the outcome of his legal aid application. The case was postponed to 17 January 2019.

12(1)(b) 'A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.'

16.4 On 17 January 2019, the applicant informed the court that he did not generate sufficient funds to instruct a private legal representative and therefore requested to be afforded about a month to do so. Accused 3 had a change of heart and decided to apply for legal aid. Legal Aid appointed a lawyer, Ms. *Maria Amupolo* to represent accused 4. She was, however, not in court attendance. The case was postponed to 5 March 2019 for ascertainment of the status of the applicant's legal representation and legal aid outcome for accused 3.

16.5 On 5 March 2019, the applicant was at court, represented by *Mr. Mukasa* from the Directorate of Legal Aid. Accused 2 conducted his own defence. Accused 3 was represented by *Mr. Shiningayamwe* from the Directorate of Legal Aid. *Ms. Amupolo* appeared for accused 4. *Ms. Amupolo* intimated accused 4's intention to lodge a bail application. Consequently, the case was postponed to 7 May 2019 to fix dates for bail application and for trial.

16.6 On 7 May 2019, the applicant was at court represented by *Mr. Japhet*, a colleague to *Ms. Amupolo*, only for purposes of bail, while *Mr. Mukasa* was still on record as his representative for trial. Accused 2 was absent as he was in police cells in Okahandja and not taken to court by the police. By agreement between the parties, the case was postponed to 9 May 2019 for the hearing of the bail application and subsequently to 28 June 2019 to fix the date for trial.

16.7 On 9 May 2019, the applicant lodged his second bail application based on new facts. Accused 2 and 4 launched their first bail applications. The matter was then postponed for ruling.

16.8 On 28 June 2019, accused 2, *Ms. Amupolo* and the regional court prosecutor were absent. The case was postponed to 29 August 2019 to fix the date for trial. In the interim, on 31 July 2019, the ruling dismissing the bail applications for the applicant and accused 4 was delivered. The case was postponed to 18 December 2019 for plea and trial.

16.9 On 18 December 2019, *Mr. Amoomo* was placed on record by *Mr. Namene* (who stood in for him), as the new legal representative for the applicant. Accused 2 as well as *Mr. Shiningayamwe* for accused 3 were not at court. The state witnesses

were present at court and the state was ready to commence with the trial. The state however applied, supported by the all defence counsel, for the recusal of the trial magistrate following the hearing of the merits of the case in the bail application. The matter was postponed to 5 February 2020 for the appointment of a new trial magistrate and to set the date for trial.

16.10 On 5 February 2020, the applicant and his co-accused were all present at court. The legal representatives for accused 3 and 4 were not at court. By agreement between the parties, the case was postponed to 6 March 2020 to arrange trial dates and the appointment of a trial magistrate.

16.11 On 6 March 2020, the applicant and his co-accused were in court attendance but none of their representatives were present. The matter was postponed to 9 April 2020 to fix trial dates.

16.12 1st respondent further stated that this matter was postponed on several occasions by agreement between the parties. She concluded that the applicant contributed to the delay of the commencement of his own case.

[17] Upon perusal of the affidavits it became apparent that there are factual disputes between the parties. The approach to factual disputes in application proceedings was authoritatively stated in the celebrated case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*². Where factual disputes arise from the affidavits in application proceedings, a final order sought by the applicant can only be granted, if the facts averred by the applicant, and facts admitted by the respondent, justify the order sought. If, however, the respondent's version consists of bare denials, fictitious disputes of fact or is far-fetched, then the court may reject same. The factual averments in dispute must be real, genuine or *bona fide*, emanating from established facts.

[18] *In casu*, after conceding to the live factual disputes between the parties, *Mr. Amoomo* submitted that the applicant filed an application to strike out the material portion of the 1st respondent's answering affidavit, which comprises such factual disputes. He submitted further that the applicant's case stands or falls by the

² 1984 (3) SA 623 (A) 634-5.

application to strike out. The reason for the submission is logical. If the application to strike out is upheld, then no substance would remain in the respondents' case resulting in no answer to the application and the order sought may be justified. However, if the court finds to the contrary, then, there is a dispute on the established facts, resultantly, the order sought cannot be granted on the papers.

The application to strike out

[19] The applicant was not to be outmuscled by the 1st respondent. He applied to strike out para 6.1 to 54 of the 1st respondent's answering affidavit on the basis that it constitutes inadmissible hearsay evidence. This comprises of the material part of the 1st respondent's affidavit. The allegations complained about literally cover the whole affidavit of the 1st respondent which deals with the dates and reasons for postponements. The applicant claimed that 1st respondent did not state her source of information regarding court proceedings. It is unknown whether she was present in court during such proceedings, if not, the names of the persons who were present at court who provided her with such information were not provided and confirmatory affidavits from such persons were not filed, so submitted. 1st respondent further failed to annex the record of court proceedings to her affidavit.

[20] *Mr. Amoomo* submitted that the allegations of the 1st respondent about court proceedings, in the absence of the confirmatory affidavits remain uncorroborated and amounts inadmissible hearsay evidence. *Mr. Khupe* submitted the contrary.

[21] 1st respondent provides, *inter alia*, as follows in her affidavit:

'3. The averments made herein, unless the context indicates otherwise, fall within my personal knowledge and I believe the same to be true and correct. Where the information conveyed to me by others or in documentation, (sic) I verily believe such information to be both true and correct. The submissions and contentions of law made herein are based on advice received from my legal practitioners of record, which advice I believe to be sound and correct...

6.14 ... The entire record of proceedings will be made available to the Honourable Court during the hearing.'

[22] A confirmatory affidavit of *Ms. Nelao Ya France (Ms. Ya France)* was filed of record. *Ms. Ya France* stated that she is a public prosecutor stationed at Oshakati magistrate's court. She is assigned to the prosecution of the applicant and his co-accused in the criminal matter under case number OSH-CRM-2592/2018. She confirmed to have read the answering affidavit of the 1st respondent. She further confirmed the truthfulness of the content of the said affidavit in so far as it relates to the conduct of the prosecution, which she is handling against the applicant and his co-accused and as supported by the record of proceedings.

[23] As a matter of fact, the 1st respondent did not single out *Ms. Ya France* as her source of information on court proceedings. The 1st respondent should have set out her source of information for corroboration to be ascertained with ease. Notwithstanding, *Ms. Ya France* upon reading 1st respondent's answering affidavit confirmed the truthfulness of its contents in respect of the court proceedings of the applicant and his co-accused persons in the criminal matter.

[24] The closest that the applicant gets to the deal with the confirmatory affidavit of *Ms. Ya France* is in his replying affidavit where he stated as follows:

'It must be pointed out that the confirmatory affidavit of *Ms. Nelao Ya France* which was filed in support of the answering affidavit is also not helpful in that it does not state specifically nor does it confirm that she was the one who attended to the matter in the Regional Court on all the various dates and numerated and narrated (sic) by the Prosecutor-General.'

[25] The applicant's application to strike out is, however, as silent as the grave to the confirmatory affidavit of *Ms. Ya France*. There is no application to strike out *Ms. Ya France's* affidavit or any portion thereof. In the absence of an attack, *Ms. Ya France's* confirmatory affidavit remains intact on the content deposed to. Although *Ms. Ya France* does not state that she attended to the matter on all court appearances, she states that she is the prosecutor assigned to the matter. She further confirms the allegations of the 1st respondent regarding the conduct of the case as supported by the record.

[26] The absence of the application to strike out the confirmatory affidavit of *Ms. Ya France* or portions thereof, inclusive of the allegation that the record also supports the allegations about the conduct of the criminal case and in the further absence of clear evidence to the contrary, the court finds itself invited to accept the confirmation of *Ms. Ya France*. This court is not afforded any reason which establishes any qualms with the version of *Ms. Ya France*. *Ms. Ya France*'s confirmatory affidavit is thus accepted for its content.

[27] It follows as a matter of consequence, that the allegations of the 1st respondent about the conduct of the prosecution of the applicant and his co-accused persons confirmed by *Ms. Ya France* cannot be said to be inadmissible hearsay evidence. The dispute that *Ms. Ya France* did not attend to all court appearances of the criminal matter does not detract an inch from the fact that she was the prosecutor assigned to the matter and that the conduct the prosecution is supported by the record proceedings.

The record of proceedings

[28] On 26 May 2020, a day before the hearing, 1st respondent filed a record of the criminal court proceedings of the regional court of Oshakati. *Mr. Amoomo* submitted that this record was introduced through the backdoor, so to speak and should be disregarded. *Mr. Khupe* in counter argument, submitted that the record is a court process and its submission to the present proceedings is not restricted to be annexed to the affidavit of a person who seek to introduce it. *Mr. Khupe* made reference to the judgment of *S v Hoadoms*.³ The said judgment reiterates the duty of magistrates to keep a proper record of proceedings in order to allow for due review process. Sound as the *ratio decidendi* is, it was made with reference to criminal reviews conducted in terms of the Criminal Procedure Act⁴ and not to civil proceedings. Submissions to invoke the said principle in these proceedings is therefore misplaced.

³ 1990 NR 259 (HC).

⁴ S 302 of Act 51 of 1977.

[29] *Mr. Khupe* further submitted that rule 61 of the Rules of the Magistrate's Court, allows for the production of the magistrate's court record in these proceedings. Rule 61 provides that:

'(1) Where it is necessary to give in evidence in the court any record, entry or document of the same court in another action, the clerk of the court shall, on reasonable notice produce and show the original thereof, and the cost of copies shall not be allowed.

(2) Where it is necessary to give in evidence in another court any such record, entry or document, a copy thereof certified by the clerk of the court may be given in evidence without production of the original.'

[30] I do not view it necessary to determine an issue which was not fully argued before me, that is whether the record of the magistrate's court can be admitted into evidence in this court in terms of rule 61 of the rules of the magistrate's court. A finding thereon without the parties having ample opportunity to address this subject is likely to unfairly prejudice the affected party.

[31] The question that remains is what should this court then make out of the record of the magistrate's court? The said record was certified as a true copy of the original record of proceedings by the clerk of court of Oshakati.

[32] *Mr. Amoomo* submitted that the applicant has a choice whether to seek a stay of prosecution while relying on the full record of proceedings of the court below or not. *In casu*, the applicant chose the latter and relied on the Supreme Court decision of *New Era Investment (Pty) Ltd v Roads Authority*.⁵ In that matter *Damaseb DCJ* stated the following:

'It is trite that in review proceedings the production of the record of proceedings and the accompanying reasons sought to be reviewed is for the benefit of an applicant. It has been recognized in a long line of cases that an applicant seeking review may waive the right to obtain the record of proceedings and the accompanying reasons and proceed to the hearing without first obtaining it.'

⁵ 2017 (4) NR 1160 (SC).

[33] The applicant in the present matter filed parts of the record of the criminal proceedings, which includes, the charge sheet bearing his names, the court orders of 18 December 2018, 05 February 2020 and 06 March 2020. To the contrary, the applicant did not waive the filing of the record filed but opted to file only a portion thereof. The applicant therefore introduced portions of the record while the 1st respondent on the other hand introduced the full certified record covering the period from 25 June 2018 to 15 May 2020 where the matter was postponed to 29 July 2020 to fix a date for trial.

[34] Undoubtedly, court records aid the courts in the adjudication of matters in order to attain justice. More often than not, it is only after having sight of the record that, a picture of the proceedings under review will be laid bare for the court to scrutinize. Attempts to withhold court records from the reviewing court may have the capacity of placing insufficient information before court, which may at times mislead the court. Resultantly, injustices may be carried out.

[35] This court therefore finds that the record of the court proceedings of the regional court is before this court and this court is justified in the interest to have regard to the contents of such record.

[36] There is a side issue worth addressing. The 1st respondent referred to the applicant, who filed the application to enforce his rights, as a 'cry-baby', for launching this application. As a justification for such label, she stated that the applicant is to blame for delaying the start of his trial. Amongst other delays mentioned, is bringing the bail application when the matter was ripe for trial.

[37] It should be stated that bringing a bail application at any stage of the proceedings is a right enjoyed by an accused. It may be so, that the applicant played a role, however, minimal in the delay to have the trial commence, but it affords the 1st respondent no right to call the applicant names. Parties and counsel should be collegial to one another when involved in court proceedings, lest our profession loses its honour, which is a situation we cannot afford to bear. It is high time that the usage of such derogative language should be rebuked by courts. Such conduct in future may attract sanctions in punitive costs.

[38] For the aforesaid reasons and conclusions, this court finds that the applicant's application is without merit and falls to be dismissed.

[39] I now turn to the issue of costs of this application. It is settled law that costs follow the cause. *In casu*, I find that there are exceptions to the rule. It is noted that, notwithstanding, the fact that all respondents filed their notices to oppose the application through the Government Attorney, only the 1st respondent filed the answering affidavit. This is, despite, there being allegations made against the 2nd respondent, who featured prominently in the proceedings for having failed to appoint a new magistrate to preside over the trial in the Regional Court.

[40] To the date of hearing, this court was denied of a reasonable explanation why a magistrate was not appointed to preside over the trial and to honour the applicant's constitutional right to a fair trial in Article 12(1)(b) of the Constitution. This is extremely disappointing to say the least. I trust that upon perusal of this judgment, the 2nd respondent will immediately appoint the long-awaited trial magistrate for the trial to commence without further delay. The 3rd respondent was further not spared as jabs were thrown at him for not taking the applicant and his co-accused persons to court on certain occasions while under his custody. This is also unacceptable. All the Government functionaries should ensure that they work together to ensure that people accused of crime are at the disposal of the court whenever required in order to speed up their trials.

[41] When regard to the aforesaid factors, inclusive of the 1st respondent's cautioned name calling, the failure by the 2nd respondent to explain the non-appointment of a trial magistrate which contributed to the delay in commencing the trial, the role played or the failure thereof by the 3rd respondent as aforesaid, this court in exercise of its discretion, in disapproving the attitude of the respondents decided not to award the respondents costs.

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

1. The application to strike out is refused.
2. The applicant's main application is dismissed.
3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

O S Sibeya
Acting Judge

APPEARANCES

APPLICANT : K. Amoomo
Of Kadhila Amoomo Legal Practitioners,
Windhoek

RESPONDENT: M. Khupe, assisted by N. Tjahikika
Of the Office of the Government Attorney,
Windhoek