

**REPUBLIC OF NAMIBIA**



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

**TRIAL –WITHIN – A- TRIAL**

**RULING**

**CASE NO.: CC 4/2011**

In the matter between:

**THE STATE**

and

**ANTONIE MBOK**

**ACCUSED 1**

**ANTONIE MBOK N.OA**

**ACCUSED 2**

**DANIEL DAVID NGHIWILEPO**

**ACCUSED 3**

**Neutral citation:** *S v Mbok* (CC 4/2011) [2020] NAHCMD 263 (15 June 2020)

**CORAM:** NDAUENDAPO, J

**Heard on:** 4 – 5 November 2019

**Delivered on:** 15 June 2020

**Flynote:** Criminal Procedure-Admissibility of Recordings-Trial within a trial-Witness instructed by Anti-Corruption Commission to secretly record incriminating conversations-Recordings not disclosed during docket disclosure-Recordings done in violation of Accused Rights to fair trial-Privacy and Equality-Inadmissible-Prejudice of late disclosure curable.

**Summary:** The three Accused are charged with ten main counts, together with alternatives, of contravening various provisions of the Anti -Corruption Act, 8 of 2003. The Accused were initially four, but one of the Accused, Ms. Thomas, pleaded guilty and sentenced .The other three pleaded not guilty. The trial was separated. Ms. Thomas turned state witness. On the instruction of the ACC (Anti-corruption Commission), Ms. Thomas was sent, with a recording device, to Accused 3 to secretly record incriminating conversations she had with Accused 3. On three occasions, she recorded the conversations and handed the recording device to the ACC. The recordings were done without Accused 3's rights to remain silent, not to incriminate himself and the right to legal representation being explained to him. The recordings and the transcription thereof were not disclosed to Accused 3 until after Ms. Thomas testified in the main trial.

The State sought to introduce the recordings and the transcriptions thereof into evidence. Accused 3 objected to that on the basis that his rights to a fair trial; to privacy and to equality were violated.

*Held* that Accused 3's rights to remain silent, not to incriminate himself were not explained to him when the recordings were done and accordingly his rights were violated.

*Held* further that his right to be treated equal before the law like any other suspect was also violated.

*Held* further that the failure not to disclose the recordings earlier violated Accused 3's right to a fair trial.

*Held* further that the late disclosure of the recordings did not vitiate the trial as the prejudice suffered by Accused 3 as a result of late disclosure could be cured by a postponement to enable him to prepare on the issue of the recordings.

*Held* further that the recordings and the transcriptions thereof are ruled inadmissible.

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### **ORDER**

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The recordings and transcriptions thereof of the conversations made by Ms. Thomas with Accused number 3 on the following dates:

- (a) 30 March 2010;
- (b) 8 April 2010;
- (c) 9 April 2010;

Are ruled inadmissible.

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### **JUDGMENT**

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**NDAUENDAPO, J:**

[1] This is a trial within a trial in which the admissibility of three recordings and the transcriptions thereof is being objected to. The recordings were made by Ms. Thomas, who recorded conversations she had with Accused 3 on 10 March 2010, 8 April 2010 and 9 April 2010, respectively. The State wishes to introduce the said recordings and the transcriptions thereof into evidence. Accused 3 objected to that.

Before dealing with the objections, it is important to give a brief background.

### Brief background

[2] The three Accused were charged with ten (10) counts of contravening various provisions of the Anti-Corruption Act 8 of 2003. They were initially four Accused. The fourth Accused, Ms. Thomas, pleaded guilty before Siboleka J and she was sentenced to a term of imprisonment.

[3] The investigation in this case commenced during March 2010 when the Anti-Corruption Commission (the ACC) started to investigate a complaint of missing VAT cheques that were deposited at the Receiver of Revenue's offices. Ms. Thomas who was working at the Receiver of Revenue became a prime suspect because her stamp was used. She was eventually arrested with the other three Accused. She pleaded guilty, convicted and sentenced to an imprisonment term. She turned a state witness against the other Accused. On Ms. Thomas' request, the ACC provided her with a recording device to record certain conversations between her and Accused no.3. The recordings were made on 30 March 2010; 8 and 9 April 2010, respectively. The recordings and the transcriptions thereof were not disclosed to Accused 3 at the time of the docket disclosure, but only after Ms. Thomas testified in the main trial. The State now wishes to adduce those recordings into evidence.

### The grounds of objection

[4] They are stated as follows:

(a) The evidence was obtained and procedures were not followed for that purpose which constitute unlawful breach of Art 12 of the Constitution - the right to a fair trial.

(b) The evidence was obtained in breach of the Accused right to privacy in terms of Art 13 of the Constitution.

- (c) The unconstitutional evidence so obtained and the fact that it was obtained was deliberately withheld from the Accused by the State and investigating officer of the ACC and as such did not only infringe Accused's right to a fair trial but also completely destructive to any notion of fair trial
- (d) The digital copies from which the transcripts were made are copies and are not the originals.
- (e) Accused 3 reserved his right to raise any other objection at a later stage.'

### The issues

[5] The issues for determination are:

- (i) Whether the recordings were obtained in a way which constitute an unlawful breach of the third Accused's rights to a fair trial;
- (ii) Whether the recordings were obtained in a manner in breach of the Accused's rights to privacy.
- (iii) Whether the recordings were deliberately withheld by the State (ACC included) and whether such conduct not only infringed the third Accused's fair trial rights and or was destructive of any notion of a fair trial.
- (iv) Whether recordings were obtained from copies and hence are not the original recordings.

### The evidence

#### Ms. Thomas' evidence

[6] She testified that towards the end of March 2010 she went to the offices of the Anti-Corruption Commission because she became a born again and wanted to tell the truth as Daniel (Accused 3) was insisting that she should not tell the truth. She testified that it was because of Daniel that she got involved in the crimes. At the offices of the ACC she met Mr. Masule who called Ms. Justine Namukwambi. She told them:

'To show that I am not lying give me something so that I can take to Daniel to show that he was the one behind these things'.

When asked, by the prosecutor, what she had in mind? She responded:

'Anything that they can give me to prove that it was Daniel.'

They said they are going to see their supervisor and they will call her back. She testified that there was no mention of the recording device at that first meeting.

[7] After a few days, Ms. Justine Namukwambi called her and told her that the supervisor gave them a go-ahead and they will give her something. She proceeded to the ACC offices where she met Mr. Masule and Ms. Namukwambi. They gave her a recording device. White in color and similar to the remote device of an air conditioner and it had earphones. Ms. Namukwambi demonstrated to her how to use it when she is going to meet Daniel. She showed her how the device would be wrapped around her and the earphones will come up on her chest. Thereafter Ms. Justine Namukwambi called her to call Daniel to see whether he was in his office and she inserted the recording device on her. She called Daniel who said she could come over to his office and she proceeded to his office at NWR along Independence Ave, Windhoek.

[8] She met Daniel and spoke about a lot of things, telling him that she wanted to resign because of these things, that she may be hauled before a disciplinary hearing and may be fired and that she did not want that. He told her resigning is not a solution because if she is going to resign people would suspect that she is the one who stole those cheques. Daniel told her to keep on denying because they don't have the evidence against her. After the meeting with Daniel, she proceeded to the offices of the ACC. At the office, Ms. Justine Namukwambi took off the recording device. She connected it to her computer and they, (Masule included) listened to the conversation. The quality of the recording was good and they could hear both parties speaking. That was around end March 2010. After listening to the conversation, she went to her office.

[9] She further testified that during the first week of April 2010 Daniel called her and told her that he wanted to see her. She told him that she would be there within 20 to 30 minutes. She called Ms. Justine Namukwambi to find out whether she was in her office as Daniel wanted to see her. She proceeded to Ms. Justine Namukwambi's office and she put the recording device on her body. She then proceeded to the office of Daniel. At the office they started talking. After they finished talking, she left and went to the ACC's offices. At the office, Ms. Justine Namukwambi took off the recording device and she called Mr. Masule to her office. She connected the device to her computer and they listened to the conversation. The quality of the conversation was good. After that, she left and went back to her work.

[10] She further testified that the next day Daniel called her and told her to meet behind the Franco cultural center in Robert Mugabe Street. After she spoke to him, she quickly called Ms. Justine Namukwambi and told her that Daniel called her and he wanted to see her. She said she must come to her office, but she told Ms. Justine Namukwambi that she could not come there as they were meeting at the Franco Cultural center. She suggested that they could meet where Ackerman store used to be opposite First National Bank, John Meinert Street. They met there in the fitting room and Ms. Justine Namukwambi inserted the recording device on her body. From there, she proceeded to the Franco Cultural center. She met with Daniel in his car. The car was parked on the side where Franco Cultural Centre is. They were all seated in the front seats. He started to speak, it was a long conversation and she was recording the conversation.

[11] Daniel told her that the previous day, he was called by an officer of the ACC and he was telling her what he talked with ACC officials. After that, she went to the office of Ms. Justine Namukwambi, she removed the recording device and called Mr. Masule and they all listened to the conversation. After that, she left their offices and went to her work. That was the last recording she did as on 27 March 2012 she was sent to prison.

She testified that only 3 recordings were done. She testified that the conversations were not only about the case, but other things like their life in exile.

[12] Under cross examination, she was asked why she did not testify in her evidence in chief that a recording device was used to record the conversations she had with Accused 3, she responded by saying:

'I thought the Anti-Corruption was going to talk about that because they are the ones who did the recording with me.'

It was also put to her that the only reason why the recordings were done was because the ACC wanted to obtain, through her, incriminating information about Accused 3 and she answered in the affirmative. She also testified that Ms. Justine Namukwambi told her that she must leave the recordings, they are going to come at the last minute if Daniel was still going to deny.

#### Mr. Philemon Masule

[13] He testified that he was the Chief Investigating Officer at ACC (Anti-Corruption Commission) since its inception. Prior to that he was a member of the Namibian Police Force (Nampol) since 1990. He testified that he made 2 statements, one on 15 August 2010 and the other on 11 April 2015. The ACC was busy with investigation at the Ministry of Finance about cheques that were stolen and deposited into an account named M. Finance. He was not the investigating officer, but assisted Ms. Justine Namukwambi now Kanganjela. He assisted in interviewing Ms. Thomas because her official stamp was used and she was linked to the crimes. She denied her involvement. He asked her whether she knew Mbok (Accused 1) and she said no. They did not have other evidence, except that her stamp was used. A statement from Ms. Thomas was recorded on 15 March 2010 by another investigator. After some days, Ms. Thomas came back to the office and she wanted to see him. She immediately apologized to him for having lied and he called Ms. Justine Namukwambi. She then continued telling them



the story. She said she was a born again and she did not want to continue with the lies. She told them how the whole saga unfolded.

[14] On 17 March 2010 another statement was recorded from Ms. Thomas, Ms. Thomas opened up and made full disclosure. She told them that Daniel continues telling her not to tell the truth and must lie to the ACC. She said if we could give her something to record the conversations between her and Daniel, as Daniel was telling her to tell lies, otherwise she would go to prison alone. They had an interest in the matter and wanted justice to be done. They did not have a problem to give her a recording device and they gave her one. He testified that Ms. Thomas did the recordings of the conversations she had with Daniel and they had listened to it on three occasions, and it indeed confirmed what she told them. After they listened to the second recording, they called in Daniel and interviewed him because they saw that he was doing damage to the case and public funds were at stake. When asked by the prosecutor as to who initiated getting the information on Daniel, He testified that was it was Ms. Thomas who made the request for a recording device and that it was Ms. Thomas' own initiative.

Ms. Justine (born Namukwambi) Kanjanga

[15] She testified that she was employed at the ACC as Chief Investigating Officer since August 2007. Her duties are to investigate corrupt activities as per the Anti-Corruption Act, 8 of 2003. They received a complaint from Standard Bank that cheques paid by tax payers were intercepted and paid into the account of M. Finance, a private company. They were instructed to investigate how the cheques were stolen from the Ministry of Finance and ended up in the account M. Finance, a private company. She testified that by the time they took statements from Ms. Thomas, she came to them and told them that Daniel was trying to influence her so that she could seal her mouth and she asked for something to record the conversations between herself and Daniel. They went to their supervisor, Mr. Becker, who gave them a recording machine. Ms. Thomas came back days after she gave a statement. She came back and told them that she was a born again Christian and that Daniel told her to keep quiet and she wanted to

prove that Daniel was also involved. She made the statements and confession. After they got permission from Mr. Becker, they got two recording devices the one keyless and a normal recording (like having a cellphone you can record). She mounted the recordings on the side of the thigh of Ms. Thomas. After that Ms. Thomas left our office and then later returned. She removed the device and they listened to the recording with Mr. Masule. The quality of the recording was good. It was in March 2010. After a week, Ms. Thomas came and told them that she was going to meet Daniel at a park. She mounted the recording device on her and she left. She later returned and again they listened to the recording.

[16] After the second instance, Mr. Masule called Daniel to come to their office in the afternoon and they interviewed him. Daniel informed them that Mr. Mbok owed him N\$60 000 and that it was in March that he was going to pay him. After the interview, Mr. Masule told him to go and prepare a statement. He said he did not know about the cheques of the Ministry of Finance. The following day, Ms. Thomas came to their offices. She told them that it was urgent, she needed the recording device because Daniel called her last night and they were going to meet. She mounted the recording device on Ms. Thomas in Ackerman's shop in the fitting room and she left. She came back and brought the recording device and they listened to it. She further testified that, there was a time when Ms. Thomas came and was insisting that she wanted the recordings back, but they told her that it must be transcribed and that it was the property of the ACC. She testified that it was Ms. Thomas' initiative to get the recording device and that she was insisting, but they also had an interest in the matter. She wanted something to prove her case because they were all part of the crimes.

[17] She further testified that in August 2010, the recordings were given to Moria Kambrude transcribers to transcribe, but they only received it back in December 2010 because she had to get somebody who could speak Oshiwambo, as some of the conversations in the recording were in Oshiwambo and needed to be translated in English. She was given four months to complete the investigation, the docket was given

to the office of the PG in July/August 2010 to. Adv. Sibeya who was in charge of the Corruption Unit and she informed him that there were recordings that were outstanding and the moment they became available, they were given to him. By that time, the decision to arraign the Accused was out. She denied the evidence by Ms. Thomas, that she told her that the recordings should be withheld from Accused 3 until the last moment. She testified that once the recordings were submitted to the office of the PG, then it was out of their hands. That was the case for the State. Accused 3 did not testify, nor did he call witnesses.

#### Submissions by the prosecution

[18] Counsel submitted that constitutional irregularities arise in both pre-trial setting and trial setting and that is trite that not every constitutional irregularity is fatal to a fair trial. Counsel referred this court to *S v Shikunga*<sup>1</sup> where the Supreme Court said:

#### [19] 'The proper approach

There can be no doubt from these authorities that a non-constitutional irregularity committed during a trial does not per se constitute sufficient justification to set aside a conviction on appeal. The nature of the irregularity and its effect on the result of the trial has to be examined. Should the approach be different where the error arises from a constitutional breach? That question assumes that the breach of every constitutional right would have the same consequence. In my view that might be a mistaken assumption and much might depend on the nature of the right in question. But even if it is assumed that the breach of every constitutional right has the same effect on a conviction which is attacked on appeal, it does not follow that in all cases that consequence should be to set aside the conviction. I am not persuaded that there is justification for setting aside on appeal all convictions following upon a constitutional irregularity committed by a trial court.

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<sup>1</sup> 1997(2) SACR 470 (Nms).

It would appear to me that the test proposed by our common law is adequate in relation to both constitutional and C non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims - the claim that society has that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter interest prevails. Where however the irregularity is such that it is not of a fundamental nature and it does not taint the verdict the former interest prevails. This does not detract from the caution which a court of appeal would ordinarily adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the Accused in any way or taint the conviction which followed thereupon...'

[20] Counsel argued that it was Ms. Thomas who initiated the recordings and not the ACC and that is corroborated by what she told Ms. Justine Namukwambi:

'When we went out I told Justine that what I told you is the truth but you can use any possible means whatever you can do to send to Accused 3 for you to see that he is the one who made me to do this and he is the one that I hand the cheque over to, not to anybody else but to him.'

From the above, counsel argued, that the inescapable conclusion can only be that Ms. Thomas initiated the recordings and that she wanted a recording machine as testified by Mr. Masule.

[21] On the question whether she acted as an agent of ACC when she engaged Accused 3, counsel submitted that he could not find any authority in Namibia, but in other jurisdiction. Counsel referred to *R v Broyles*,<sup>2</sup> Jacobucci J where the court stated:

'Where the informer who allegedly acted to subvert the right to silence of the Accused is not obviously a state agent, the analysis will necessarily focus not only on the relationship between the informer and the Accused, but also on the relationship between the informer and the state. The right to silence will only be infringed where it was the informer who caused the Accused to make the statement, and where the informer was acting as an agent of the state at the time the Accused made the statement. Accordingly, two distinct inquiries are required. First, as a threshold question, was the evidence obtained by an agent of the state? Second, was the evidence elicited? Only if the answer to both questions is in the affirmative will there be a violation of the right to silence in s. 7.'

I would accordingly adopt the following simple test: would the exchange between the Accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?

[22] Counsel submitted that cognizance being had to the apparent eagerness of Accused 3 to sway Ms. Thomas, from being forthright with the ACC the relationship between the two "...in no way affects the exchange between the informer<sup>3</sup> and the Accused<sup>4</sup>." Furthermore, from the *Broyles* case, it is apparent that the law is primarily concerned with circumstances where the Accused is under the power of the State, i.e. under detention, which obviously places him in a vulnerable position, thus rendering it unconscionable for State functionaries to take advantage of him by sending their agent to ferret for information from him.

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<sup>2</sup> [1991] 3 SCR 595, 1991 CanLii 15 (SCC).

<sup>3</sup> Ms. Thomas.

<sup>4</sup> 3<sup>rd</sup> Accused.

[23] Counsel further argued that it was remiss for the third Accused to opt not to testify, at least on the very limited area as to who was contacting who at each of the three instances when recordings were taken. This is more particularly so as the encounter at the rendezvous of the Franco Namibia cultural Centre, taking into account the frenzied setting up of the recording device in Ackermann's store, bears out the insistence by Ms. Thomas and Ms. Kanyangela, that both of them were not prepared for such an encounter between Ms. Thomas and Accused 3.

[24] On the question whether it was permissible for the ACC to utilize Ms. Thomas in the investigation of Accused 3, in view of Accused's right to silence, counsel submitted that it was permissible, more so, as clearly stated by Mr. Masule, Accused 3 concerted pestering of Ms. Thomas to mislead the ACC was tantamount to obstruction of justice<sup>5</sup> Accused 3's conduct as stated by Mr. Masule cannot be as easily dismissed as the defense would rather have it by countering that the ACC did not then proceed to charge Accused 3 with obstruction, as indications of the Accused 3 desire to influence Ms. Thomas is well documented in her statements which pre-date the recordings.

[25] Counsel argued that, if the version of the ACC State witnesses is taken into account, it was in fact Ms. Thomas who was on the fore-front in having conversations between her and Accused 3 recorded. Further that, although it is in contention whether in all instances she initiated such contacts, it also came out from Ms. Thomas' testimony that Accused 3 at times initiated contact with Ms. Thomas, then it cannot be said that Accused 3's right to privacy was violated.

[26] On the question whether the ACC and or the Prosecution deliberately withheld or did not make disclosure of the recordings to the third Accused, counsel argued that the explanation given by Ms. Kanyangela concerning the movement of the recordings is backed up by verifiable independent facts. This is in the context of (a) The submission of the Case File (Docket) to the Office of the Prosecutor-General (PG) by which date the

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<sup>5</sup> P 408 (21).

recordings could not be included as they needed to be transcribed; (b) That the recordings were sent for transcription in August 2010 to Kambrude/Shivangulula transcribers and that they were handed back to the ACC only in December 2010; (c) The undisputed fact that the Office of the PG had a high staff-turnover and resultantly, but undeniably, the repeated handing over of the Case File in this matter from one Prosecutor to the next, namely Advocates Sibeya, Konga and Nyambe allowed for possible misplacement of exhibits. Counsel argued that in view of the explanation given by Mr. Nyambe on the 26<sup>th</sup> March 2015 regarding how the recording transcription came to be located is credible. Counsel further submitted that there is no indication whatsoever that Mr. Nyambe deliberately withheld the exhibits, cognizance being had to the undisputed fact that by the time he took over the handling of the matter disclosure had already been made. His *bona fides* is also corroborated by the observation made by defense counsel Adv. Botes, in the cross-examination of Ms. Thomas (in the trial-within-a-trial) that Mr. Nyambe did not seek to suppress Ms. Thomas from testifying on any aspect.<sup>6</sup> Militating against withholding the recordings theory, counsel submitted, is the bizarre essence of the allegation, for it boggles the mind how a Prosecutor, more so an experienced one of the caliber of Mr. Nyambe, could ever hold a reasonable expectation that at a future date, the recordings could just be sprung on the defense.

[27] On the question whether the third Accused was prejudiced by the non-disclosure, counsel referred to *S v Scholtz*, where<sup>7</sup> Dumbutshena AJA stated:

'For disclosure to be effective it must be done at the earliest possible time. In some instances soon after arrest and in others long before the Accused is asked to plead and in some cases only after the witness has given his evidence in chief. This depends on the circumstances of each case. However, the overriding factor should be the sufficiency of time in which the Accused should prepare his or her case. In my view it won't be sufficient time to hand witnesses' statements and other materials to the Accused a few minutes before plea. There should be

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<sup>6</sup> See at p 76 (3) and 76 (30).

<sup>7</sup> 1996(2) SACR 426 (NMS).

reasonable time to allow the Accused to prepare thoroughly his reply to the charge and his defence<sup>8</sup>.

[28] In this connection, in the recent case of *S v Hanse-Himarwa*<sup>9</sup> Liebenberg J noted:

'As regards statements that were not initially disclosed to the defence but disclosure made only during the trial when requested from the investigating officer, the court is satisfied that the defence did not suffer any prejudice as a result thereof. The explanation given as to why these statements remained with the investigating officer is neither suspect nor deemed irregular in the absence of evidence showing otherwise. In fact, the mere production of the statements at a later stage and nothing untoward arising from its contents, dispels any suggestion that the withholding of the said statements was done with malicious intent.'<sup>10</sup>

For all those reasons, counsel submitted that the recordings and the transcriptions thereof should be ruled admissible.

### Submissions on behalf of Accused 3

[29] Counsel referred this court to the relevant verbatim evidence of Ms. Thomas in the mitigation evidence of her sentence, before Siboleka J, on 10 February 2012 finds itself on pages 33 to 35.11 For the sake of convenience the most important aspects have been underlined.

'You say that you kept going to Daniel, Accused no. 3? - - - That is right to his 11 See also Exhibit "F4". 7 office yes. On whose instructions? - - - Anti Corruption Commission. And for what purpose? - - - It is to get more information because when I wrote the Statement I think maybe they could not believe me. Then I said to them I am ready to do anything for you to know that it is true is Daniel who came to me. I am ready without any promise, I am ready I want the truth to come out let everybody face the charges of this. Then from this we started working

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<sup>8</sup> At page 447.

<sup>9</sup> (CC05/2018) [2019] NAHCMD 229 (8 July 2019).

<sup>10</sup> See *Smile & Anor v State* 1998 (1) SACR 688 at 692.



together. Were there also recordings involved? - - - That is right I normally go with the recordings. So you went to Daniel on instructions of the Anti-Corruption Commission? - - - That is right. And then you recorded certain conversations? - - - That is right. Is it also correct that you have indicated your willingness to testify as probably the State' main Witness in the forthcoming trials. - - - I do not have a problem with that, yes.'

[30] Counsel submitted that the aforesaid evidence is clear and needs no elaboration, nor discussion except to say that it leaves no doubt that the said Ms. Thomas went to Daniel with a recording device on the instructions of the Anti-Corruption to, through that means, obtain incriminating evidence and/or information from him to enable the ACC to arrest Accused 3, whom they already also had interviewed.

[31] Counsel further referred to some relevant evidence during the main trial:

'Okay, proceed. - - - When we went out I told Justine that please whatever I told you is the truth but you can use any possible means whatever you can do to send to Accused no. 3 for you to see that he is the one who made me to do this and he is the one that I hand the cheque over to, to anybody else but to him.

Proceed what else materialized? - - - After that she say she will talk to her boss and she will let me know then I went off to my office.

Okay and proceed. - - - Then from there some days later she called me Justine from Anti-Corruption commission and directed me to go to Accused no. 3 to ask him some questions.

Okay, what else if there is any to add? - - - Then I say it is okay see you, then he say it is okay greet the kids then I left his office and went back to the Anti-Corruption Commissioner to Justine Namukwambi and delivered what I was supposed to deliver to her my message of what went on between me and Accused no. 3.

Okay. - - - And again another occasion some few days because it was like closer, close days which that are closer to each other it was all this happen in March. Again Justine called me. She called me and then she said I should go to her, I went to her she sent me again to him to Accused no. 3 to his office and when I went there he was not there he was out with work.

Okay, proceed. - - - Then on the third occasion Namukwambi called me again Justine from ACC (Anti-Corruption Commission) and sent me again to Accused no. 3.

Okay, proceed. - - - I went to his office I greeted him, we greet each other then I ask, I told him that but really these people were stingy, why they did not give me anything then he said even me no I did not get anything.

Okay, you went to where, to your office? - - - Off, I went to Anti-Corruption Commission to Justine to deliver my message to her of what happen when I was by his office. (Intervention) Okay, - - - Accused no. 3 Alright, you may stop there. Okay, you have testified earlier on that in total you took five cheques (intervention).'

[32] Counsel argued that from the underlined parts of the evidence of Ms. Thomas, it is clear that it was Ms. Justine Namukwambi who sent Ms. Thomas to go to Accused 3 and to record the conversations. Counsel further argued that it is obvious that Ms. Thomas nowhere in her evidence in chief referred to a recording device at all. No doubt exist that Ms. Thomas, until the very end, attempted, from her side, to keep the existence of the recording device and the recordings made until the very last moment, as conspired. No other plausible reason can exist for this inference as the prosecutor Mr. Nyambe did not examine her at all on what she meant by to deliver my message to her, as testified on three occasions, which any prudent state prosecutor should and would have done if he was not aware of the existence of the recordings and the conspiracy in respect of same. Ms. Thomas in fact, played her part in the conspiracy to not reveal the existence of a recording device until the issue, during cross examination of Mr. Uirab became too hot to handle.

MR UIRAB:

'The confession was also done? - - - That is right. Right, so after you spoke to Accused 3 you went (intervention) - - - Back to the offices. Back to Anti-Corruption Commission. - - - That is right. Yes. From experience I know Anti-Corruption Commission if they send somebody like on a trade they normally give you devices, recording devices. Your conversation with Accused 3 relating to Accused 1 was it recorded? - - - It was recorded yes. And do you know what happened to such recording? -- - No, I gave the recording to Ms. Justine the officer of Anti-Corruption. Yes, but will you be surprised that there is no mention in the docket of many files of any recording to that respect? These is no such recording that was disclosed or even mentioned? - - - then the officers they betray me they did meant to get information from me that is against him.'

[33] Counsel argued that at least on three of the four occasions when she was sent to the offices of Accused 3, same was not as a result of a request being made by Accused for her to come visit that is borne out by, *inter alia*, the following exchanges:

'Okay, so that was your suggestion that you do not want to operate it might not perform properly and then what happen thereafter? --- Thereafter then Justine ask me to call Daniel to see whether he is in his office which I did and he was in the office then she insert it on me then I went to his office.'

[34] On a question as to the reason why she did not testify, in her evidence-in-chief, during the merits at all, about the existence of the recording device, the witness indicated that: MR BOTES:

'I am sorry that my Learned Colleague gets confused so easily. Why did you not at any stage indicate that a recording device was used? --- Why I did not indicate it in any stage? Yes. During your testimony here in Court on the merits? --- I thought the Anti-Corruption was going to talk about that because they are the one who did the recording with me.'

[35] Counsel argued that the only reason for the recordings was that the ACC wanted to obtain information through her from Accused 3 in the alleged commission of the specific offences.

'Now the only reason therefore being for this recording or recordings that the ACC wanted to obtain through you was to attempt to get information from Accused no. 3 which would implicate him in the alleged commission of this specific offences as alleged by you? --- Yes.'

Now your answer then is as follows: 'I did mention some of those things. The one that are in the recording because Ms. Namukwambii told me that I must leave the recording. They are going to come at the last minute if they are still going to deny.'

That was the whole (intervention) --- Sorry? Nature of this discussion. You were requested to keep quiet about the recordings you must not mention it in court, is that correct? --- Yes.'

COURT: 'Yes, Ms. Thomas? --- Yes, My Lord. Mr. Nyambe never new, and he was not aware of the recording until I came to tell him when I came from prison. That is the day when you consulted me I told him that also recording which were taken because that was the time that I have seen that nothing was done with the recording. Let me go and do it now with this chance that I got that is when I told him and then that day he asked me in court. When you consulted with him, you are the one who informed him (intervention) --- That is right, My Lord. About the existence of the recordings? --- That is right, My Lord.'

MR BOTES: 'I have got the recordings.' She now said that she mentioned the existence of the recordings to Nyambe? --- "Yes, I mentioned to him. During consultation yes. --- Yes, I did. And also that Justine indicate to you that it must be kept back until the last minute? --- That is right.'

[36] Counsel argued that Mr. Masule was evasive, inconsistent, incredible and improbable, and on important aspects also contradicted the evidence of Ms. Justine Kanyangela, who was the investigating officer. It is common because that this witness made two statements, the one dated 16 August 2010 and another statement dated 10

April 2015. The latter statement was made after the event. The witness became reluctant and obtrusive to answer questions pertaining to how records are being kept

[37] Counsel submitted that Justine Kanyangela in her evidence in chief testified the following as to how the recordings came to be made:

'How did those recordings come to be made from Ms. Thomas? --- My Lord by the time we took the statement from Veronica Kituna Thomas, she came back to our office and she informed me and Mr. Masule that Mr. Daniel was trying to influence her not to say anything and she must seal her mouth. And she was telling us if you do not believe that she was the one who initiated the issue of the stolen cheque we must give her something, she want to go to Daniel and she will proof that Daniel was part of the crime. So (intervention) Just hold on, when you say she said you must give her something, what was that, what was this something that was in issue here, or did she specify or was the issue of something then dealt with or mentioned at that initial conversation? --- She said give me something to record the conversation between myself and Mr. Daniel you do not believe what I am telling you is the truth.'

[38] Counsel argued that according to this witness, the request to use a recording device came from the witness Thomas herself where after she having been armed with the device on the first occasion went to see Daniel at his office for apparently a pre-arranged meeting. This is contrary to the evidence of Ms. Thomas. , in the sense that Ms. Thomas was requested on two occasions by Ms. Justine Namukwambi to go to Accused 3.

[39] Counsel submitted that the right to be presumed innocent until proven guilty according to law cannot be overemphasized. This fundamental right protects all persons against State overreach, constitute the essential precondition to the protection of the right to human dignity, from which there is no possible derogation. These rights condition the treatment to which any person is entitled to, throughout the period of criminal investigations and trial proceedings, up to and including the end of a final appeal.

[40] Counsel argued that the onus to prove the guilt of the Accused lies on the state and the State is obliged to discharge this duty without any assistance from an Accused or by making use of (potentially) incriminatory evidence which originates from an Accused in violation of the (constitutional and common law) admissibility requirements.

[41] Counsel submitted that if there is a lack of reliable and/or conclusive evidence a discharge should be granted. Any discretion the court may execute must be viewed subject to the Namibian Constitution (NC) which entitles all persons the right to not be compelled to give evidence against himself and prescribes that no court shall admit evidence which had been obtained in violation of fair trial principles.

[42] Counsel further argued that it is peremptory for police investigations to be in accordance with the Rule of Law and the principles of legality which are fundamental to a criminal investigation. The aforesaid principles permit no derogation, whatsoever, from inter alia the right to privacy, the right to human dignity, the right of all persons to equality and non-discrimination; the right of all persons to be presumed innocent the right of all persons to a fair trial; the latter right which includes the right against self-incrimination, the right to legal representation and the right to adequate facilities and time to prepare and present a defense.

[43] Counsel referred to Article 13 of the NC which provides:

‘(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with the law as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.’ (My underlining)

[44] Counsel argued that the right to privacy is in itself a fundamental human right, guaranteed by a number of human rights treaties. Having regard to the words “save as

in accordance with law” in Article 13(1), read together with Article 22 of the NC, counsel submitted that it is specifically in peremptory terms provided that the constitutionally permitted regulatory limitations and qualifications in respect of the exercise of the fundamental right to privacy, must be contained in domestic legislation.

[45] Counsel argued that the conversations between Ms. Thomas and the third Accused, under the circumstances and existence of the recordings of these self-incriminating statements by the third Accused constitute not only an unconstitutional, unlawful and arbitrary interference with the third Accused’s right to privacy in violation of article 13(1) of the NC, article 12 of the HDHR and article 17 of the ICCPR. It constitutes a derogation of his non-derogable rights entrenched in Articles 8, 10, 12(1) (d), (e) and (f) of the NC and the constitutional protection guaranteed to him against such abuse by Article 5 of the NC.

[46] Counsel contended that ‘it is an obvious conclusion that police in assisting and providing Ms. Thomas with the recording device and sending her off on her mission to effectively interview the third Accused, must be assumed to have known that neither they nor Ms. Thomas could base this secret, deceptive unconstitutional, unlawful and arbitrary surveillance operation on domestic statutory authority. The process was *male fide* and went beyond mere passive criminal investigation.

[47] Counsel argued that the police officers involved in setting up the surveillance must be assumed to have known that they could not find any authority in the Constitution, domestic statutory law or international law for such procedure.

[48] Counsel argued that these constitutional violations completely destroyed his entitlement to be presumed innocent until found guilty according to law and inevitably in the process culminated in the irreparable violation of his right to a fair trial under any circumstances.

[49] Counsel argued that in terms of the fundamental *lex certa* principle a person must be aware of the charges and the case against him which approves the principle of *audi alteram partem* (hear the other side or the adversary principle).

[50] Counsel argued that the right of all persons to have adequate time and facilities for the preparation of his/her defence is an important element of the guarantee of a right to a fair trial and corollary of the principle of dignity and equality. The defence must never be placed at a "substantial disadvantage" *vis a vis* the prosecution in preparing a case. To achieve equality and fairness the duty to disclose is placed on the shoulders of the state to compensate for the factual and procedural disadvantages of the defence. This duty compels the state to investigate incriminating and exonerating circumstances alike and to disclose all evidence to the defence that is relevant to both the defence and the prosecution's case. The testimony of Ms. Thomas the double accomplice, testimony regarding the unconstitutional, irregular and unlawful enterprise she and the police were involved in, stand uncontested.

[51] According to counsel, the police officers, in collaboration with Ms. Thomas were not only instrumental through unlawful and unconstitutional means to derogate the third Accused's fundamental human rights but also in the process aided and abetted Ms. Thomas to commit perjury in her evidence under oath, by not disclosing this unconstitutional and unlawful enterprise. Similarly, the police officers by not disclosing this unconstitutional and unlawful enterprise are also guilty of perjury. There is a duty on the State to convince the court that the State first of all obtained evidence in a constitutional and lawful manner and through a constitutional and lawful process and therefore dealt with it also in a lawful and constitutional manner.

[52] Counsel further argued that 'In respect of the self-incriminating statement and the recordings thereof the State failed to prove that the officials of the ACC came to Court with clean hands and has followed a process which is not tainted by serious unconstitutionality and illegality. It is submitted that the fact that the prosecution, while in



possession of recordings and other evidential material, failed or neglected or refused to act in accordance with their duty or legal obligation to make same available to the court and/or the defence, as well as knowingly allowed Ms. Thomas and the police to hide the truth about their own unlawful and unconstitutional conduct, renders the whole process unconstitutional and in derogation of the third Accused's entitlement to fair trial.'

[53] Counsel submitted that the position of the State is aggravated by the fact that the Namibian Police provided the recording device to Ms. Thomas and made no mention of this unlawful and unconstitutional procedure in any of their statements. The reason for this, it is submitted, is because they knew they had no legal authority to obtain a self-incriminating statement from the third Accused and make a tape recording themselves, without an informed waiver by the third Accused of his rights. The police and Ms. Thomas were dependent on each other and the unconstitutional, unlawful and irregular recordings were done by cooperation between them.

[54] Counsel argued that evidence obtained in breach of the fundamental rights embodied in the peremptory provisions of Articles 8, 10, 13(1) and 12(1)(d),12(1)e) and 12(1)(f) already referred to, the entitlement to be presumed innocent, the right to a lawyer and the right not to be a compellable witness against oneself both before and during trial may well have been obtained voluntarily and be perfectly reliable, but the rationale of its exclusion will lie in persevering the fairness of the criminal justice system as a whole and not only the fairness of the actual trial itself.

[55] For all those reasons, counsel argued that the recordings were obtained in violation of the rights of Accused 3, the right to a fair trial, right to privacy, the right against self-incrimination and accordingly they should not be ruled admissible.

### Discussion

[56] Ms. Thomas testified during mitigation that she was instructed by the ACC to go to Accused 3 and obtain incriminating evidence.

The following exchanges are instructive:

MR WESSELS: 'You have pleaded guilty? Yes I am guilty.

At the time you were charged and you also assisted the ACC in their investigations? That is right

Is it for that reason your cooperation, participation, is it based on that other persons were arrested?...Yes, Daniel. They could not arrest Daniel because it is where I have to go get the information

MR WESSELS: You say that you kept going to Daniel, Accused no.3? That is right to his office yes.

On whose instructions? Anti-Corruption Commission

And for what purpose? It is to get more information because when I wrote the statement I think maybe they could not believe me. Then I said to them I am ready to do anything for you to know that it is true is Daniel who came to me.

Were there also recordings involved? That is right I normally go with the recordings.

So you went to Daniel on instructions of the Anti-Corruption Commission? That is right.

And then you recorded certain conversations? That is right.'

[57] From the above quoted evidence, it is abundantly clear that that Ms. Thomas, on the instruction of ACC and armed with a recording device, went to Accused 3 to obtain incriminating evidence or information.

[58] Also from the evidence in the main trial, Ms. Thomas testified as follows:

'Okay, proceed, - -- When we went out I told Justine that please whatever I told you is the truth but you can use any possible means whatever you can do to send to Accused no. 3 for you to see that he is the one who made me to do this and he is the one that I hand the cheque over to, to anybody else but to him.

Proceed what else materialized? - - - After that she say she will talk to her boss and she will let me know then I went off to my office.

Okay and proceed. - - - Then from there some days later she called me Justine from Anti-Corruption commission and directed me to go to Accused no. 3 to ask him some questions. I went to him I ask him.

Okay, what else if there is any to add? - - - Then I say it is okay see you, then he say it is okay greet the kids then I left his office and went back to the Anti-Corruption Commissioner to Justine Namukwambi and delivered what I was supposed to deliver to her my message of what went on between me and Accused no. 3.

Okay. - - - And again another occasion some few days because it was like closer, close days which that are closer to each other it was all this happen in March. Again Justine called me. She called me and then she said I should go to her, I went to her she sent me again to him to Accused no. 3 to his office and when I went there he was not there he was out with work.

Okay, proceed. - - - Then on the third occasion Namukwambi called me again Justine from ACC (Anti-Corruption Commission) and sent me again to Accused no. 3.

Okay, proceed. - - - I went to his office I greeted him, we greet each other then I ask, I told him that but really these people were stingy, why they did not give me anything then he said even me no I did not get anything.

Okay, you went to where, to your office? - - - Off, I went to Anti-Corruption Commission to Justine to deliver my message to her of what happen when I was by his office. (Intervention)  
Okay, - - - Accused no. 3 Alright, you may stop there. Okay, you have testified earlier on that in total you took five cheques (intervention).'

[59] It is abundantly clear from the evidence in the main trial, that Ms. Thomas was called on three occasions by Justice from ACC and instructed to go to Accused 3 to go and obtain incriminating information from him.

[60] Also, during her evidence in chief, Ms. Thomas did not refer to the recording device. Nor did Mr. Nyambe, the former prosecutor, clarify with her what she meant by

delivering her message to ACC. The issue of the recording device only came out during cross examination. The following exchanges are instructive:

'Mr. Uirab (for Accused 1): "From experience I know Anti- Corruption Commission if they send somebody like on a trade they normally give you devices, recording devices. Your conversation with Accused 3 relating to Accused 1 was it recorded? It was recorded yes.

And do you know what happened to such recording? No, I gave the recording to Ms. Justine the officer of Anti- Corruption.

Yes, but will you be surprised that there is no mention in the docket of many files of any recording to that respect? There is no mention of such recording that was disclosed or even mentioned? Then the officers they betray me they did meant to get information from me that is against him. Sorry just before you proceed, after you were sent by Anti-Corruption to go to Accused3 to speak to him and then convey the discussion that you had with him on all these occasions you had a recording device?...they were all recorded yes my Lord.'

#### Was Accused 3 right to a fair trial infringed?

[61] The evidence before court is that Ms. Thomas was instructed by the ACC to go to Accused 3 to obtain incriminating evidence against him. To achieve that objective, she was armed with a recording device, given to her by the ACC, secretly recorded all the conversations she had with Accused 3 on three occasions and handed over those recordings to the ACC. Accused 3 was not aware that those conversations were being recorded.

[62] Counsel for the State argued that Accused 3's rights to silence and privacy were not violated by the conduct of the ACC officers and Ms. Thomas. Counsel relied on the matter of *S v Kidson*<sup>11</sup> where the issue was that of entrapment, but synonymous with recording (according to counsel) where the court said:

'An entrapment is directed at procuring the attempted commission by a suspect of a future offence. In the present case no offence was sought to be procured. The police agent, Rabane, merely engaged the Accused in conversation. It was common cause that his

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<sup>11</sup> 1999 (1) SACR.

conversation with the Accused included a conscious and deliberate solicitation by Rabane of certain intimations, admissions or evidence from the Accused. It is against that background that it was contended that the operation constituted a trick...Counsel urged that it was unfair of the police to send in a member of the public to elicit information in this way from a suspect. Mr Nel, by contrast, argued that some untruth or deception was required for the device to constitute an illegitimate trick. The essence of the Accused argument, as I understand it, is that Rabane was in effect a police agent and that his status as such was not known to the Accused. The failure to disclose that status led the Accused in ignorance to make certain statements which she would not have made had she known that Rabane was operating in that capacity. That this was so is indisputable, but the conclusion sought to be drawn from it in my view fails. It seems to me that for the term trick to be applied in any pejorative sense to the police operation here, some element of guile, untruth or deception is required. The only relevant omission was Rabane's failure to inform the Accused that he was at the time under police supervision and participating in a police operation. That is frequently the case in instances which are universally regarded as legitimate instances of evidence-gathering.'

[63] In this case, Ms. Thomas was acting on the instructions of the ACC and the rules of engagement, as it were, of the ACC should have applied. Her objective was to gather incriminating evidence from Accused 3 on behalf of the ACC. According to Mr. Masule, the chief investigating officer of the ACC, before they interview a suspect, he or she would be warned of his or her right to remain silent; his right not to incriminate himself and the right to legal representation. When Ms. Thomas engaged Accused 3 and recorded the conversations, he was not warned of his rights. Why should it be different where somebody is instructed by the ACC to obtain incriminating evidence against a suspect, by way of a recording device, that such a suspect must be treated differently? The ultimate aim is the same: to gather evidence that may be used before a court of law. And the court must only admit evidence that has been gathered in accordance with the Rule of law and the Constitution. In *S v Orrie*<sup>12</sup> the court held that:

'I respectfully concur with the conclusion reached by Satchwell J that, no less than an Accused, a suspect is entitled to fair pre-trial conditions...' (my underlining).

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<sup>12</sup> 2005 (1) SACR 63 (C) at p 69(H).

[64] Art 12(1) (f) of the NC provides: 'no persons shall be compelled to give testimony against themselves...' In this case Accused 3, as counsel for Accused 3 put it:

'Accused 3 was tricked into surrendering his rights to silence and advice of legal counsel at the instance of unauthorized police officers by an implicit and deliberate misrepresentation that Ms. Thomas sought his confidence as a friend and former lover and not as a police agent.'

[65] A person needs to be informed in clear terms what his rights and privileges are so as to make an informed choice before it can be said that the recordings were made freely and voluntarily. In this case, that did not happen and those recordings were done in violation of his right to a fair trial. Put differently, the recordings were made unconstitutionally and are therefore should not be admitted into evidence.

[66] Those recordings were also made in violation of Art 10(1) of the Namibian Constitution. Art. 10(1) provides: 'All persons shall be equal before the law.' Counsel for Accused 3 referred this court to *Morris v United Kingdom*<sup>13</sup> where the court held that:

'The right of equality before the law is a key element of fundamental human rights protection and procedural means to safeguard the rule of law and the right to a fair trial.'

[67] Accused 3 did not receive equal treatment in the manner the law was applied to him in that he was, as counsel for Accused 3 put it, ' through deception deprived of a proper caution to inform him about any charges, his entitlement to the right to remain silent, his entitlement to the right not to incriminate himself , the right to be informed of the consequences of making any statement and the right to consult counsel' and such Accused 3 was denied the right to equal treatment , the right to remain silent and the right not to incriminate himself. Accused 3 unknowingly and involuntarily surrendered these rights solely because of the deliberate deception.

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<sup>13</sup> [2005] ECHR 103 para 59.

[68] Counsel for Accused 3, referred this court to: In Ex parte Attorney General, Namibia: in re: The Constitutional Relationship between the Attorney- General and the Prosecutor –General<sup>14</sup> where the court held that:

‘Every person is entitled to full equality in the manner in which the law is applied to him during investigation in order to guarantee his entitlement in full equality to fair and public hearing by an independent and impartial court in the determination of a criminal charge against him.’ In this case, Accused 3 was not treated equal like any other suspect who is called by the ACC and his rights explained before being questioned. The recordings were also made in violation of that right.

[69] In *S v Naaido & Another*,<sup>15</sup> McCall J referring to Melani<sup>16</sup> with approval, held that:

‘The violation jeopardized the right against self-incrimination.... To admit evidence provided by an Accused person against himself without his knowledge as a result of the unlawful monitoring of his conversation with someone else would offend against the notion of basic fairness in no less a measure as than the admission of a confession or admission made by an Accused person without being informed of his right to legal representation, which has been held to result in an unfair trial in, for example *S v Melani and Others*.’

[70] Equally in this case, the admission of those recordings, obtained in circumstances where Ms. Thomas was instructed by ACC to obtain incriminating evidence from Accused 3 and where Accused 3 rights were not explained, is tantamount to admitting admissions or a confession made without the rights of the Accused having been explained to him. That is unlawful.

Were the recordings deliberately withheld from Accused 3 and, if so, the effect thereof on the trial?

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<sup>14</sup> 1998 NR (SC)(1).

<sup>15</sup> 1998 (1) SACR 479(N).

<sup>16</sup> 1995 (2) SACR 141(F).

[71] It is common cause that the recordings were not disclosed to Accused 3 when the docket was disclosed to him. When Ms. Thomas testified in mitigation, she mentioned about the recordings for the first time. When she testified, as a state witness, in the main trial of Accused 3, Ms. Thomas did not mention the recordings in her evidence in chief. Only when she was cross examined did she give more evidence about the recordings and how it was done. She also testified that after the recordings, she handed the recording device to Ms. Justine Namukwambi at the ACC. Ms. Justine Namukwambi testified that when the docket was forwarded to the office of the Prosecutor General, the recordings were not included as they had to be transcribed.

[72] They were sent to Moria Kambrude Transcribers in August 2010. They were only transcribed in December 2010, when they were handed back to the ACC. It was then forwarded to the PG's office. Counsel for the state argued that it is undisputed that the office of the PG had a high staff-turnover and resultantly, but undeniably, the repeated handing over of the case file in this matter from one prosecutor to the next, namely Adv. Sibeya, Konga and Nyambe allowing for possible misplacement of exhibits. Counsel further submitted that there is no indication that Mr. Nyambe deliberately withheld the exhibits, cognizance being had to the undisputed fact that by the time he took over the handling of the matter disclosure had taken place.

[73] Timeous disclosure of the docket, including recordings and transcriptions thereof is vital to enable an Accused to adequately prepare for his trial. That is part of the right to a fair trial as enshrined in art 12 of the Namibian Constitution. Although the recordings were only mentioned by Ms. Thomas when she testified as a witness for the state and were not disclosed to Accused 3 until that time, such late disclosure is not fatal to the trial of Accused 3. Although highly prejudicial to him, Accused 3 would have been entitled to ask for a postponement to afford him the time to prepare and to deal with those recordings. I agree with the submissions by counsel for Accused 3, that Accused 3's right to a fair trial was violated because there was no disclosure of these recordings at a much earlier stage, however, I am of the view that such failure did not



vitiate the entire proceedings. In addition, the actual position is that when the issue of the recordings came to the fore, his counsel had not yet commenced the cross-examination of the key witness, Ms. Thomas. *In S v Scholtz*<sup>17</sup> Dumbutshena AJA held that:

‘For disclosure to be effective it must be done at the earliest possible time. In some instances soon after arrest and in others long before the Accused is asked to plead and in some cases only after the witness has given his evidence in chief. This depends on the circumstances of each case.’

[74] In my considered views, the explanation proffered as to why the recordings were not earlier disclosed to Accused 3, is unacceptable. Although Accused 3 is prejudiced, such prejudice can be cured, to a certain extent, by applying for a postponement to enable Accused 3 to consider the recordings and prepare around the issue of the recordings. The late disclosure of the recordings and the transcriptions thereof is not fatal to his trial and can be cured.

[75] In sum, the recordings and the transcriptions are ruled inadmissible on the basis that they were made (recorded) in violation of Accused 3 rights to a fair trial, the right to privacy and the right to equality.

#### Order

[76] The recordings and transcriptions thereof of the conversations made by Ms. Thomas with Accused number 3 on the following dates:

- (a) 30 March 2010;
- (b) 8 April 2010;
- (c) 9 April 2010;

Are ruled inadmissible.

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<sup>17</sup> *Supra*.

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G N NDAUENDAPO

JUDGE

APPEARANCES

THE STATE:

Mr. Nduna (assisted by Mr Muhongo)  
Of office of the Prosecutor-General  
Windhoek

ACCUSED:

Mr. Botes  
Instructed by Isaaks & Benz Inc.  
Windhoek