

HIGH COURT OF NAMIBIA
RULING (TRIAL-WITHIN-A-



MAIN DIVISION, WINDHOEK
TRIAL)

Case no: CC 17/2018

In the matter between:

THE STATE

and

MAMSY MWENENI HILMA NUUYOMA

FIRST ACCUSED

LUKAS NESTOR

SECOND ACCUSED

BENVINDO MOMAFUBA

THIRD ACCUSED

PEMBELE ZIMUTU

FOURTH ACCUSED

PAULO KIALA

FIFTH ACCUSED

JOAO MANUEL DOS SANTOS

SIXTH ACCUSED

TATIANA LUQUENA MUCHADU GONGA

SEVENTH ACCUSED

CARLOS VICTOR ELISEU

EIGHTH ACCUSED

ISAAC CATIVA CUPESSALA

NINTH ACCUSED

PAQUETE AMERICO KAPAYOLA JOSE

TENTH ACCUSED

MALAKIAS TOMAS RUFINE

ELEVENTH ACCUSED

MIAPA AURELIO NELSON

TWELFTH ACCUSED

LUCIO JOSE CAZEMBE

THIRTEENTH ACCUSED

NOAH BOYKIE NAUKOSHO

FOURTEENTH ACCUSED

Neutral citation: *The State v Nuuyoma* (CC 17/2018) [2020] NAHCMD 62 (31 January 2020)

Coram: MILLER AJ

Heard: 9, 11 and 12 December 2019

Delivered: 31 January 2020

Flynote: Criminal procedure – Trial-within-a-trial – Admissibility of bank records – Court to determine whether Notices (Summons) issued by the Director-General of the Anti-Corruption Commission under did not comply with section 18(3) and 20(2) of the Anti-Corruption Commission Act, 2003, whether Notice (Summons) were unintelligible and whether section 27 was applicable instead.

Summary: Trial-within-a-trial to determine admissibility of notices or summons as State evidence.

Held: section 18(3) and 20(2) require that before summons is issued there should be an investigation in progress, which investigation was factually in progress.

Held: it was reasonable in the circumstances to specify the various types of accounts kept by those entities at the bank.

Held: that the notices (Summons) fall squarely within the ambit of section 26(1)(c) and (d).

Held: that the objections raised by the defence counsel stand to be rejected.

ORDER

1. The bank records of Mr Naukosho and NNN Transport are held to be admissible.
2. The matter is postponed to **2 – 20 March 2020** at **10h00** for continuation of trial.
3. Those who are in custody remain in custody, and those who are on bail your bail is extended on the same conditions.

JUDGMENT

MILLER AJ:

[1] During the course of the State's case the State called a certain Ms Ingrid Katjiukua as a witness. Her evidence is to the effect that she is employed at First National Bank at Windhoek in the Forensic Division of that Bank and as such, she has access to the bank records kept at the bank.

[2] Her evidence is to the effect further that she came into possession of a summons purportedly issued in terms of section 21(5) read with 26(1) of the Anti-Corruption Act 2003, Act 8 of 2003. I will refer to this particular piece of legislation simply as the Act.

[3] The document in her possession related to a request for the bank records of the following customers, NNN Transport and Mr Naukosho, for the period 1st of January 2013 until the time that the document came into her possession. Her evidence is to the effect that she procured the relevant documents which were in her possession.

[4] At that stage Mr Christians raised an objection to the admission of the bank records which the witness had gathered. I ordered that a trial-within-a-trial should be held to determine the admissibility of the documents. I will deal in due course with the nature of the objections raised by Mr Christians who was supported to some extent by some of the counsel for the other accused.

[5] During the course of the trial-within-a-trial, I heard the evidence of the Director of the Anti-Corruption Commission Mr Paulus Noah as well as the evidence of the investigating officer Mr Karl Cloete. The evidence of Mr Noah is to the effect that he had signed the document requesting the bank statements of Mr Naukosho and NNN Transport on the 14th of December 2015. His evidence is further to the effect that following an intelligence report which was handed in at the trial, a case docket was

opened, a case registered and thereafter assigned to the investigating officer, Mr Cloete.

[6] The evidence of Mr Cloete is that he commenced the investigation in October 2015, the upshot of which was that several of the accused persons were requested to visit the office of Aveshe Consulting Services, ostensibly to collect cheques due to them in respect of VAT refund payments.

[7] The evidence is further that at that meeting most of the accused persons were arrested. His evidence is further to the effect that during an interview with accused number 5, accused number 5 mentioned to him that certain amounts had been paid into the account of NNN Transport which prompted him to approach Mr Noah in order to obtain the so called Summons to obtain the bank statements of Mr Naukosho or NNN Transport. None of the Accused testified during the trial-within-a-trial.

[8] On reviewing the evidence of both Mr Noah and Mr Cloete, I find for purposes of the trial-within-a-trial that the evidence can be relied upon and accepted as being factually correct. The nature of the objections raised by Mr Christians and some other counsel for the accused were the following: Firstly, that the Anti-Corruption Commission did not comply with sections 18(3) and 20(2), of the Act. Secondly, that the notice issued to First National Bank was not intelligible or was too wide in its ambit and thirdly, that the notice issued should have been issued in terms of section 27 of the Act.

[9] The particular sections of the Act which are relevant here, were the subject of a series of judgements delivered by Liebenberg J in the case of *State vs Teckla Lameck and Others*. As far as the first objection is concerned with sections 18(3) of the Act, it is important to note that the facts in this particular case are different from the facts which Liebenberg J dealt with in the *Lameck* matter.

[10] It is quite apparent from the facts of this case that prior to the notice being issued to First National Bank, an investigation had already commenced at the Anti-Corruption Commission and it was during the course of that investigation, and

following the arrest of amongst other accused, also number 5, that Mr Cloete was prompted to seek the bank records relating to NNN Transport and Mr Naukosho.

[11] Insofar as it was held in the *Lameck* matter by Liebenberg J, that section 18(3) and 20(2) require that before Summonses are issued there should be an investigation in progress. It follows that there is no reason why I should follow the judgement of Liebenberg J delivered on the 24th of January 2019 in which he ruled as inadmissible notices which had been issued prior to any investigation having commenced by the Anti-Corruption Commission. The facts in the matter before me are totally different.

[12] The second objection raised is that the notice is too wide. In particular Mr Christians mentioned the fact that the notice required the banks records relating to savings account records, cheque account records, loan records, deposit boxes wherein certificates were, deposit certificates, credit card records, bank cheques and other records. It is clear however from the reading of the notice, that it was specific and directed specifically at the bank records of Mr Naukosho and NNN Transport.

[13] It is apparent that Mr Cloete and the Anti-Corruption Commission had limited information as to what types of accounts were kept by those persons or instances at First National Bank. In these circumstances, it would be reasonable to specify in broad terms various the types of accounts which might have been kept by those entities at First National Bank.

[14] In the judgement of *Lameck* written by Liebenberg J on 22nd of August 2019, pretty much the same argument was raised. In para 19 of the judgement of Liebenberg J said the following:

‘The exhibits were all issued by an authorized officer, addressed to the relevant ‘persons’ and delineated the scope of information sought. I am, for these reasons, unable to accept counsel’s contention that the ‘summonses’ are unlawful for being vague and overbroad. I am of the view that the impugned notices do not offend the underlying philosophy of intelligibility, i.e. reasonableness, and for such reason ought to be admitted into evidence.’

[15] I agree with that view which is of equal application in this case.

[16] The provisions of section 26(1)(c) and (d) read as follows:

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

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

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

[17] On the facts before me, it is quite apparent that at the time an investigation was already in progress. The notice issued falls squarely within the ambit of section 26(1)(c) and (d) of the Act, and was in my view properly issued.

[18] The objections raised by counsel for the defence, thus stand to be rejected. It follows that the evidence which the State intends to produce regarding the bank records of Mr Naukosho and NNN Transport are held to be admissible.

[19] The following order is made:

1. The bank records of Mr Naukosho and NNN Transport are held to be admissible.

2. The matter is postponed to **2 – 20 March 2020** at **10h00** for continuation of trial.
3. Those who are in custody remain in custody, and those who are on bail your bail is extended on the same conditions.

P J Miller
Acting Judge

APPEARANCES:

STATE: M H MUHONGO (with him T T IITULA)
Of Office of the Prosecutor General, Windhoek

FIRST ACCUSED: W T CHRISTIANS
Of WT Christians Legal Practitioners, Rehoboth

SECOND, THIRD AND SEVENTH
ACCUSED: V UANIVI
Of Uanivi Gaes Inc., Windhoek

FIFTH ACCUSED: K KAMWI
Of K Kamwi Law Chambers, Windhoek

SIXTH AND TENTH ACCUSED: T M CAROLUS
Of Neves Legal Practitioners, Windhoek

EIGHTH, NINTH, TWELFTH
AND FOURTEENTH ACCUSED: T P BROCKERHOFF
Of Brockhoff & Associates Legal
Practitioners, Windhoek

ELEVENTH AND THIRTEENTH
ACCUSED: M TJITERE
Of Dr Weder, Kauta & Hoveka Inc.,
Swakopmund