A. 267/99

HENDRIK MULLER VAN AS & 1 OTHER vs THE STATE.
HEREIN REPRESENTED BY THE PROSECUTOR-GENERAL

Silungwe, J; Levy. AJ. Manyarara, AJ

14/12/2000

Application for "guide-lines".

The High Court has not been established to settle academic questions of law or to advise a litigant how to regulate his affairs or how to conduct prospective litigation. The High Court can make a declaration of rights in terms of Section 16(4) of the High Court Act. The High Court pursuant thereto declared that where an accused is released by virtue of the provisions of Article 12(1)(b) of the Constitution in that the trial has not taken place within a reasonable time, such release will not constitute a permanent stay of prosecution.
The Court disagreed with other dictum in ***State v Heindenreich*** 1995 NR 234 and agreed with the statement in ***State v Strowitski*** 1995(1) BCLR 12 (Nm).

Case No.: A. 267/99

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HENDRIK MULLER VAN AS **FIRST APPLICANT**

PAUL NICOLAAS ADONIS **SECOND APPLICANT**

and

THE STATE, HEREIN REPRESENTED BY

THE PROSECUTOR-GENERAL **RESPONDENT**

CORAM: SILUNGWE, Jet LEVY, AJ et MANYARARA, AJ

Heard on: 08.12.2000

Delivered on: 14.12.2000

JUDGMENT

LEVY, AJ: In this matter first applicant is represented by Mr Z J Grobler while respondent is represented by Mr D F Small.

On 3rd March 2000 first applicant issued Notice of Motion out of the High Court purporting to invoke the provisions of Rule of Court 33(4) and by agreement between the parties as a result

of this "application" on 24th March 2000 the High Court made the following order:

"It is ordered

1. That the following questions of law is hereby disposed of separately before the application for a permanent stay of the criminal proceedings is decided on the merits and/or the criminal trial against the Applicants proceeds:

1.1 That the Honourable Court provide guidelines as to the procedure to be followed and the legal principles applicable to an application for the permanent stay of criminal proceedings in terms of an Accused person's right to a fair trial in terms of Article 12 read with Article 25(2) of the Namibian Constitution, in particular:

a1 Can the accused person proceed by way of affidavit in an application by Notice of Motion, i.e. does civil procedure apply to such an application or

a2 must the application be brought by way of viva voce evidence in the criminal trial itself, i.e. a type of trial within a trial and applying rules of criminal procedure.

b1 Can an application for stay of criminal proceedings only be brought before the criminal trial actually commences or

b2 at any stage before judgment if during the trial it appears that a serious irregularity occurred in the proceedings before the trial court, or from the evidence presented that serious irregularities occurred before the trial commenced.

C Can an accused person's right to a fair trial be derogated from or suspended in any way in particular:

c1 If during a criminal trial it becomes clear that an accused person is an aggrieved person as contemplated by Article 25(2) of the Namibian Constitution, can he apply immediately for a permanent stay of the proceedings or must he first exhaust all his possible remedies in terms of the Criminal Procedure Act.

c2 Can the trial judge order that the application for a permanent stay of the criminal proceedings be struck from

the roll as not being urgent and order that the criminal trial must proceed, or are all applications for a permanent stay of criminal proceedings inherently urgent in terms of the provisions of Article 24(2) of the Namibian Constitution and must be disposed of on the merits.

c3 Does an application for the permanent stay of criminal proceedings immediately suspend the continuation of the criminal trial until the application has been disposed of.

c4 Can the right to a fair trial in terms of Article 12 of the Namibian Constitution be suspended in terms of any Rule of Civil or Criminal Procedure for example by insisting that Section 317 of the Criminal Procedure Act must be applied.

c5 Is there a duty on the Trial Judge as soon as it comes to his attention that a serious irregularity occurred, to mero motu adjudicate on the irregularity in relation to a fair trial for the accused person.

dl Can only the Trial Judge adjudicate on an application for a permanent stay of criminal proceedings after the criminal trial has commenced or

d2 can any judge adjudicate on the application for a permanent stay of the criminal trial after the criminal trial has commenced and

d2.1 a copy of the record of the criminal trial up to that stage be placed before him to consider the seriousness of the irregularities complained of.

e. Does the credibility and/or veracity of State witnesses that testified in the trial in relation to irregularities that occurred in the pre-trial period, play any role in the investigation to the seriousness of the irregularities complained of.

f. Must the evidence given in the criminal trial be disallowed as hearsay if another Judge must decide whether the Accused is enjoying a fair trial.

1.2 Is the State entitled to an order as to costs if the application for a permanent stay of criminal proceedings is unsuccessful in that Article 25(4) of the Namibian Constitution only makes provision that monetary compensation in respect of any damages suffered

> by aggrieved persons can be paid and the content of an application for a permanent stay of criminal proceedings is basically criminal in nature.

2. That this application is regarded as urgent in that a trial date for the hearing of the above questions of law be allocated as soon as possible, subject thereto that the date be settled with the Registrar.

3. That the relief sought in prayer 3 be decided by the Judge-President."

Mr Grobler maintained that the object of the application was to provide "guidelines as to the procedures to be followed and the legal principles to be applied to an application for the permanent stay of criminal proceedings".

The High Court has not been established to settle academic questions of law or to advise an applicant on how to regulate his affairs or how to conduct prospective litigation. The aforesaid is adumbrated in Article 80(2) of the Constitution of the Republic of Namibia which provides ***inter alia:***

> "The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms granted thereunder

It is clear from the aforegoing that the emphasis is on "disputes" and "prosecutions". These may include matters relating to the Constitution but the operative words remain "disputes" and "prosecutions".

First applicant purports to apply to this Court in terms of Rule 33**(4).** This High Court Rule

which relates to civil law disputes and actions, provides, as far as is relevant hereto;

> "If it appears to the court ***mero motu*** or on the application of any party that there is, in any pending action, a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the trial of such question in such manner as it may deem fit, and may order that all further proceedings be stayed until such question has been disposed of:
>
> (My emphasis)

II is clear that this Rule relates to, and can only be invoked in respect of, a "pending action". The Rule of Court is not there for some academic exercise. Mr Grobler at first contended that the application was brought for the benefit of the public and that it did not relate to a particular action or trial. Eventually, however, Mr Grobler was driven to concede that there was indeed an action to which this application of first applicant had a direct relationship. The action was a criminal trial.

Both applicants are being tried for murder and the trial is pending before Mr Justice Mtambanengwe. He also eventually conceded that a similar application to this one was brought before Mr Justice Mainga. Mr Grobler says, he did this because the presiding judge Mtambanengwe, J., was on long leave. Mainga,J., dismissed the application. According to Mr Grobler the learned judge, Mainga,J., did not deal with the merits of the application but dismissed it because Mtambanengwe,J., was seized with the criminal trial, and therefore Judge Mainga said the matter should be dealt with by him.

On 8th October 1990 the High Court Act (No. 16 of 1990) was duly promulgated and section 2

thereof which must be read with section 16, provides:

> "The High Court shall have jurisdiction to hear and to determine all matters which may be conferred or imposed upon it by this Act or the Namibian Constitution or any other law."

The term "any other law" refers to any other statutory provisions as well as to the Common Law. In terms of the Common Law the Supreme Court of the various Provinces in South Africa including the Supreme Court of South West Africa had "inherent jurisdiction", that is jurisdiction which was not prescribed in any statute. Accordingly the term "any other law" in section 2 includes that inherent jurisdiction.

In ***Ex parte Millsite Investment Co. (Pty) Ltd*** 1965(2) SA 582 (T) the Court said at 585 G-H;

> "Apart from powers specifically conferred by statutory enactments and subject to any specific deprivations of power by the same source, a Supreme Court can entertain any claim or give any order which at common law it would be entitled so to entertain or give. It is to that reservoir of power that reference is made where in various judgments Courts have spoken of the inherent power of the Supreme Court: see e.g. ***Union Government and Fisher v West,*** 1918 A.D. 556 at p. 572-3. The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation."

Article 138(2)(a) of the Constitution provides, as far as is relevant hereto:

> "The laws in force immediately prior to the date of Independence governing the jurisdiction of Courts within Namibia, the right of audience before such Courts, the manner in which procedure in such Courts shall be conducted and the power and authority of the Judges, Magistrates and

> other judicial officers, shall remain in force until repealed or amended by Act of Parliament, ..."

Section 16 of the High Court Act provides:

> "The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance, and shall, in addition to any powers of jurisdiction which may be vested in it by law, have power-
>
> (a) to hear and determine appeals from all lower courts in Namibia;
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> (b) to review the proceedings of all such courts;
>
> (c) subject to the provisions of this Act or any other law, to hear appeals from judgment or orders of a single judge of the High Court;
>
> (d) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

The High Court can in terms of Section 16(d) make declaratory orders in regard to all those matters in respect whereof it has jurisdiction and indeed, it is possible that such declaratory order could amount to the "guidelines" referred to by Mr Grobler.

Mr Grobler confirmed that a declaratory order in respect of the meaning and effects of Article 12(l)(b) of the Constitution is what he is seeking.

Article 88 of the Constitution provides for the appointment of the Prosecutor-General and prescribes the latter's functions. Sub-Article 2(a) provides:

"(2) The powers and functions of the Prosecutor-General shall be:

(a) to prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings;"

The Sub-Article restricts the Prosecutor-General to prosecuting "subject to the provisions of the Constitution". Inasmuch as Article 80 gives the High Court the power to interpret, implement and uphold the Constitution, the High Court is specifically authorised to ensure that the Prosecutor-General prosecutes subject to the Constitution. The declaratory order therefore can affect criminal prosecutions.

From the terms of first applicant's Rule 33(4) application and from the Order of Court of 24th March 2000 granted because of the agreement of the parties it is apparent that Mr Grobler presupposes that Article 12(l)(b) makes provision in our law for a permanent stay of criminal proceedings and that he wants to invoke such proceedings in order to stay the murder trial from continuing before Mr Justice Mtambanengwe. If this court decides that on a proper interpretation of Article 12(l)(b) a person released by virtue thereof does not receive a permnent stay of prosecution, Mr Grobler's application collapses whether it is brought allegedly by virtue of the provisions of the Constitution and the Rules of Court or under Common Law.

Mr Grobler says that in the ***State v Heidenreich*** 1995 NR 234 the High Court held that in terms of Article 12(l)(a) and (b), where a court ordered the release of an accused, because his trial had not taken place within a reasonable time, such accused had a permanent stay of prosecution in respect of the offence with which he was being tried.

In that case, the trial of Heidenreich had been delayed for a considerable time in a Magistrate's Court and when the legal representative of the accused applied for the release of the accused in terms of Article 12(l)(b) it was granted. Thereafter the matter came on review before two judges of the High Court. The points set down for argument before the High Court were as follows:

> "1. Was the magistrate correct in holding that the trial of the accused had not taken place within a reasonable time as required by art 12(l)(b) of the Constitution?
>
> 2. If so, is the magistrate's court a competent court in terms of art 25(2) to take the necessary action to enforce or protect the right of an accused to a fair trial?
>
> 3. Was it competent for the magistrate to order that the accused be released and what is the effect of such order?"

As to point 1, the Court held that the magistrate was incorrect in holding that the trial of the accused had not taken place within a reasonable time. The decision of the magistrate therefore was set aside. Any remarks therefore by the Court on the effect of an order to release an accused where the trial had not taken place within a reasonable time, was entirely obiter.

Furthermore, the Court held that it was competent for the magistrate to make an order in terms of Article 12(l)(b) releasing an accused. The learned judge relied on Article 5 of the Constitution which enjoined the judiciary to uphold the fundamental rights enshrined in the Constitution. There can be no doubt that this is correct but if a magistrate has the jurisdiction to make such an order (which I believe he has) the effect of such order cannot enlarge the jurisdiction of a magistrate. The order granted by the magistrate must be within the ambit of the magistrate's jurisdiction.

The learned judge pointed out that the jurisdiction of the Magistrate's Court was prescribed in Act 32 of 1944. In terms of Article 138(2)(a) quoted above the jurisdiction of the magistrate prior to Independence was to remain in force as therein provided until "repealed or amended by Act of Parliament". This was laid down in the Constitution which is the Supreme Law of Namibia (Article 1(6)). There has been no relevant Act of Parliament. The Magistrate's Court's jurisdiction is therefore the same as it was before Independence. If the effect of the Order made by the magistrate to "release" an accused is to grant a permanent stay of prosecution the magistrate would be exceeding his jurisdiction. If a magistrate has the power "to release" an accused which by virtue of Article 5, he/she has, by necessity "release" does not have the extended meaning given to it in ***Heidenreich's*** case.

Furthermore, the High Court (as opposed to a Magistrate's Court) can also "release" a person whose trial has "not taken place in the High Court within a reasonable time" but such an order would also not grant an accused a permanent stay from prosecution for the same offence, as he has been neither convicted nor acquitted as required by Article 12(2). I have set out above the jurisdiction of the High Court, and it is extremely doubtful whether as therein provided or in Common Law the High Court has the jurisdiction to grant an accused a permanent stay of criminal prosecution merely because he has been "released" in terms of Article 12(l)(b).

With great respect to the learned judges who heard ***Heidenreich's*** case, the effect of Article 12(l)(b) was never intended to be more than release "from arrest or from onerous conditions of bail" as decided by O'Linn J in ***State*** v ***Strowitski*** 1995(1) BCLR 12 (Nm) (judgment delivered on 22nd April 1994).

The learned judges in ***Heidenreich's*** case gave to the word "release" a meaning similar to "acquit". At page 239 I to J, the Court said;

> "The general approach when construing constitutional provisions is that the provisions are to be 'broadly, liberally and purposively' interpreted: ***Government of the Republic of Namibia v Cultura*** *2000* ***and Another*** 1994(1) SA 407 (NmS) at 418F, and if this canon of construction is to be relied upon it is as well to identify expressly the underlying purpose of the constitutional provision under consideration."

With due respect, this "canon of construction" does not permit a court to give a word the meaning it does not have. In ***Minister of Defence v Mwandinghi*** 1993 NR 63 at 69 I to J a Full Bench in a joint decision by Berker, CJ, Mahomed AJA and Dumbutshena AJA said the following:

> "H M Seervai, citing what was said by Gwyer CJ, remarked, in ***The Constitutional Law of India*** 3rd ed vol I at 68, that
>
> '. . . . . a broad and liberal spirit should inspire those whose duty it is to interpret the Constitution; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purposes of supplying omissions or correcting supposed errors.'"

It is trite that a court must start with the interpretation of any written document whether it be a Constitution, a statute, a contract or a will by giving the words therein contained their ordinary literal meaning. The Court must ascertain the intention of the legislators or author or authors of the document concerned and there is no reason to believe that the framers of a Constitution will not use words in their ordinary and literal sense to express that intention. As was said by Innes CJ in ***Venter v R*** 1907 T.S. 910 at 913;

> "By far the most important rule to guide courts in arriving at that intention is to take the language of the instalment, or of the relevant portion of the instrument, as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and give them their ordinary effect."
> (My emphasis)

This has been followed in Namibia on countless occasions. Where a particular word in its ordinary sense has more than one meaning, an ambiguity can arise and only then does one have recourse to other methods of ascertaining the intention of the authors concerned as to what the meaning was which the authors intended the word should have.

One need not consult a dictionary for the meaning of the word "release". It is frequently used by members of the public and by lawyers in courts and in documents. In the instant case, the word is used in Article **12** which deals with a fair trial. In the same Article the framers of the Constitution used the word "acquit" and dealt with the effect thereof, namely, having been acquitted an accused could not be charged again.

These two concepts namely "release, because the trial has not taken place within a reasonable time" and "acquit" where the trial has been completed appear in the same Article. It is therefore logical to contrast the concepts and not to give them the same meaning.

It is true the framers of the Constitution did not recite what the effect of a "release" would be. This is not a ***casus omissus*** as it was not necessary to elaborate on the normal consequences of a person who is being prosecuted, being released. A person who is prosecuted is arrested in order

to be prosecuted but may be on bail. Where such person is released from arrest and bail it does not terminate the prosecution. One can attend a trial on a "warning" from the Court and one can be on one's own recognisances and still be prosecuted.

In ***R v Stevens*** 1969(2) SA 572 (RAD) at 577, Beadle CJ said;

> "...when the meaning of a section is plain...., the mere fact that there may be a ***casus omissus*** in the section does not seem to me to justify a departure from its plain meaning and this is more especially so when that plain meaning appears to accord with the intention of the Legislature."

In any event there is no need to interpret the Sub-Article as having a ***"casus omissus".*** In ***Dhanabakium v Subramanian and Another*** 1943 AD 160 at 170-1, Centlivres, JA said;

> "The conclusion at which I have arrived avoids what would otherwise be a ***casus omissus*** in sec. 70 and it seems to me that if a reasonable construction of an Act does not lead to a ***casus omissus*** while another construction does lead to that result, the construction which should be applied is the one which does not lead to that result."

I conclude this aspect by once again referring to the Full Bench judgment in ***Mwandinghi's*** case quoted above, where the learned judges referred with approval to the remarks of Gwyer CJ which included a warning that in the interpretation of Constitutions one should not "supply omissions" even when applying that "broad and liberal spirit" for interpreting Constitutions.

To give the word release its ordinary meaning (to release from arrest or bail) fits in with the scheme of the Constitution and with the existing Common Law and the Criminal Procedure Act (Act 51 of 1977) applicable before Independence in Namibia and since Independence by virtue

of Article 140 of the Constitution. An example illustrates a situation which could arise if the ***obiter dictum*** in ***Heidenreich's*** case is correct.

Theft in terms of the Common Law is a continuing offence.

Sv VonElling 1945 AD 234

An accused embezzles and steals N$ 10,000,000-00 over a period of years and invests it in a bank in Europe. He is arrested but due to his cunning, the investigation is involved. A person cannot take advantage of his own bad faith. Therefore any delay in his trial caused by his own cunning will not accrue to his benefit in deciding whether there has been an unreasonable delay. The State, however, similarly cannot benefit from its own ineptitude and if due to such ineptitude the investigation after his arrest is unduly and unreasonably delayed, the accused would be entitled to his release in terms of Article 12(l)(b). If that meant that prosecution was permanently stayed, the accused would be able to enjoy the spoils of his crime with impunity while still committing theft. This could never have been intended by the framers of the Constitution.

Accordingly, I am satisfied that should a person be "released" in terms of Article 12(l)(b), such person would not thereby be granted a permanent stay of prosecution.

Mr Grobler contended that Article 5 of the Constitution enjoins the Courts to enforce the fundamental human rights of an accused which included his client's rights to a fair trial. He said the enforcement of such rights could not be suspended. Therefore if during a criminal trial or even before the trial, some fundamental human right is breached by the State, an accused can

immediately apply to the Court hearing the criminal case or to another judge of the High Court to stay the prosecution. Such accused, says Mr Grobler, would not have to wait to take the case on appeal.

The Criminal Procedure Act of 1977 is still applicable in Namibia by reason of Article 140 of the Constitution. It must be applied unless repealed or amended by an Act of Parliament or unless some provision is declared unconstitutional by a Court of Law. If an accused considers that one or more of his/her fundamental human rights are infringed during the case or in respect of a trial, he/she in terms of the Criminal Procedure Act, can and should raise his or her objection, with the Court seized with the trial. Should that Court not uphold the objection immediately a special entry can be asked for. At the conclusion of the case, the Court can re-consider the objection and acquit or convict. If its convicts, the accused can appeal and raise his objections afresh.

More often than not the very right which the accused may contend is infringed is closely associated with the prosecution and cannot be decided until the prosecution is finalised. A decision on the alleged infringement is therefore not delayed by the accused having to wait for final adjudication. Should the Court immediately during the trial uphold an accused's objection as to some infringement, the question is whether or not the infringement is so fundamental and trial related that the continuation of the trial must be terminated and if the decision is made on appeal, whether or not the conviction should be quashed. This does not necessarily mean that the accused cannot be tried again. A decision to prosecute afresh depends on the nature of the irregularity or infringement e.g if the Court was incompetent from the commencement, a

competent Court can rehear the matter.

Mr Grobler has not informed this Court of the nature of the alleged irregularities or human rights infringement of which he complains and this Court cannot speculate in respect thereof. There are many cases which have been decided on appeal which have quashed convictions because an accused has not received a fair trial. These cases should provide the 'guidelines" which Mr Grobler seeks.

Mr Small contends that in ***S v Shikunga and Another*** 2000(1) SA 616 (NmS) at 629 C to 630 F the Supreme Court considered whether pre-trial irregularities could form the basis for an application for a permanent stay of criminal proceedings and rejected the contention.

In view of the fact that Mr Grobler has not placed material facts before this Court, this Court is unable to make any order whatsoever on this aspect but in principle if Mr Small's contention as to the meaning of the ***Shikunga*** case is correct this Court unreservedly accepts the Supreme Courts decision.

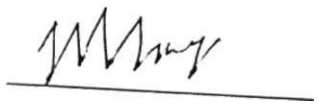
To sum up the Court's order is:

In terms of Section 16(4) of the High Court Act it is declared that where an accused is released by virtue of the provisions of Article 12(l)(b) of the Constitution in that the trial has not taken place within a reasonable time, such release will not constitute a permanent stay of prosecution.

I agree

SILUNGWE, J

I agree



MANYARARA, AJ

For First Applicant:	Advocate Z J Grobler
Instructed by:	Messrs A Louw & Co
For the Respondent:	Advocate D F Small
Instructed by:	The Prosecutor-General