

**MARGARET MALAMA-KEAN vs THE MAGISTRATE FOR THE DISTRICT OF  
OSHAKATI N.O. & THE PROSECUTOR-GENERAL**

CONSTITUTIONAL LAW

Meaning of "released" in Article 12(1)(b) considered. The Court differed from the judgment in *van as & Another v The State* (A. 267/99). The Court held that "released" constitutes not only release from *custody and release from bail* or conditions of bail; but also release from further *prosecution*.

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**MARGARET MALAMA-KEAN**

**APPLICANT**

**and**

**THE MAGISTRATE FOR THE DISTRICT OF**

**OSHAKATI N.O.**

**FIRST RESPONDENT**

**THE PROSECUTOR-GENERAL**

**SECOND RESPONDENT**

**CORAM:** HANNAH, J *et* MARITZ, J *et* MAINGA, J

Heard on: 2001-08-31

Delivered on: 2001-10-15

**JUDGMENT**

**HANNAH, J.:** On 7<sup>th</sup> September, 2001 we made the following order in this application:

"IT IS ORDERED

1. The Notice of Motion is amended by the insertion of the words "and/or the decision of the first respondent on 5<sup>th</sup> July 2001" after the word "proceedings" in paragraph 2 thereof;

2. The order of the first respondent made in the Magistrate's Court, Oshakati, in case no. 491B/2000 on 5<sup>th</sup> July 2001 refusing to release the applicant under Article 12(1)(b) of the Constitution from the conditions of her bail is set aside and substituted for the following order:

*"The accused is released on bail in the amount of N\$50 000.00 and she is warned to appear in the Regional Magistrate's Court at Oshakati on 13 July 2001, failing which, she may be arrested and her bail may be forfeited";*

3. The applicant is released in terms of Article 12(1)(b) of the Constitution from all the conditions of her bail other than those contemplated in the order under paragraph 2;
4. The second respondent is ordered to pay the costs of the application."

We said that we would give our reasons for making the order at a later date. Our reasons are as follows.

We heard the application on 31<sup>st</sup> August simultaneously with an appeal brought by the applicant against the order of the first respondent made on 5<sup>th</sup> July and referred to in paragraph 2 of our order made on 7<sup>th</sup> September. When dealing with the background I will extract certain facts which are to be found in the appeal record.

The applicant is a Zambian citizen married to a British national. They have six year old twins and their home is in the United Kingdom. In February, 1997 the applicant was appointed as Chief Executive Officer of a Non-Governmental Organisation called CD Namibia which had its offices at Ongwediva. She lived there with her husband and children and her contract was due to expire at the end of July, 2000. According to the applicant, she discovered some evidence of financial irregularities at CD Namibia in March, 2000 and made a report to the board as a result of which the finance officer, Ndamona Ndeulita, was suspended. An internal investigation began. Then on 27<sup>th</sup> June, 2000 the applicant was arrested on suspicion of having committed theft or fraud. She appeared before the Oshakati Magistrate's Court and was remanded in custody. On 4<sup>th</sup> July the

State opposed an application for bail on several grounds, including the lengthy period of time it would take to complete the investigation, and the applicant's legal representative did not pursue the application. On 9<sup>th</sup> August a further application for bail was made and this time the State did not oppose. Bail was granted in an amount of NS150 000,00 and the applicant was required to report twice daily at Oshakati Police Station, to surrender her passport, not to leave the District of Oshakati without permission and not to enter the premises of CD Namibia. The case was adjourned to 14<sup>th</sup> August. On that day the public prosecutor informed the court that the investigation was incomplete and there was a further adjournment to 12<sup>th</sup> September. On that date the public prosecutor informed the court that he did not know how far the investigation had progressed and there was a further adjournment to 16<sup>th</sup> October. Further adjournments were granted at the instance of the State on 16<sup>th</sup> October and 29<sup>th</sup> November and it was during the latter month that the applicant's husband was required to leave Namibia with the children because their temporary visas had expired. They returned to the United Kingdom.

On 7<sup>th</sup> December the applicant's legal representative informed the court that CD Namibia, the complainant in the matter, had withdrawn its complaint and he asked that all conditions of bail be removed except that the applicant be required to report once daily. The State agreed that the reporting condition be reduced to once daily but otherwise opposed the application. It was pointed out that it was for the Prosecutor-General to decide whether the case against the applicant should be withdrawn and as it involved N\$1 000 000,00 all the other conditions of bail should remain in place. This submission was upheld by the magistrate and the case was postponed to 19<sup>th</sup> December for the finalisation of the investigation.

On 19<sup>th</sup> December Ndamona Ndeulita was joined as second accused and she was granted bail of NS50 000. The State was still not ready to proceed and the case was postponed to 1<sup>st</sup> February,

2001. On that day the public prosecutor informed the court that the case was still under investigation and a further adjournment was granted to 9<sup>th</sup> April. On 9<sup>th</sup> April the position remained unchanged but the applicant had had enough. Her legal representative opposed the State's application for a further three month postponement. The applicant was called to testify. She said that the investigation had been continuing for nine months and no explanation for the delay had been given. CD Namibia had conducted its own internal investigation and she considered that four weeks would have been sufficient to complete the police investigation. She had not seen her husband and children for five months and this caused her great distress. However, the magistrate granted the State's application and the case was postponed to 24<sup>th</sup> July.

The applicant then appealed against the magistrate's order granting a postponement and the appeal came before the High Court on 15<sup>th</sup> June. Also before court on that day was an application by the State that the matter be remitted to the Magistrate's Court for a proper hearing of the application for postponement. The basis for that application was an allegation that the magistrate had erred by allowing the applicant to testify before the investigating officer was called and then compounded that error by refusing to allow the public prosecutor to call the investigating officer. The High Court ruled in favour of the State and remitted the matter to the Magistrate's Court for further consideration.

On 26<sup>th</sup> June the application for a postponement resumed in the Magistrate's Court and the State called the investigating officer, Inspector Mulimina. His explanation for the delay in completing the investigation was that in July, 2000 he was told by the lawyer acting for CD Namibia and the lawyer acting for the applicant that they were endeavouring to settle the matter and that he should put the investigation on hold. This, he said, he did. Then in November he received a letter from CD Namibia's lawyer stating that its differences with the applicant had been settled and that it

wished to withdraw all criminal charges against the applicant. The matter was referred to the Prosecutor-General 's office and it was only in December that he was instructed to continue with the investigation. When the application for a postponement was made in April, 2001 he had only spent four months on the investigation and this was not enough. He required a further three months to complete it and this led to the application for a three month postponement.

Mulimina also testified that there was a prima facie case against the applicant and gave details. The amount involved, he said, was N\$2 800 000,00. However, in cross-examination the Inspector changed tack and said that it was not his case that the applicant had committed fraud or theft in an amount of N\$2 800 000,00 and in re-examination he went so far as to say that there was only a prima facie case against the applicant in connection with the sale of a Mazda motor vehicle for the sum of N\$22 000,00. Also in cross-examination Mulimina conceded that had the applicant wished to do so she could have absconded to England. He trusted her not to do so.

The lawyer who had acted for CD Namibia, Johannes Greyling, was also called by the State to give evidence. He said that he had informed Mulimina that settlement negotiations between the complainant and the applicant were about to take place and sought his permission which was granted. He also told Mulimina that he thought it would be a waste of time to continue with the investigation if a settlement was going to be reached but he did not tell him to stop the investigation. That, he said, was in the discretion of the investigating officer and the State.

One other matter of some relevance which emerged during the June hearing was that the investigation had been completed and the docket had been submitted to the Prosecutor-General for consideration.

At the conclusion of the hearing counsel for the applicant submitted that any further postponement should be refused, alternatively that if a postponement was to be granted that the applicant be "released" in terms of Article 12(1)(b) of the Constitution.

That Sub-Article provides:

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

A criminal trial falls squarely within Sub-Article (a).

The magistrate gave her finding on 5<sup>th</sup> July. With regard to the concessions made by Mulimina she said that the court:

"is not bound by the suggestions of the investigator and if the court finds that the suggestion are not in the interest of justice, the court can rule otherwise."

I would say in passing that although it is undoubtedly correct that a court is not bound by any concessions made, or opinions given, by an investigating officer when considering applications for bail or for a postponement, it would be a bold court indeed which ignores entirely that kind of material especially if it emanates from a senior police officer.

The magistrate then went on to say that there were no grounds for refusing a postponement as the investigation had been completed and the docket was with the Prosecutor-General. As for the application brought in terms of Article 12(1)(b) she ruled that the delay in completing the investigation was not caused by the State and that it would not be in the interest of the administration of justice to order the release of the applicant.

Having given her ruling the magistrate was then informed by the Deputy Prosecutor-General that the Prosecutor-General had decided that the applicant should be arraigned in the Regional Court on charges of theft of N\$2 894 740,10 and corruption. The Deputy Prosecutor-General asked for the case to be transferred to that court. The magistrate then made such an order and the applicant was required to appear at the Regional Court on 13<sup>th</sup> July. On that date the trial was fixed for 22<sup>nd</sup> October, 2001. That date is approximately sixteen months after the arrest of the applicant.

That brings me to the present application which was launched on 9<sup>th</sup> August. The principal reason for the delay in launching it was that the typed record of the June hearing in the Magistrate's Court did not become available until the end of July. In the Notice of Motion the applicant sought the following relief:

- " 1. Condoning the Applicant's non-compliance with the rules of the High Court and ordering that this matter should be heard as one of urgency as envisaged in Rule 6(12) of the rules of the High Court of Namibia.
2. Ordering that the proceedings in the Magistrate's Court for the district of Oshakati, held at Oshakati in case number 491/B/2000 (State versus Margaret Malama-Kean) be set aside.
3. Ordering that the Applicant be released, forthwith, as envisaged in Article 12(1)(b) of the Constitution of the Republic of Namibia.
4. Ordering the Second Respondent to pay:
  - (i) the costs of this application;
  - (ii) the costs of the High Court proceedings incurred by the Applicant in the appeal lodged by the Applicant against the finding or order of the First Respondent handed down on 9 April 2001;
  - (iii) the costs incurred by the Applicant in all the proceedings conducted in the Magistrate's Court for the district of Oshakati after 30 July 2000, to date, on a scale as between attorney and own client.



## 5. Further and/or alternative relief."

In her founding affidavit the applicant recounts the history of the matter and makes three complaints concerning the June hearing in the Magistrate's Court. She complains that she was not afforded the opportunity to respond to the allegation that the delay in completing the investigation was due to the action of her own lawyer. That admissible evidence was rejected. And that the presiding magistrate displayed bias against her. A further complaint relates to the transfer of the case on 5<sup>th</sup> July to the Regional Court. It is only necessary to deal with the first of these complaints. The applicant states that neither she nor her lawyers were aware of the fact that the investigation had been halted. Had she been aware of this she would have immediately instructed her lawyers to object to her initial remands in custody and to the subsequent imposition of stringent bail conditions. The applicant annexes to her founding affidavit an affidavit sworn by Arumugam Thambapilai, the lawyer who allegedly told Mulimina to put the investigation on hold, and an affidavit sworn by Richard Metcalfe, the lawyer who represented her in the Magistrate's Court on a number of occasions. Thambapilai denies giving any orders to Mulimina to halt the investigation and deposes that had he been aware of the fact that the investigation had been halted he would have objected to the postponements sought by the State on those occasions when he represented the applicant at the Magistrate's Court. Metcalfe states that he also was unaware that the investigation had been halted and had he been made aware of this he would immediately have drawn it to the magistrate's attention.

The respondents' answering affidavit was sworn by Olyvia Imwala, a Deputy Prosecutor-General. She annexes an affidavit sworn by Mulimina. In that affidavit he states that Thambapilai requested him in July, 2000 to suspend the investigation and that he heeded the request. Mulimina then adds that during the period from the end of July, 2000 he did in fact obtain certain statements and documents concerning the investigation but only those which were easily obtainable. No mention

is made of this in the affidavit of Mulimina which was placed before the High Court on 15<sup>th</sup> June in support of the State's application to have the case remitted and it is in stark contrast to the Inspector's testimony in the Magistrate's Court. In that testimony he stated in terms that:

"I stopped the investigation as it was put on hold."

and

"I only investigated this case as from December to March 2001."

The admission made by Mulimina that he did in fact obtain certain statements and documents must be viewed in the light of the fact that the State provided the applicant with a copy of the investigation diary on 24<sup>th</sup> August, 2001, the very same day that Mulimina swore his affidavit. This diary tells a very different story to that told by Mulimina when he testified in the Magistrate's Court. According to the investigation diary, which is annexed to the applicant's replying affidavit, Mulimina took at least twenty statements between the end of July and November, 2000 and also obtained a variety of documents. If the investigation diary is correct, and there is no reason to think that it is not, Mulimina withheld this vital information when making the affidavit which was placed before the High Court and also when testifying in the Magistrate's Court. And it is also highly significant that the alleged instruction given to Mulimina to stop the investigation finds no mention in the diary.

The affidavits which have been filed do, of course, reveal a dispute of fact and the general rule is that relief may only be granted if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify an order. However, there are exceptions to this general rule. Where a statement in the respondent's affidavits is clearly untenable then the Court may

reject it merely on the papers. *See Associated South African Bakeries (Pty) Ltd v Oryx Vereinigte Backereien (Pty) Ltd en Andere* 1982(3) SA 893 (A) at 923G-924D. In my view, the statement made by Mulimina that Thambapilai requested him to suspend the investigation falls squarely into this category. Once account is taken of the investigation diary kept by Mulimina it becomes clear that his stratagem of laying the blame for the delay in completing the investigation at the feet of the applicant is without proper foundation. What happened seems to me to be clear. Mulimina pursued the investigation with some vigour but a month or so after learning that settlement negotiations were in progress he lost interest and for several months did nothing. The delay complained of is the responsibility of the State.

Further, even if we were to decide this matter on the basis of the alleged instruction by the defence lawyer to stop investigations we would be driven to the same conclusion. Once the State commences criminal proceedings it has a duty actively to pursue those proceedings. It is not for the State or its officials to take instructions and allow the proceedings to lie dormant.

The applicant asserts that the delay in bringing her to trial was unreasonable and that her constitutional right to be tried within a reasonable time has therefore been infringed. What constitutes a reasonable time for the purposes of Article 12(1)(b) was considered at some length in *S v Heidenreich* 1995 NR 234 and I do not propose to repeat what was said in that case in this connection.

Time started to run on 27<sup>th</sup> June, 2000 when the applicant was arrested. At that stage the police had not started their investigation. The arrest was made on the complaint of CD Namibia and was in

the nature of a pre-emptive strike due to the fairly imminent departure of the applicant from the country. In these circumstances there was a heavy burden on the State to pursue the investigation with vigour and complete it as soon as was reasonably possible. Yet it was not until June of the following year that the investigation was completed and the earliest trial date which could be given was October, 2001, some sixteen months after the applicant's arrest. That, in my view, is delay which is presumptively prejudicial.

I take account of the fact that the case against the applicant is, in all probability, a complex one but that does not weigh too heavily with me. I respectfully agree with the following observation of Kriegler, J. in *Sanderson v Attorney-General, Eastern Cape* 1998(1) SACR 227 at 243 f:

"If a person has been charged very early in the complex case that has been inadequately prepared, and there is no compelling reason for this, a court should not allow the complexity of the case to justify an over-lengthy delay."

Next, there is the neglect on the part of the investigation officer to pursue the investigation with vigour. The ultimate responsibility for such neglect must rest with the State, not the applicant.

Then there is the question of the applicant asserting her rights. While it is true that it was not until April, 2001 that the applicant resisted an application by the State for a further postponement she and her lawyers had, in the year 2000, been misled by statements by the public prosecutor suggesting that the investigation was continuing when in fact it was not. As the applicant's lawyer, Thambapilai, states, and it is stated on oath, had he been aware of the fact that the investigation had been halted he would have objected to the postponements.

Coming to the question of prejudice suffered by the applicant due to the delay, there are present tre obvious kinds of prejudice such as social prejudice and the requirement in her conditions of bail that she reports daily to the police. But looming larger is the fact that her husband and children were required to leave Namibia and as a result of the delay she has been separated from her family month after month. Also, she has not been in a position to take gainful employment.

Still under the heading of prejudice lies the question of trial-related prejudice. The applicant alleges that due to the inordinate delay it will be difficult, if not impossible, to trace potential defence witnesses many of whom will have left the country as CD Namibia has, since her arrest, ceased its operations. The applicant can do no more than generalize because at the stage when this application was launched she was not in possession of the prosecution docket and therefore had no knowledge of the details of the case being presented against her. Trial-related prejudice is only speculative at this stage.

As was pointed out in *Heidenreich's* case (*supra*), what is required when considering whether the time which has lapsed in bringing an accused to trial is reasonable or not is a balancing exercise and ultimately a value judgment. Having weighed and considered all the factors just mentioned I am satisfied that the trial of the applicant has not taken place within a reasonable time and accordingly she is entitled to relief in terms of Article 12(1)(b).

That brings me to the meaning to be given to the word "released" as used in the Sub-Article. In *Heidenreich's* case (*supra*) the following was said on this question at 242 F- 243 A:

"This question was briefly considered by O'Linn in *S v Strowitzki and Another* 1995(1) BCLR 12 (Nm) at 35-6. Having referred to what is called in the United States 'dismissal with prejudice' and the fact that according to certain writers this remedy is only permissible in the United States where the

ability of the accused to defend himself is gravely impaired, the learned Judge continued:

"The Namibian Constitution provides a specific remedy for failure to bring to trial within a reasonable time, namely:

"The accused shall be released."

This appears to mean 'released from incarceration'. It may also include release from onerous conditions of bail. *Prima facie*, it does not seem to include a permanent quashing or stay of prosecution.'

As Mr Small, who appeared for the State, pointed out to us by reference to certain dictionaries, the term 'released' can have a variety of meanings and could, as O'Linn J rather tentatively concluded, mean freed from custody or relieved from certain onerous conditions of bail. But when regard is had to the underlying purpose of art 12(1)(b) I am of the view that a broader, more liberal, construction should be given to the word. Once the main purpose of the sub-article is identified as being not only to minimize the possibility of lengthy pre-trial incarceration and to curtail restrictions placed on an accused who is on bail but also to reduce the inconvenience, social stigma and other pressures which he is likely to suffer and to advance the prospect of a fair hearing, then it seems to me that 'released' must mean released from further prosecution for the offence with which he is charged. It is only by giving the term this wider meaning that the full purpose of the sub-article is met. Release from custody or from onerous conditions of bail only meets part of the purpose of the sub-article."

However, in the case of *Van As & Another v The State* (A. 267/99) a Court comprising of three judges took a different view of the matter. It made a declaration that where an accused is released by virtue of the provisions of Article 12(1)(b) such release will not constitute a permanent stay of prosecution. The *Van As* case was a curious one. Van As and his co-applicant were on trial in the High Court on a charge of murder. They wanted to bring an application for their release in terms of Article 12(1)(b) but before doing so applied to the High Court to

"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 25(2) of the Namibian Constitution."

The application then posed a number of questions.

In contending that the Court had jurisdiction to provide guidelines and lay down legal principles, counsel for the applicants purported to rely on Rule 33(4) of the High Court Rules but in its

judgment, which was delivered on 14 December 2000, the Court held that that Rule was not applicable. The Court then went on to consider whether the word "release" in Article 12(1)(b) means release from prosecution and made the declaration to which I have already referred purporting to do so, according to the written judgment, in terms of section 16(4) of the High Court Act. The reference to (4) must have been a mistaken reference to (d).

The material part of section 16 reads as follows:

"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 cognizance, and shall, in addition to any powers of jurisdiction which may be vested in it by law, have power-

- (a) .....
- (b) .....
- (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."

I very much doubt whether the declaration made by the Court constituted a determination of an "existing, future or contingent right or obligation" but even if it does it is quite clear that in the application before the Court there was no person, let alone an interested person, seeking such a determination. The meaning of "release" in Article 12(1)(b) was not a question before the Court. And neither counsel for the applicants nor the Deputy Prosecutor-General, Mr Small, who appeared for the State, argued for the restrictive construction which the Court ultimately gave to Article 12(1)(b). It must follow that what was said by the Court in that connection was entirely obiter.

Quite apart from the foregoing, and I say this with great respect for the learned judges concerned, I am convinced that the decision was wrong. The principal reasoning appears in the following passage:

"With great respect to the learned judges who heard *Heidenreich's* case, the effect of Article 12(1)(b) was never intended to be more than release 'from arrest or from onerous conditions of bail' as decided by O'Linn J *mState v Strowitski* 1995(1) BCLR 12 (Nm) (judgment delivered on 22<sup>nd</sup> April 1994). The learned judges in *Heidenreich's* case gave to the word 'release' a meaning 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 Mwandighi* 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* 3<sup>rd</sup> 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 given 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 instrument, 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.'

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, J A 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 *Mwandinglii'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.

*SvElling* 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(1)(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."

With great respect, I do not see how the example given at the end of this passage supports the reasoning. The only two significant consequences of theft being regarded as a "continuing" crime are 1) that the thief may be tried at the place where he is found with the stolen property; and 2) those who assist the thief after the initial *contrectatio* but while the theft "continues" are guilty of theft itself. See *South African Criminal Law and Procedure* (Vol II) at 629. I fail to see how consequences of a technical nature such as these could have had any impact on the framing of Article 12(1)(b) of the Constitution.

In its reasoning the Court proceeded on the supposition that the ordinary meaning of "released" in the context of the Sub-Article is released from arrest or bail. In making this supposition the Court appears to have considered that an acquittal and a permanent stay of prosecution amount to the same thing. The Court said:

"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."

I cannot agree. An acquittal is a setting free by verdict. A release from prosecution is a setting free as a result of an entirely different process. It is manifestly clear to my mind that "released" in the context of Article 12(1)(b) can have three meanings namely, released from arrest/custody, released from conditions of bail and released from further prosecution, and in order to determine whether the word bears all or some or one of these meanings the Court is entitled to take a broad, liberal and purposive approach. That is what the Court did in *Heidenreich's case* (*supra*) and it concluded that release from custody or from onerous conditions of bail only meets part of the purpose of the Sub-Article. I adhere to that view. Relief granted in terms of the Sub-Article can constitute not only release from custody and release from bail or conditions attached to bail; but it can also constitute release from further prosecution.

Any conclusion other than that reached in *Heidenreich's case* (*supra*) would mean that the trial of an accused person could be delayed indefinitely. A refusal to postpone could be followed by a withdrawal of the charge in terms of section 6 of the Criminal Procedure Act and this could be followed by a fresh prosecution and so on. An accused in such a case would indefinitely suffer social stigma, inconvenience and other pressures without remedy. Another illustration, which I think is apt, is the case of an accused who, by reason of unreasonable delay on the part of the State, has suffered irreparable trial prejudice. Vital defence witnesses have died or disappeared. According to the judgment in the *Van As case* (*supra*) the accused who finds himself in such a situation has no remedy in terms of Article 12(1)(b). He must battle on without such witnesses. That could never have been the intention of the Founders of the Constitution. In my respectful view, to follow the *Van As case* (*supra*) would render Article 12(1)(b) partly ineffectual and for the reasons just given I do not intend to do so. I should mention that even Mr Botes, who appeared for the respondents, stated that he could not support that decision.

As for the order which this Court made on 7<sup>th</sup> September, we considered whether to make an order releasing the applicant from further prosecution but decided against doing so. It is a drastic order and, as was pointed out in the *Sanderson case* (*supra*) at 245 g-h, it is likely to be made only in a narrow range of circumstances such as where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay or where the State embarks on a deliberate stratagem of delay. As stated earlier, trial-related prejudice is only speculative at this stage. And the delay for which the State was responsible was caused by neglect, not willfulness. The alternatives to making an order releasing an accused from further prosecution are an order releasing him from custody or an order releasing him from some or all conditions of bail. The relief to be given will, of course, depend on the circumstances of each case and will be governed by

the type of, and extent of, prejudice suffered as a result of the unreasonable delay in bringing him to trial. In the instant case we considered that appropriate relief would be to remove most of the bail conditions leaving only a monetary deposit of NS50 000. If Mulimina is right in his estimation of the applicant she can be trusted to return to Namibia for her trial.

Mr Botes submitted that even if we should find in favour of the applicant we should not make a costs order against either of the respondents. Neither, he submitted, was responsible for the delay. That responsibility lay with the police. In my opinion, that submission is only partly correct. Although direct responsibility for the delay lay with the police those who represented the second respondent at the numerous applications for postponement could have done much more to ascertain the true state of affairs and the second respondent did, of course, choose to oppose this application. Accordingly, we saw fit to order the second respondent to pay the applicant's costs of the application. However, we could find no basis for awarding the costs sought in prayer 4(H) and (iii) of the Notice of Motion.



HANNAH, J

I agree.



I agree.

MAINGA, J

For the applicant: Advocate R Heathcote

Instructed by: Messrs H Barnard & Partners

For the first and second respondent: Advocate L C Botes

Instructed by: The Government Attorney