



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2017/00076

In the matter between:

THE PROSECUTOR-GENERAL (THE STATE)

APPLICANT

And

FELIUANO ABILIO JANO MIGUEL

1ST RESPONDENT

FRANCISCO SOSSINGO

2ND RESPONDENT

JOAQUIM ANTONIO

3RD RESPONDENT

THE INSPECTOR – GENERAL

4TH RESPONDENT

Neutral citation: *The Prosecutor-General v Miguel* (HC-MD-CIV-MOT-GEN-2017/00076) [2017] NAHCMD 76 (14 March 2017)

Coram: UEITELE J

Heard: 10 March 2017

Delivered: 14 March 2017

Flynote: *Jurisdiction* – means the power or competence of a Court to hear and determine an issue between the parties, and limitations may be put upon such

power in relation to territory, subject matter, amount in dispute, parties.

Jurisdiction – ‘inherent jurisdiction’ – means – the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

Jurisdiction - Power of Court to grant interim relief pending appeal against an order of Magistrates Court - Nothing in law to exclude such power - Inherent jurisdiction of Court to grant such *pendente relief* in deserving cases a salutary power to be jealously preserved.

Practice - Parties - Joinder - Rule seeking to avoid orders which might affect third parties in proceedings between other parties not technical rule to be ritualistically applied without regard to circumstances of case - To deny applicant relief simply because Magistrate not joined as party not in interests of justice.

Summary: Applicant sought an order directing that the application be heard as one of urgency as contemplated by Rule 73 of the Rules of Court, that the execution of the order of the Magistrate, directing that the cash (which was seized by the Namibian Police during the arrest of the respondents) be handed back to the respondents be stayed, pending the finalization of the appeal proceedings and that the cash remain at Bank of Namibia pending the finalization of the appeal proceedings and cost of the application if the application is opposed.

The respondents opposed the application and filed a notice to raise points of law in terms of Rule 66 (c) of the Rules of Court. The points of law raised are: whether this Court has the jurisdiction to stay the order (directing that the cash be handed back to the respondents) issued by the Magistrate? Whether section 34(4) of the Criminal Procedure Act, 1977 apply and is the section available to the Prosecutor General? Can the application to stay the order of the Magistrate be made and heard in the circumstances where the Magistrate who made the concerned order is not cited as a party? Can the State apply for stay of the order granted by the Magistrate if the State has not yet been given leave by the High Court (in criminal

proceedings) to appeal to the High Court? Has the State made out a case for the Relief that it is seeking?

Held that the High Court has inherent jurisdiction. Inherent jurisdiction means the court may draw upon its reserve or fund of powers or residual source of powers whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law or to do justice between the parties and to secure a fair trial between them. Therefore the Court has jurisdiction to hear the application presently serving before it.

Held further that the State has also not instituted review proceedings and there is as such no review pending before this Court. It follows that the jurisdictional facts required to trigger the application of s 34(4) are not present. The answer to the second question is therefore that the State cannot rely on s 34 (4).

Held further that the Magistrate has no direct and substantial interest in the application to stay the order she made. There would therefore be no need for the Magistrate to be joined. There is thus no substance in this question and the answer is that the State does not, in this application to stay an order made by a Magistrate, need to cite that Magistrate.

Held further that the State can apply for stay of the order granted by the Magistrate if the State has not yet been given leave by the High Court (in criminal proceedings) to appeal to the High Court. The courts cannot shut its doors to any person including the State. It would be unjust and detrimental to the administration of justice if the cash were handed back to the respondents pending the outcome of the leave to appeal.

Held further that the State has established a *prima facie* right to appeal the order made by the Magistrate. In order not to render the right to appeal nugatory and in order to avoid injustice and hardship the Court resorted to its reserve powers to grant *pendente lite* relief.

ORDER

1. The applicant's non-compliance with the forms and service as provided for by the Rules of this Court is condoned and this application is heard as one of urgency as contemplated in Rule 73 of the Rules of this Court.
2. The order, made by Magistrate Du Plessis in the Otjiwarongo Regional Court on 27 February 2017 under Case Number OTJ – CRM- 2733/2016, directing the Namibian Police to hand over the cash in the amount of N\$1 740 000 sealed in exhibit number 633725 and N\$280 000 sealed in exhibit number 643224, which was seized by the Namibian Police in connection with CR 132/09/2015, to the first, second and third respondents is stayed pending the finalization of the appeal proceedings instituted under case number Appeal 01/17.
3. That the cash, in the amount of N\$ 1 740 000 sealed in exhibit number 633725 and N\$ 280 000 sealed in exhibit number 643224, must remain at Bank of Namibia pending the finalization of the appeal proceedings instituted under case number Appeal 01/17.
4. The first, second and third respondents must, jointly and severally the one paying the others to be absolved, pay the applicant's costs of this application.

JUDGMENT

UEITELE, J

Introduction and Background

[1] During September 2015 Messrs Feliuano Abilio Jano Miguel ("Miguel"), who is the first respondent in these proceedings, Francisco Sossingo ("Sossingo"), who

is the second respondent in these proceedings and Joaquim Antonio (“Antonio”) who is the third respondent in these proceedings were arrested in the Otjiwarongo district on allegations that they contravened the Exchange Control Regulations of 1961¹, the Immigration Control Act, 1993² (I will in this judgment refer to this Act as the Immigration Act), committed acts of fraud and money laundering offences in terms of the Prevention of Organised Crime Act, 2004³ (I will in this judgment refer to this Act as POCA). I will furthermore, in this judgment, refer to these three gentlemen as the respondents, except where the context of the judgment requires of me to refer to them individually, in which event I will refer to that respondent by his surname. All the three respondents are foreign nationals, they hail from the Republic of Angola.

[2] At the time of their arrest, the arresting members of the Namibian Police Force seized cash in the amount of N\$1 740 00 and N\$280 0000 sealed it in exhibits numbered 633725 and 643224 respectively (I will in this judgment refer to these amounts so seized as “the cash”) and a Hyundai Accent motor vehicle with licence number KEI-02-17 (“the Hyundai”).

[3] On 5 December 2016, the respondents were arraigned before Magistrate Du Plessis in the Regional Court for the magisterial district of Otjiwarongo, on charges of contravening the Exchange Control Regulations, 1961, contravening the Immigration Control Act, fraud and money laundering offences in terms of POCA. At the close of the State’s case the Magistrate, in terms of section 174 of the Criminal Procedure Act, 1977⁴, discharged the respondents in respect of the charges relating to the contravention of the Exchange Control Regulations, but put them on their defence in respect of the charges relating to fraud, money laundering and contravention of the Immigration Control Act.

[4] On 27 February 2017, the Magistrate handed down her judgment convicting the respondents of contravening s 6(d) read with sections 1,4,5 6(a), 6(c) and 11(1) of

¹ Passed under Currency and Exchanges Act, 1933 (Act No. 9 of 1933) and promulgated by Government Notice R1112 of 1 December 1961 as amended.

² Act No.7 of 1993.

³ Act No. 29 of 2004.

⁴ Act No. 55 of 1977.

POCA, and of contravening section 7 read with sections 6, 8 and 9 of the Immigration Control Act. The respondents were each sentenced to:

- (a) A fine of N\$ 150 000 or 1 year imprisonment for the money laundering offence in contravention of section 6 (d) of POCA; and
- (b) A fine of N\$ 2 000 or 6 months imprisonment for contravening section 7 of the Immigration Control Act.

[5] Despite the finding of guilt and a request by the State for the Magistrate to, in terms of s 35 of the Criminal Procedure Act, 1977 order the forfeiture of the cash and the Hyundai motor vehicle which were seized by the arresting members of the Namibian Police at the time of arresting the respondents, the Magistrate ordered that the Hyundai motor vehicle be returned to the lawful owner, upon production of proof of ownership and that the cash be handed back to the respondents.

[6] The Prosecutor General is aggrieved by the judgment and order of the Magistrate and has, on behalf of the State and in terms of s 310 of the Criminal Procedure Act, 1977 filed a Notice for Leave to Appeal against the order, the sentence as well as the s174 of the Criminal Procedure Act, 1977 discharge specifically in relation the contraventions in terms of the Exchange Control Regulations. A copy of the Notice for Leave to Appeal is attached as OMI3 to the Prosecutor General's supporting affidavit.

[7] In addition to applying for leave to appeal the Prosecutor General on 07 March 2017 launched these proceeding seeking an order directing that the application be heard as one of urgency as contemplated by Rule 73 of the Rules of Court, that the execution of the order of the Magistrate directing that the cash be handed over to the respondents be stayed pending the finalization of the appeal proceedings and that the cash remain at the Bank of Namibia pending the finalization of the appeal proceedings and cost of the application if the application is opposed.

[8] On 8 March 2017, that is the day following the day on which the Prosecutor General's application was served on the respondents, Mr Namandje of Sisa

Namandje Incorporated indicated that the respondents will oppose the application. Mr Namandje did not file an affidavit in support of the respondents' opposition of the Prosecutor General's application but filed a notice in terms of Rule 66(1)(c) of this Court's rules.⁵

[9] The notice filed by Mr Namandje on behalf of the respondents in material terms reads as follows:

'BE PLEASED TO TAKE FURTHER NOTICE THAT the questions of law to be raised by the first, second and third respondents are the following:

A The first to third respondents hereby give notice that they will argue that the applicant's application is liable to be dismissed with costs alternatively to be struck from the roll as it is impermissible, defective, incompetent and fundamentally flawed on the basis of the following questions of law:

1. This being a civil court does it have the competence and jurisdiction to grant an order staying an order made in criminal proceedings at the conclusion of a criminal trial?
2. Does section 34 (4) of the Criminal Procedure Act, Act 51 of 1977, apply at all and further is such section available to the Prosecutor-General at all (in civil proceedings)? Can it ever be available to the State?
3. Assuming that this court has competency and jurisdiction to hear and determine the purported application brought by the applicant, can such application be made and heard in the circumstances where the Magistrate who made the concerned order is

⁵ Rule 66(1) in material terms reads as follows:

'66 Opposition to application

- (1) A person opposing the grant of an order sought in an application must-
 - (a) within the time stated in the notice give the applicant notice in writing that he or she intends to oppose the application and in that notice appoint an address within a flexible radius of the court at which he or she will accept notice and service of all documents;
 - (b) within 14 days of notifying the applicant of his or her intention to oppose the application deliver his or her answering affidavit, if any, together with any relevant documents, except that where the Government is the respondent, the time limit may not be less than 21 days; and
 - (c) if he or she intends to raise a question of law only, he or she must deliver notice of his or her intention to do so within the time stated in paragraph (b), setting out such question.'

not cited as a partly?

4. Assuming an application for stay could be made by the Prosecutor-General can such application be brought when the Prosecutor-General has not yet been given leave by the High Court (in criminal proceedings) to appeal to this court?
5. Assuming the Prosecutor-General could bring an application of this nature to stay a criminal court order, without having been granted leave to appeal to this court, - on the basis of the facts alleged in her founding affidavit did she make out a case on the requisites of the relief she seeks?
6. Is it appropriate and permissible for the civil court to pronounce itself on prospects of success or otherwise of the Prosecutor-General's pending application for leave to appeal in criminal proceedings?
7. Is the applicant's application competent at all in law? What is its legal foundation and basis?

Does this Court have the jurisdiction to stay the order (directing that the cash be handed back to the respondents) issued by the Magistrate?

[10] Mr Namandje argued that since the proceedings that were concluded before the Regional Magistrate Court in Otjiwarongo were criminal proceedings, this Court exercising its civil jurisdiction does not have the power to stay an order issued at the conclusion of criminal proceedings. Properly understood, Mr Namandje's argument is that this Court is not possessed with the competence to grant civil orders affecting criminal proceedings. Mr Namandje further argued that in the absence of an application to review the order granted by the Magistrate this Court does not have the power to grant a stay of an order issued at the conclusion of a criminal trial.

[11] Before I consider the soundness of Mr Namandje's submission I find it appropriate to first deal with the jurisdiction of this Court. In the matter of *Graaff-*

*Reinet Municipality v Van Ryneveld's Pass Irrigation Board*⁶ Watermeyer CJ said:

‘Jurisdiction means the power or competence of a Court to hear and determine an issue between the parties, and limitations may be put upon such power in relation to territory, subject matter, amount in dispute, parties etc...’

[12] The starting point to consider the jurisdiction of the High Court is the Constitution. Article 80 of the Namibian Constitution reads as follows:

‘Article 80 - The High Court

(1) The High Court shall consist of a Judge-President and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.

(2) 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 guaranteed thereunder. The High Court shall also have jurisdiction to hear and adjudicate upon appeals from Lower Courts.

(3) The jurisdiction of the High Court with regard to appeals shall be determined by Act of Parliament.’

[13] In terms of s 16 of the High Court Act, 1990⁷ the High Court has ‘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, ...’. In addition to this statutory basis for jurisdiction, the superior courts enjoyed an ‘*inherent jurisdiction at common law*’.

[14] In the unreported judgment of *Shikwetepo v Khomas Regional Council and Others*⁸ Parker J said:

‘...it does not assist this Court merely to be told that the High Court has “inherent” jurisdiction and, therefore, this Court, sitting as the High Court, has the power to hear the

⁶ 1950 (2) SA 420 (A) at 424.

⁷ Act 16 of 1990.

⁸ Case No.: A 364/2008 delivered on 24 December 2008 at para [6].

present application. Such submission gives no meaning and content to the term; such submission renders the term “inherent” jurisdiction amorphous and meaningless and, therefore, irrelevant for the present purposes.’

[15] Van Winsen, Cilliers and Loots argue that *inherent* in the context of orders which a superior court may make means, a superior court and in this instance the High Court of Namibia has the power to:

‘Make orders, unlimited as to amount, in respect of matters that come before them, subject to certain limitations imposed in some instances by the common law, but more often by statute. In other words, whereas inferior courts may do nothing that the law does not permit, superior courts may do anything that the law does not forbid. Thus where a particular matter is not provided for in the rules of court the superior courts will in the exercise of their inherent powers deal with it.’⁹

[16] In the matter of *National Housing Enterprise v Beukes and Others*¹⁰ the Supreme Court said:

‘Inherent jurisdiction is the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.’

[17] With those remarks I now return to the argument by Mr Namandje that this Court sitting as a civil Court does not have the power to stay the order made by the Magistrate Court. It is common cause that the proceedings in the Magistrates’ Court were completed in the sense that the respondents were found guilty and sentenced. The court *a quo* in the exercise of its powers made an order directing that the cash seized from the respondents must be handed back to them.

[18] The State represented by the Prosecutor General is dissatisfied with that order and contends that that order is in law wrong. The Prosecutor General thus

⁹ *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa* (4 ed) Cape Town, Juta and Co: 1997, 38.

¹⁰ 2015 (2) NR 577 (SC) at para 13 p 581.

availed herself of the right conferred on the State by s 310¹¹ of the Criminal Procedure Act, 1977 and applied to this Court for leave to appeal against the order and judgment of the Magistrate Court.

[19] It follows that upon filling an application for leave to appeal with the Registrar of this Court the proceedings that commenced in the lower court are now properly before this Court and are no longer cognisable in the Magistrates' Court. It therefore follows that the general principle that a superior court will not interfere with uncompleted proceedings in an inferior court is not applicable to a matter which is properly before the superior court.

[20] In what circumstances will a superior court then resort to the utilisation of its reserve or fund of powers or residual source of powers? The answer to this question is in my view to be found in the *National Housing*¹² matter where the Supreme Court said a superior court may draw upon its reserve or fund of powers or residual source of powers whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law or to do justice between the parties and to secure a fair trial between them.

[21] In the South African case of *National Director of Public Prosecutions v King*¹³ the Supreme Court of Appeal said the following:

'Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the State. This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and

¹¹ Section 310 (1) reads as follows:

'(1) The Prosecutor-General or, if a body or a person other than the Prosecutor-General or his or her representative, was the prosecutor in the proceedings, then such other prosecutor, may appeal against any decision given in favour of an accused in a criminal case in a lower court, including-

(a) any resultant sentence imposed or order made by such court;

(b) any order made under section 85(2) by such court,

to the High Court, provided that an application for leave to appeal has been granted by a single judge of that court in chambers.'

¹² *Ibid.*

¹³ *National Director of Public Prosecutions v King* [2010] ZASCA 9; 2010 (2) SACR 116 (SCA) para 5.

ingenious legal stratagems, or to encourage preliminary litigation — a pervasive feature of white collar crime cases in this country...'¹⁴

[22] Article 78 of the Namibian Constitution vests the judicial power of Namibia in the Courts of Namibia which consist of the Supreme Court of Namibia, the High Court of Namibia and the Lower Courts of Namibia. On a consideration of all the authorities that I have referred to above in this judgment, I take the view that this Court can, make any order that the law does not forbid, be it a civil or criminal order, in order to prevent or obviate a clear miscarriage of justice. Mr Namandje has referred me to no law statutory or otherwise and I could also not find any which forbids this Court to stay an order made by a lower court pending the outcome of litigation (the appeal proceedings) between the State and an accused person. I therefore find that this Court has jurisdiction to hear the application presently serving before it.

Does section 34(4) of the Criminal Procedure Act apply and is the section available to the Prosecutor General?

[23] The second point of law raised on behalf of the respondents is whether s 34(4) is available to the State in civil proceedings. That section reads as follows:

‘34 Disposal of article after commencement of criminal proceedings

(1) The judge or judicial officer presiding at criminal proceedings shall at the conclusion of such proceedings, but subject to the provisions of this Act or any other law under which any matter shall or may be forfeited, make an order that any article referred to in section 33-

- (a) be returned to the person from whom it was seized, if such person may lawfully possess such article; or
- (b) if such person is not entitled to the article or cannot lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article; or

¹⁴ See also *Mngomezulu & another v National Director of Public Prosecutions & another* [2007] ZASCA 129; 2008 (1) SACR 105 (SCA) paras 12-14.

- (c) if no person is entitled to the article or if no person may lawfully possess the article or, if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.

(2) The court may, for the purpose of any order under subsection (1), hear such additional evidence, whether by affidavit or orally, as it may deem fit.

(3) If the judge or judicial officer concerned does not, at the conclusion of the relevant proceedings, make an order under subsection (1), such judge or judicial officer or, if he is not available, any other judge or judicial officer of the court in question, may at any time after the conclusion of the proceedings make any such order, and for that purpose hear such additional evidence, whether by affidavit or orally, as he may deem fit.

(4) Any order made under subsection (1) or (3) may be suspended pending any appeal or review.

(5) Where the court makes an order under paragraph (a) or (b) of subsection (1), the provisions of section 31(2) shall *mutatis mutandis* apply with reference to the person in favour of whom such order is made.

(6) If the circumstances so require or if the criminal proceedings in question cannot for any reason be disposed of, the judge or judicial officer concerned may make any order referred to in paragraph (a), (b) or (c) of subsection (1) at any stage of the proceedings.'

[24] Section 34(1) is in my view clear and unambiguous, it empowers a presiding officer to, at the conclusion of a trial, order that an article which was seized for the purposes of a criminal trial, be returned to the person from whom it was seized, if that person may lawfully possess the article; or if the person from whom it was seized is not entitled to the article or cannot lawfully possess the article, that the article be returned to any other person who is entitled to the article or who may lawfully possess the article. Sub-section (4) empowers a court to stay the order directing that the article be returned if there is an appeal or review pending.

[25] In the present matter the State has no right of appeal and such there is no appeal pending before this Court. The State has also not instituted review

proceedings and there is as such no review pending before this Court. It follows that the jurisdictional facts required to trigger the application of s 34(4) are not present. The answer to the second question is therefore that the State cannot rely on s 34 (4). In her affidavit the Prosecutor General in fact makes it clear that the State does not rely on s 34 (4). I am accordingly of the view that the second question of law raised by the respondents is irrelevant to the resolution of this matter.

Can the application to stay the order of the Magistrate be made and heard in the circumstances where the Magistrate who made the concerned order is not cited as a party?

[26] As I understand this question the respondents are in essence raising the non-joinder point. The leading case on questions of non-joinder is the case of *Amalgamated Engineering Union v Minister of Labour*¹⁵. In that case it was held that as a general rule Courts must refrain from dealing with issues in which a third party who may have a direct and substantial interest in the matter serving before the court have not been joined as a party joined to the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests.

[27] In the matter of *Wholesale Provision Supplies CC v Exim International CC and Another*¹⁶ Mahomed J observed, that:

‘...the rule which seeks to avoid orders which might affect third parties in proceedings between other parties is not simply a mechanical or technical rule which must ritualistically be applied, regardless of the circumstances of the case.’

[28] The circumstances of this case are the following. The respondents were charged with certain offences and they were tried before Magistrate Du Plessis. The magistrate found them guilty on certain offences and acquitted them on others. The State is dissatisfied with the acquittal and one order made by the Magistrate and is seeking leave to appeal against the acquittal and the order so made by the

¹⁵ 1949 (3) SA 637 (A).

¹⁶ 1995 (1) SA 150 (T).

Magistrate.

[29] In the unreported judgment of *JB Cooling and Refrigeration CC v Dean Jacques Willemse t/a Windhoek Armature Winding and Others*¹⁷ I remarked that persons who ordinarily preside over matters as judicial officer should ideally steer away from getting entangled in litigation. I quoted from the Swaziland matter of *Director of Public Prosecutions v The Senior Magistrate, Nhlengano and Another*¹⁸ where the following is recorded:

‘Criminal trials, and applications for review, are of course not adversarial contests between the judicial officer and the prosecutor. It is wrong and unseemly that they should be allowed to acquire that flavour. Ordinarily on review, the judicial officer whose decision is being called into question is cited as a party for formal purposes only. He will have no need to do anything beyond arranging for the record to be sent up to the High Court, including any written reasons that he has or may wish to give for his decision.’ (My emphasis)

[30] It thus follows that the Magistrate has no direct and substantial interest in the application to stay the order she made. There would in my view be no need for the Magistrate to be joined. There is thus no substance in this question and the answer is that State does not, in this application to stay an order made by a Magistrate, need to cite that Magistrate.

Can the State apply for stay of the order granted by the Magistrate if the State has not yet been given leave by the High Court (in criminal proceedings) to appeal to the High Court?

[31] My short answer to this question is a simple yes. The court cannot shut its doors to any person including the State. In this matter the State has, by applying for leave to appeal, set in motion the process of appealing against the order made by Magistrate and to that extent litigation is pending between the parties. It is not clear as to how long the application for leave to appeal will take to be determined. It would be obviously unjust and detrimental to the administration of justice if the cash were handed back to the respondents pending the outcome of the leave to appeal.

¹⁷ A 76/2015) [2016] NAHCMD 8 (delivered on 20 January 2016).

¹⁸ 1987-1995 S.L.R. 17 at 22 G-I.

[32] I, have above come to the conclusion that this Court has inherent power to make any order which the law does not prohibit it to make whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law or to do justice between the parties and to secure a fair trial between them. In the matter of *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and Others*¹⁹ Kotze JA held that a superior court has

‘...an inherent jurisdiction to grant *pendente lite* relief to avoid injustice and hardship. An inherent power of this kind is a salutary power which should be jealously preserved and even extended where exceptional circumstances are present and where, but for the exercise of such power, a litigant would be remediless, as is the case here.’

Has the State made out a case for the relief that it is seeking?

[33] In this matter the State is seeking an order staying the order made by the Magistrate pending the outcome of an appeal it intends to institute. It is thus clear that the State is seeking interim relief. The requisites for interim relief are well settled and were neatly summarised in *Hix Networking Technologies v System Publishers (Pty) Ltd*²⁰ as follows:

‘The legal principles governing interim interdicts in this country are well known. They can be briefly restated. The requisites are:

- (a) a prima facie right,
- (b) a well-grounded apprehension of irreparable harm if the relief is not granted,
- (c) that the balance of convenience favours the granting of an interim interdict; and
- (d) that the applicant has no other satisfactory remedy.

‘To these must be added the fact that the remedy is a discretionary remedy and that the

¹⁹ 1986 (2) SA 663 (A).

²⁰ 1997 (1) SA 391 (A) [1996] 4 All SA 675) at 398 – 399 which was cited with approval by this Court in the matter of *Nakanyala v Inspector-General Namibia and Others* 2012 (1) NR 200 (HC).

court has a wide discretion.'

[34] The degree of proof to establish a *prima facie right* is well established. It has been consistently applied by the courts. It was restated in the *Nakanyala*²¹ matter in the following way:

'The degree of proof required has been formulated as follows: The right can be *prima facie* established even if it is open to some doubt. Mere acceptance of the applicant's allegations is insufficient but a weighing up of the probabilities of conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate *onus*, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case the latter cannot succeed....'

[35] In this application the respondents elected not to file an answering affidavit to deal with the Prosecutor General's allegations. There are thus no facts set up by the respondent in contradiction to those set up by the applicant, to consider. In argument Mr Namandje did not and cannot dispute the right of the State to appeal against an order of the Magistrate. I am thus satisfied that the State has in my view established a *prima facie* right to appeal the order made by the Magistrate. In order not to render the right to appeal nugatory and in order to avoid injustice and hardship I will resort to the reserve powers of this Court to grant *pendente lite* relief. As regards the costs of this application I see no reason why the general rule that costs should follow the course cannot apply.

[36] In the result I make the following order:

1. The applicant's non- compliance with the forms and service as provided for by the Rules of this Court is condoned and that this application is heard as one of urgency as contemplated in Rule 73 of the Rules of this Court.

²¹ *Ibid* at p213 para [46].

2. The order, made by Magistrate Du Plessis in the Otjiwarongo Regional Court on 27 February 2017 under Case Number OTJ – CRM- 2733/2016, directing that the Namibian Police hand over the cash seized by Nampol in the amount of N\$1 740 000. sealed in exhibit number 633725 and N\$280 000. sealed in exhibit number 643224 in connection with CR 132/09/2015 to the first, second and third respondents is stayed pending the pending the finalization of the appeal proceedings instituted under case number Appeal 01/17.
3. That the cash, in the amount of N\$1 740 000. sealed in exhibit number 633725 and N\$280 000. sealed in exhibit number 643224, must remain at the Bank of Namibia pending the finalization of the appeal proceedings instituted under case number Appeal 01/17.
4. The first, second and third respondents must, jointly and severally the one paying the others to be absolved, pay the applicant's costs of this application.

.....
SFI Ueitele
Judge

APPEARANCES**APPLICANT**

Kavejamua N. Kazondunge
Government Attorney, Windhoek

1st to 3rd RESPONDENTS:

Sisa Namandje
Of Sisa Namandje Inc.
Windhoek