

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK****RULING ON APPLICATION FOR A POSTPONEMENT**

In the matter between:

Case no: CC 20/2013

**THE STATE**

and

**DIRK HENDRIK CONRADIE**

**ACCUSED 1**

**SARAH NGENOHANI DAMASES**

**ACCUSED 2**

*Neutral citation: S v Conradie (CC 20/2013) [2015] NAHCMD 101 (27 April 2015)*

**CORAM: MASUKU, AJ**

Heard: 16 April 2015

Delivered: 27 April 2015

**Flynote:** This is an application for the postponement of a criminal trial to enable counsel for the accused who hails from South Africa time to obtain a visa to attend the

trial. The application was also sought to enable the prosecution to consider a special plea to be filed by the defence. The court considered the principles applicable to postponements generally. The court held that the postponement to allow defence counsel time to obtain immigration papers to attend trial was important in order to secure the fundamental interests of justice and thus granted the application. The court refused to allow the postponement to enable the prosecution to consider the special plea as the special plea had not been served and the prosecution had a right, once it had been served to consider same and make an appropriate application to court. The court refused to countenance an application for a postponement hinging on an application that had not been served when valuable court time may needlessly be lost. The application was granted in part.

---

## **RULING**

---

### **MASUKU, AJ.:**

[1] The above-named persons stand before me jointly accused of contravening certain provisions of the Anti-Corruption Act<sup>1</sup>. In addition, the 1<sup>st</sup> accused is further indicted for some alleged contraventions of provisions of the Companies Act<sup>2</sup>. It is unnecessary, at this stage, to reproduce the indictment and the particulars thereof as very little, if anything, turns thereon.

[2] Presently serving before court is an application moved by the accused persons for the postponement of the matter to 23 April 2015 for commencement. This application is strenuously opposed by the State. I shall consider the various arguments raised by the parties in due course.

---

<sup>1</sup> Act No. 8 of 2003.

<sup>2</sup> Act No. 28 of 2004.

[3] In order to conduce to a proper understanding of the application and the context in which it was made, it will be necessary to advert briefly to the history of the matter. I presently set out the history as can be gleaned from the papers before court. It is common cause that the trial in this matter was fixed by the agreement between the parties on 3 July 2014. It was set to run from the 16 April to 15 May 2015. This means the trial date was set almost nine months ago. Pre-trial meetings and other formalities were also finalized.

[4] When the matter was called this morning, the accused, through their counsel, Mr. Makando, made an oral application for the postponement of the trial to 23 April 2015 as aforesaid. The reasons advanced for the postponement are essentially two. First, the court was informed that the accused persons' lead counsel Mr. V. Soni S.C., from the Johannesburg Bar, who was briefed has not yet received his immigration papers which would allow him to participate in the proceedings at commencement. Mr. Makando, for the accused, indicated that he had received a confirmation that the Immigration authorities would issue the necessary papers to enable Mr. Soni to take part in the proceedings by 18 April 2015. In this regard, Mr. Soni's application form for a work permit, had been filed, the court was informed. Furthermore, a certificate in terms of section 85 (2) of the Legal Practitioners Act<sup>3</sup>, granting Mr. Soni's *ad hoc* admission to appear in this matter, issued by the Deputy Chief Justice on 13 April 2015 was exhibited to the court.

[5] Regarding the lateness of the involvement of Mr. Soni, Mr. Makando submitted that accused had to obtain counsel from South Africa because some local counsel would be called as witnesses in the trial and that one of the accused persons was an officer of the court, which might render it difficult for his peers to appear on his behalf. It was thus considered advisable to instruct counsel from South Africa. It was Mr Makando's submission that at first, his instructions were for him to handle the trial but around December 2014, his instructions changed. His clients opted to obtain legal representation from South Africa. By a stroke of misfortune, the two counsel lined up and one of whom had participated in preparing the defence, were unable to make it for trial. It was at a very

---

<sup>3</sup> Act No. 15 of 1995.

late stage that the name of Mr. Soni came up and he was fortunately able to make it for the trial. Mr. Makando stated that the accused persons regretted the inconvenience caused to the prosecution and the court but it was important for the accused to have the best legal representation available for them. He argued that a refusal to grant the application would seriously violate their right to legal representation enshrined in the Constitution of Namibia.

[6] The second reason advanced is that Mr. Soni, in the course of preparation for the trial has advised and further settled papers to be filed for the raising of a special plea on behalf of the accused persons. In his spirited address, Mr. Makando submitted that it would be reasonable to postpone the matter to 23 April, in order to enable the prosecution the *dies* prescribed in law, to consider and respond to the special plea as they deem fit once the special plea has been filed. It was for that reason that he submitted 23 April 2015, would be the date by which, all the necessary procedures completed, the matter would be ripe for commencement.

[7] In contrary argument, Mr. Marondedze, punched holes in the application. His first salvo was that the trial was set about twelve months ago and all the parties were well aware of the dates and had the responsibility to ensure that all preparations were geared towards the trial starting on schedule. It was his observation that the accused appear to have left instructing Counsel too late. As a result, he argued, the said counsel's immigration requirements had not been met on the date of commencement of trial thus resulting in a delay of the commencement of trial. In this regard, he submitted that no information was given to the prosecution regarding the possible difficulties in good time. As a result, he argued, the State had been put to great expense in securing the attendance of witnesses, some of whom have had to travel from abroad to attend the trial, which from all indications then available, was due to proceed as nothing indicating the contrary had been forthcoming from the accused's legal representatives. He strongly urged the court to refuse the postponement, citing the cost, inconvenience, both to the court and the witnesses as the main reasons. He argued that the interests of justice are in some

circumstances wider and more important than the convenience of the accused, considering that the trial had been scheduled to proceed a long time ago.

[8] Mr. Marondedze further argued that a cat and mouse game as it were, was being played by the accused persons' legal team in relation to the special plea. He laid much store on the fact that a pre-trial conference was held and the pre-trial memorandum was finalized a long time ago. It was his contention that if there was a change of tact, as it were, the prosecution was entitled to be told in good time about the said plea. He harped upon the point that even on the date of trial, the delivery of the special plea was still being threatened, with the prosecution and the court being held at ransom as it were by the accused. He pointed an accusing finger in an obvious but unnamed direction, alleging that there was a party, barring the State, that appeared averse to the trial commencing. There is only one other party.

[9] I now turn to the law. What is the judicial policy towards postponements? One of the leading cases on postponements is the case of *Myburgh Transport v Botha*<sup>4</sup> where our Supreme Court laid down the principles applicable to amendments. Admittedly, the case was in respect to civil proceedings. I dare say though that some of the factors are fully applicable to criminal proceedings as well. I will avoid quoting the said principles as set out in the case lock, stock and barrel but shall make reference to those that in my view are applicable to the instant matter. The relevant principles are the following:

- (i) 'the trial judge has a discretion as to whether an application for a postponement should be granted or refused;
- (ii) the discretion must be exercised judicially and I may add judiciously. It should not be exercised capriciously or upon wrong principle, but for substantial reasons;
- (iii) a court should be slow to refuse a postponement where the true reason for a postponement for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case;

---

<sup>4</sup> 1991 (3) SA 310 (NmSC) (See also Herbstein & Van Winsen Vol I 5<sup>th</sup> ed at p755).

- (iv) an application for postponement must be made timeously, as soon as the circumstances giving rise to application become known to the applicant for a postponement. Where however, fundamental fairness and justice justify a postponement, the court may in appropriate cases allow the application even if not timeously made;
- (v) an application for a postponement must always be *bona fide* and not used to gain a tactical advantage or be a manoeuvre for the purpose of obtaining an advantage to which the applicant is legitimately not entitled;
- (vi) the court should weigh the prejudice which will be occasioned to the respondent if the application is granted against the prejudice which will be occasioned to the applicant if it is not.'

[10] It has also been stated that the postponement of a matter set down for hearing or trial on particular day cannot be claimed as of right and will not be granted merely for the asking or even if the parties thereto agree to it. Furthermore, an applicant for a postponement essentially seeks an indulgence from the court and one which will not be granted unless the court is satisfied that it is in the interests of justice to so grant it.<sup>5</sup> It may be necessary, to point out that some of the principles mentioned above, applicable as they are, have been flavoured to some extent and affected by the introduction of judicial case management in this jurisdiction. As a result, the granting of postponements has become a scarcer commodity than was previously the case as it was realized that the ready grant of postponements was the bane of efficiency in the justice system, causing unnecessary clogs, delays in the conduct and finalization of trials and hearings.

[11] Reverting to the instant case, I am of the considered view that the postponement that should be granted in the circumstances and which is crucial, is that geared to enable Mr. Soni S.C. to attend the trial. I am acutely aware that an accused person is entitled in a trial, to be represented by a legal representative of his or her choice. This is enshrined in Article 12 (e) of the Constitution of Namibia. It is unnecessary to indulge in a treatise on this subject as it is well established. According to the papers filed of record and the argument presented on the accused persons' behalf, Mr. Soni's immigration application

---

<sup>5</sup> *National Police Service Union v The Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1112-1113.

will be granted by the 17<sup>th</sup> April 2015 and that, the court was informed, is a given. It must then be accepted as such. To enable Mr. Soni to appear and perform his duty both to the court and to his clients, the trial should be postponed to a date after Friday 17 April 2015. I am minded to do this in fairness to the accused and to the prosecution, particularly the witnesses, whom the court was told have been subpoenaed from abroad at great expense. I shall touch upon this issue in the succeeding paragraphs.

[12] My attention was drawn by the defence to a number of cases in this regard, including *Andries Nowaseb v The State*<sup>6</sup> on the right of an accused to legal representation. This is an issue that has been taken care of in the immediate preceding paragraph. I need not say more on this issue.

[13] Regarding the second leg of the application for a postponement, namely for purposes of allowing the Prosecutor-General an opportunity to deal with the so-called special plea, I have serious difficulty. I call it the 'so-called' special plea for the reason that it has been mentioned in court but it has not as yet been served on the prosecution and the court. I say this quite cognisant that the trial should have started on 16 April 2015 and whatever issues affecting the trial should, considering when the trial was set, ordinarily be clear by now. It is a matter of grave concern that even on the day of the commencement of the trial, the filing of the special plea was still threatened and not even an indication as to its scope and content could be given to enable the prosecution to plan and know how to deal with it. It would appear that it is being sprung on the prosecution and the court, a practice that must be discouraged.

[14] I am of the firm view that there is no need to postpone the matter to 23 April 2015, to allow the prosecution to deal with the special plea when that special plea has not even been filed, past the date when the trial is supposed to have commenced. I am of the considered opinion that the proper course is for the threatened special plea to be filed soonest and the prosecution will consider same and make the appropriate application thereto, having received same. It might be incautious to postpone the trial to a date even

---

<sup>6</sup> Case no. CA 93/1995.

before the special plea has been filed. At the moment, the nature and content of the said plea remains the defence's closely-guarded secret ammunition. It would be presumptuous of this court, operating in the dark in this regard, to then postpone the application to a certain date and second-guess the attitude of the prosecution thereto, carrying the prospect of losing what may be valuable time in the process. To my mind, the latter part of the application appears to have all the hallmarks of putting the cart before the horse.

[15] In the premises, it is my considered view that the prosecution be served with the special plea and they decide what to do with same. The accused persons' counsel mentioned that the prosecution is entitled to a certain period of time within which to consider the said plea. That may well be correct. Ingrained in that element of fairness is the right of the prosecution, if they so please, to waive the period they have at law to consider same. They must be allowed the opportunity to consider the plea and make an informed decision, which may, as I have said, include waiving the time periods they are otherwise entitled to. On the other hand, and for the sake of argument, they may decide to withdraw the proceedings on receipt but the witnesses would be kept in harness to the date to which the matter has been postponed, resulting in the State expending funds on witnesses who are kept in tow as it were when the trial might fall away, even if temporarily.

[16] In this regard, a decision may be taken as early as 20 April 2015 to have the court excuse the witnesses for instance to allow for a constitutional application or other application the defence may be minded to move. This should be done and known at earliest opportunity so as not to increase costs unnecessarily and to keep the inconvenience to witnesses to the bare minimum. Witnesses should not be left with a bitter aftertaste after availing themselves to perform what is their civic duty. It is imperative that criminal trials start without delay and any period of postponement granted must be restricted to that strictly that necessary to ensure the attainment of the interests of justice and no more. It is dangerous to postulate and prescribe time limits without the special plea having been filed.



[17] In applying the principles to the instant matter, it will be seen that I granted the application for a postponement in part and that was principally to secure the accused persons' right to a fair trial. It is true that the application for a postponement was not made timeously and it appears that steps to prepare the way for Mr. Soni to appear in the trial were taken very late and not propitiously. That notwithstanding, the principles of justice and fairness demand the grant of the postponement, to the limited degree that will ensure that MrP. Soni is able to represent his clients. On the other hand, I do not find it necessary for the trial to lose a period of about six days on the basis of an event that is unknown but is being threatened by the defence to eventuate at any time, holding the prosecution and court in suspense in the process.

[18] The foregoing constitute the reasons why I granted the application for a postponement of the trial to 20 April 2015 and not 23 April 2015 as applied for by the defence.

---

TS Masuku, AJ

APPEARANCES

STATE:

E. E. Marondedze

Instructed by: Office of the Prosecutor-General

ACCUSED 1 & 2:

S. Makando

Instructed by: Conradie & Damaseb Legal  
Practitioners