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**Prosecutor-General of Namibia v Namoloh and Others
2020 (3) NR 839 (SC)**

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Namoloh is the leading case on the definition of an accused in Namibia. It is true that, so far, there have been quite some confusion on the definition of ‘accused.’ For instance, the Criminal Procedure Act does not describe the accused and actually refer to the person through the sentencing process ‘the accused’ even if the accused has already been ‘convicted’. The *Namoloh* case therefore stabilizes criminal law in Namibia by clarifying who does and who does not qualify as an ‘accused’.

Nonetheless, the way in which the Supreme Court resolved the question of permanent stays of prosecution contradicts the Supreme Court’s own jurisprudence on the interpretation of the Constitution. Instead of reading the Constitution liberally and purposively in the value-laden manner that former Chief Justice Mahomed ushered in, the Supreme Court adopted a narrow, tunnel-visioned interpretation. Hopefully, the higher courts will reverse this aspect of the *Namoloh* judgment before long.

The facts

On 26 June 2009, a warrant officer and other police officers in the Namibian Police Force were arrested for alleged corruption and extortion. The prosecutor accused them of unlawfully taking money from foreign nationals whom they had arrested because they suspected those foreign nationals of dealing in immovable property illegally. The warrant officer in question, Mr. Marien Ngouabi Namoloh, first appeared before the court on 9 December 2009 in Katutura, Windhoek, where the charges were read to Namoloh. One week later, Namoloh was released on bail.

However, after the prosecutor and Namoloh’s defense counsel asked the court for several postponements between the first appearance in 2009 and August 2014, the magistrate refused on 4 August to grant another postponement to the prosecutor. This refusal prompted the prosecutor to withdraw the charges against Namoloh. The prosecutor said that he withdrew the charges ‘provisionally’ and that, later, he would reinstitute the charges.

In the meantime, the Namibian Police, who had suspended Namoloh, the Namibian Police, reinstated him in his former position. However, the police denied Namoloh a promotion, arguing that Namoloh still had to face charges from the prosecutor.²

It is at that juncture that, in November 2017, Namoloh approached the High Court of Namibia to order a permanent stay of prosecution. Namoloh argued that, because the prosecutor unduly delayed in reinstating the charges against him, the delay violated his right to a speedy trial, as protected by Article 12 of the Namibian Constitution.

The judge in the High Court agreed with Namoloh and granted a permanent stay of prosecution. The Prosecutor-General appealed against the High Court judgment, insisting that the judge

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² *Prosecutor-General of Namibia v Namoloh and Others* 2020 (3) NR 839 (SC) [11] (hereinafter referred to as the ‘*Namoloh*’ case).

erred in granting permanent stay of prosecution because Namoloh was no longer an accused for the purposes of Article 12 of the Namibian Constitution.

Who is an ‘accused’?

In dealing with the appeal, the Supreme Court correctly understood that the entire case hinged on the definition of ‘accused’ in the Constitution and the Criminal Procedure Act 51 of 1977. Damaseb DCJ, in a unanimous judgment,³ remarked that neither the Constitution nor the Criminal Procedure Act defines an ‘accused’.⁴ He noted that the Criminal Procedure Act refers to the accused person who would appear in court after arrest or by way of summons.⁵ Before a person appears in court, the Act referred to that person only as an ‘offender’.⁶

Damaseb DCJ looked to the dictionary definition, which says that an ‘accused’ is any person against whom summons has been brought. By looking at that definition, Damaseb DCJ concluded that Namoloh was never an accused for the purposes of Article 12 of the Namibian Constitution. In that sense, he agreed with Botes, the attorney representing the Prosecutor-General (PG). Damaseb DCJ does not see anything ‘provisional’ when a prosecutor withdraws charges in terms of Section 6(a) of the Act.⁷ He pointed out that the legislature did not include such a word in Section 6(a). For him, the section merely empowers a prosecutor to withdraw a charge, and withdrawing charges does not entitle an accused to acquittal. He stresses that, ‘for all practical and legal purposes, such a person is on no different footing than one who has not yet been charged.’⁸ The judge concluded that, once a prosecutor withdraws a charge, there is nothing to ‘stay’.⁹

Damaseb DCJ also agreed with the PG’s attorney when he accepted that, if the court allowed judges to order permanent stays of prosecution when the prosecutor did not bring back charges within a reasonable time, such decision would open up the floodgates of litigation. This is because many accused persons, against whom the prosecutor had withdrawn charges, would approach the court and seek that it orders a permanent stay of prosecution.¹⁰

When to order a permanent stay of prosecution

In deciding the case, Damaseb DCJ looked at the requirements for an urgent interdict and for an order of release when a prosecutor has unreasonably delayed the criminal proceedings against the accused. With regard to the urgent interdict, the learned judge reminded the parties that there is a clear right, that the right must be threatened or about to be threatened, and that the damage will be irreparable.

With respect to the release following an unreasonable delay, the Supreme Court judge reminded the parties that the requirements include delays attributable to the state, as opposed to delays attributable to ‘institutional limits on resources’. Damaseb DCJ also listed the three types of release: release *before the accused pleads* on the merits, release *after the accused pleads* on the merits, and release by ordering a *permanent stay of prosecution*.

³ Mainga JA and Angula AJA concurred in the judgment written by Damaseb DCJ.

⁴ *Namoloh* (n) [41].

⁵ *Namoloh* (n) [41].

⁶ *ibid.*

⁷ *Namoloh* (n) [43].

⁸ *Namoloh* (n) [43].

⁹ *Namoloh* (n) [48].

¹⁰ *Namoloh* (n) [50].

Damaseb DCJ, applying these requirements, first held that the requirements for an urgent interdict have not been satisfied. Then, the learned judge concluded that the accused, Namoloh, fell in the first type of release, that is, release before the accused's plea on the merits.

The judge upheld the PG's appeal. Damaseb DCJ reasoned that the Namoloh does not fit the definition of an 'accused' and that, therefore, the High Court judge should not have granted an order for permanent stay of prosecution.¹¹

He, nonetheless, ordered that the parties bear their own costs, departing from the ordinary rule that the unsuccessful party should pay the costs, because he considered that the lawyer for the respondent, Sisa Namandje, conducted the constitutional challenge in good faith, ventilated one of the most important constitutional rights, and conducted himself properly during the proceedings.¹² So Damaseb DCJ did not make any order against Mr Namandje's client.

Significance of the judgment

This case is significant and will definitely stand as leading case on the definition of the 'accused', the requirements for permanent stay of prosecution, and the 'institutional limits on resources' in weighing the desirability of permanent stay of prosecution.

It is true that, so far, there have been quite some confusion on the definition of 'accused'. As it currently stands, the Criminal Procedure Act does not describe the accused and actually refer to the person through the sentencing process 'the accused' even if the accused has already been 'convicted'. So the court ruling in *Namoloh* clarifies the definition of the 'accused' and ensures that the word *describes* the position of a person at particular stages of the criminal process rather than simply *names* the person being put through the process. This is particularly crucial given that the law, in its traditional sense, is so heavy on concepts; it is a concept-driven discipline and profession.

However, I do not agree with the unanimous judgments in two fundamental respects: the general interpretation of the constitutional challenge and the particular way in which the Supreme Court applied the definition of 'accused'. Regarding the overall approach to the construction of the right to a fair trial, Damaseb DCJ interpreted it as if he merely interpreted a provision in an ordinary statute. The Namibian judiciary has evolved a rich jurisprudence that oblige judges not to interpret the constitution with the 'tabulated austerity of legalism'.¹³ It is an approach pioneered and championed by former Chief Justice Ismail Mahomed. At the same time, it is an approach that was watered down by another Supreme Court Justice, Bryan O'Linn. Like Damaseb in *Namoloh*, O'Linn in *Frank* had watered down this progressive, value-laden approach for a textualist, almost positivist approach to the interpretation of the provisions of the Constitution. In *Frank*, O'Linn AJA cautioned that 'the guideline that a constitution must be interpreted 'broadly, liberally and purposively', is no licence for constitutional flights of fancy.'¹⁴

If Damaseb DCJ had interpreted Article 12 (the right to a fair trial) *à la* Mahomed, he would have expanded the scope of the definition of 'accused' to cover situations where the PG intentionally creates the impression that the accused will be prosecuted soon, forcing the accused to live under the constant threat of prosecution and thus hanging like the Sword of Damocles over a person's head. This is not mere conjecture. The PG statements, confirmed

¹¹ *Namoloh* (n) [52] and [55].

¹² *Namoloh* (n) [53]-[55].

¹³ *Minister of Defence, Namibia v Mwandighi* 1992 (2) SA 355 (NmS) 364.

¹⁴ *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) 135.

during the trial when she testified under oath, make it clear that charges were going to be levelled against Namoloh in the near future.

By holding that the scope of Article 12 did not extend to Namoloh, the Supreme Court blinded itself to the real, practical effects of the PG's behavior. Damaseb DCJ's understanding of the effects of withdrawing charges against an accused does not correspond to reality or to the ordeal that Namoloh lived through. Damaseb DCJ insisted that:¹⁵

The effect of the withdrawal as far as the PG is concerned is that whilst the statutorily prescribed prescription period has not run out, the state can bring fresh charges against the person, either identical to those withdrawn or entirely different ones arising from the same factual matrix.

The judge continued along the same lines:¹⁶

That members of the public may consider that the person is under a threat of prosecution on some future date, is of no moment in law. How different is it compared to a person against whom a criminal complaint has been made under oath and no arrest or prosecution has yet occurred but the PG makes known that she intends to prosecute the alleged offender once all facts have been marshalled?

These observations ignore the fact that the PG wields incredible power and can set in motion state machinery against individuals and businesses in ways that can dramatically tarnish their reputation, limit their freedoms and their right to liberty, and close or compromise their life chances. This is borne out by the decision of the Police – which, by the way, stands to reason given the circumstances – to deny Namoloh a chance at a promotion because he had to face criminal charges in the near future. While the Police and any employer would be justified in denying or postponing the promotion of any employee who may end up embarrassing the employer should he be charged with and possibly convicted of a crime, especially a crime that reflects negatively on his honesty and probity, a judge would be much less justified in looking away when the heavy word of the PG promises to re-prosecute someone in this manner. These effects impact everybody, even a person who forms part of the executive such as police officers.

The fact that the right to a fair trial ranks, according to Damaseb DCJ himself, as 'one of the most important rights under our Constitution'¹⁷ is all the more reason to embrace a progressive, expansive reading of the scope of Article 12. The progressive value-laden constitutional jurisprudence speaks against the narrow, or hallow legal reasoning used by the Supreme Court in *Namoloh*. In addition, the presumption that requires interpreters of the law to read penal provisions against those who drafted them also speak against the interpretation espoused by the court in *Namoloh*.

The floodgate argument, brandished by the PG's attorney and repeated by Damaseb DCJ, does not hold water either. Damaseb DCJ clarified that a withdrawal of charges in terms of section 6 of the Criminal Procedure Act can never be 'provisional'. So any fear that extending the scope of section 6 to the situations that Namoloh faced would open the floodgates of litigation in the future does not rest on solid grounds because Damaseb has made it clear that, going forward, prosecutors, lawyers and judges will no longer be allowed to make any statements that describe the withdrawal of charges as 'provisional'. With that understanding, any future cases will not allow the prosecutor to qualify his or her withdrawal of the charges as 'provisional' and, in that

¹⁵ *Namoloh* (n) [43].

¹⁶ *Namoloh* (n) [44].

¹⁷ *Namoloh* (n) [53].

fashion, it will foreclose or preclude any arguments that the court should grant a permanent stay of prosecution because the prosecutor delayed in reinstating so-called 'provisional' charges.