



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 11/2010

In the matter between:

THE STATE

and

TECKLA NANDJILA LAMECK

YANG FAN

JEROBEAM KONGO MOKAXWA

FIRST ACCUSED

SECOND ACCUSED

THIRD ACCUSED

Neutral citation: *The State v Lameck* (CC 11/2010) [2012] NAHCMD 36 11
February 2013)

Coram: MILLER AJ

Heard: 23 November 2012

Delivered: 11 February 2013

Flynote: Criminal Procedure – Request for further particulars in terms of section 87 of Act 51 of 1977 – Where information requested is contained in the contents of the docket disclosed to the accused no need to provide further particulars.

Summary Accused requested further particulars to the indictment – State contends *inter alia* that the information requested is contained in the police docket which was disclosed to the accused – Test is whether the accused has sufficient information to prepare his defence – Accused not challenging states averment that

the accused are already in possession of the information – Application to compel delivery of further particulars refused.

ORDER

The application is refused. The state is directed to amend the indictment to exclude all allegations based upon the statutory definition of the word “corruptly” in the Anti-Corruption Act, 5 of 2004.

JUDGMENT

MILLER AJ :

[1] The present applicants are indicted in this Court as accused 1 and 3 together with a certain Yang Fan who is cited as accused no. 2.

[2] They were served with the indictment which contains 18 charges ranging *inter alia* from fraud, contravention of the Prevention of Organized Crime Act, Act 29 of 2004, various contraventions of the Anti-Corruption Act, Act 8 of 2004, contraventions of the Close Corporations Act, Act 26 of 1988 and contraventions of the Value Added Tax Act, Act 10 of 2000.

[3] The indictment is a sizeable document consisting of some 35 typed pages. This document, although linguistically and grammatically deficient in some respects, contains in some detail the essential allegations upon which the State bases the charges specified.

[4] The state also served together with the indictment a summary of substantial facts as is required by section 144 (3) of Act 51 of 1077 which I shall refer to henceforth as “the Act”.

[5] In addition the state delivered to the accused copies of the witness statements and documents contained in the police docket.

[6] The present applicants now seek an order compelling the state to provide them with the further particulars they requested in terms of section 87 of the Act.

[7] I have no wish to burden this judgment by quoting the particulars in full.

[8] Suffice it to say that the request seek some fine factual details.

[9] The state's response to these requests by and large rests upon the following:

‘ (a) The accused are already in possession of all this documentation, information and witness statements. I infer from the response that the state alleges that the particulars requested can be found there.

(b) The particular requested, therefore need not be provided in order to place the applicants in a position where they are informed of the case against them sufficiently for them to prepare their defence.

(c) In respect of some the requests the states' response was that in law it is entitled to set out the allegations in the manner it did.

(d) Where allegations are made based upon the definition of the word "corruptly" in the Anti-Corruption Act, 2005 these must now bear the ordinary meaning or whatever meaning the word is given by the court. This must of necessity be so since the definition was struck down by this court in an earlier decision in this case. ’

[10] It is my view that in order to avoid further confusion, the state should amend the indictment to delete from it those allegations still based on the impugned definition. I will make an appropriate order in that respect at the conclusion of this judgment.

[11] When the matter was argued before me, Mr. Heathcote SC who appeared together with Mr. Obbes, moved an application that the indictment be quashed.

[12] Mr. Small who appeared for the State, responded that the accused should in that event have followed the procedure established by section 85 of the Act which reads as follows:

‘Objection to Charge-

- (1) An accused may, before pleading to the charge under section 106, object to the charge on the ground-
 - (a) That the charge does not comply with the provisions of this Act relating to the essentials of a charge;
 - (b) That the charge does not set out an essential element of the relevant offence;
 - (c) That the charge does not disclose an offence;
 - (d) That the charge does not contain sufficient particulars of any matter alleged in the charge; or
 - (e) That the accused is not correctly named or described in the charge:

Provided that the accused shall give reasonable notice to the prosecution of this intention to object to the charge and shall state the ground upon which he bases his objection: Provided further that the requirement of such notice may be waived by the prosecutor-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

- (2)
 - (a) If the court decides that an objection under subsection (1) is well-founded, the court shall make such order relating to the amendment of the charge or the delivery of particulars as it may deem fit.
 - (b) Where the prosecution fails to comply with an order under paragraph (a), the court may quash the charge.’

[13] Mr. Heathcote, conceded that the provisions of section 85 were not complied with. He submitted, however that Article 18 of the Constitution entitles the accused to bring the application. I do not agree. Article 18 of the Constitution is an over-arching provision.

[14] It does not dispense with statutory provisions such as section 85 of the Act, unless it can be shown that the statutory provision is unconstitutional. I will accordingly not entertain an application to quash the indictment or any of the charges contained therein.

[15] I turn to deal with the request for further particulars.

[16] The test to be applied is whether the accused has a reasonable need for the additional information for the preparation of this defence. *S v Cooper & Others* 1976 (2) SA 879 (9); *S v Katari* 2008 91) NR (HC).

[17] In that regard the fact that the accused has the witness statements and other information in the docket at his disposal renders a request for further information by way of a request for further particulars less necessary. Disclosure of the docket to the accused does not necessarily mean though that the provisions of section 87 of the Act have become redundant. There may well be cases, for instance where the further information requested does not appear from the content of the docket or is ambiguous or contradictory.

[18] Certainly in those circumstances the accused will be entitled to make use of the provisions of section 87 if he is as a result prejudicial in the preparation of his defence.

[19] The difficulty which arises for the court is that it will not know whether the further information requested by the accused is contained in the docket. In that respect the court must rely on what the parties say.

[20] If, as in the instant case the State alleges that the information is contained in the contents of the docket which was disclosed to the accused and that is not challenged, the court will accept the assurance given by the State.

[21] The applicants do not say that the information they request is not available to them or is ambiguous, contradictory or confusing.

[22] I have before me nothing more than a bold statement that “in the indictment together with the summary of substantial facts and docket are materially deficient in details and particulars. In what respects that should be so I do not know.

[23] A reading of the indictment and the summary of the substantial facts, imperfect though they may be in my view sufficiently inform the applicants of the case they have to meet.

[24] I also accept the statement by the state that in any event, the information now requested can be found in the contents of the police docket. I accordingly make the following order:

- (a) The application is refused.
- (b) The state is directed to amend the indictment to exclude all allegations based upon the statutory definition of the word “corruptly” in the Anti-Corruption Act, 5 of 2004.

PJ MILLER
Judge

APPEARANCES

STATE : SMALL D F
(Of the Office of the Prosecutor-General)

ACCUSED : R HEATHCOTE (with him D Obbes)
Instructed by Sisa Namandje & Company
Incorporated