CASE NO.: A 162/96

STRYDOM, J.P. et HANNAH J.

JEANETTE MARIETHA VON SOLMS & 1 OTHER versus MAGISTRATE P. NANGULA, N.O. & 1 OTHER

1996/09/06

CRIMINAL PROCEDURE

Bail: - Cancellation of - In the interest of the administration of justice that accused be placed in custody This includes situation when there is a strong prima facie case against accused charged with serious crime and court is convienced there is a real risk that he will abscond

CASE NO. A.l?2/96

IN THE HIGH COURT OF NAMIBIA

FIRST APPLICANT

SECOND APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

In the matter between

JEANETTE MARIETHA VON SOLMS JAN FRANCOIS VON SOLMS

versus

MAGISTRATE P NANGULA, N.O. THE PROSECUTOR-GENERAL OF THE

REPUBLIC OF NAMIBIA

CORAM: STRYDOM, J.P. et HANNAH, J.

Heard on: **1996/08/30**

Delivered on: **1996/09/06**

JUDGMENT

HANNAH, J. : On 26th November, 1995 the two applicants together with one Roelof Swart appeared before the Okahandja Magistrate's Court charged with murder. The case was postponed until 14th December and on that day all three applied for bail. Their respective applications were opposed by the State but those of the two applicants were successful while that made by Swart failed. On 12th March, 1996 the application of Swart was renewed and at the same time the State applied for the bail of the two applicants to be cancelled. Swart was refused bail once again but the State's application for cancellation of the two applicants' bail was granted. They now seek to have the application to cancel bail reviewed and the order that their bail be cancelled set aside. They contend that the magistrate who made the order acted in an unreasonable and arbitrary manner.

At the original application for bail the State contended, and the applicants through their attorney conceded, that the State had a strong case of murder against the applicants and Swart. It was also not challenged by the applicants' attorney that the murder with which the applicants were charged was a premeditated one. If convicted the applicants will in all likelihood receive long terms of imprisonment. The temptation to avoid standing trial would therefore be considerable. However, it would seem that the magistrate who heard the application was impressed with the fact that the applicants, who are mother and son, were both Namibian citizens in gainful permanent employment and that the first applicant owned and resided in a house worth approximately N$22 0 000 in Okahandja and that the second applicant, her son, resided there with her. They had strong roots in Namibia and to all intents and purposes led a stable life. As I see it it was in these circumstances that the magistrate decided to

exercise his discretion in favour of granting bail in what was very much a borderline case when account is taken of the gravity of the charge and the concession that the State's case in support of the charge was a strong one. Swart was unable to show the same degree of stability in his lifestyle as the applicants and it comes as no surprise that in his case bail was refused.

At the application for cancellation of bail the investigating officer, Inspector Bekker, made the following allegations. He alleged that the first applicant had resigned from her post as Chief Accountant with the Ministry of Mines and Energy and that the second applicant had resigned from his employment with the Namibian Engineering Corporation. He alleged that the first applicant had put her house on the market for sale and that her eldest son had purchased a business in South Africa where he was intending to move permanently. Other allegations made were that the first applicant had been overheard making a remark that the register relating to the applicants' reporting at the police station was only checked twice a month, that the first applicant had told someone that she was only waiting for Swart's renewed bail application to be disposed of before absconding and that the first applicant had a second passport which had not been surrendered to the police.

Certain of these allegations were not disputed. The first applicant admitted that she had put her house on the market for sale but said that this had been due to adverse financial circumstances and had been done openly. She also admitted that she had resigned from her post as Chief Accountant with the Ministry of Mines and Energy but said that she really had no choice in the matter. As a result of the charge against her she had been suspended without pay and as a Government employee could not take other employment. She therefore

resigned. The second applicant also admitted resigning from his employment with Namibian Engineering Corporation and said that this was due to the fact that reporting conditions made him almost invariably

late for work. However, he could give no satisfactory-explanation as to why he did not attempt to have the reporting times changed or why he did not ask his employer for a transfer to their branch in Okahandja, something which he had said at the original bail application they had agreed to do if there was a problem.

As for the allegation that the first applicant's eldest son had purchased a business in South Africa and was intending to move there permanently the first applicant said that in December, 1995 her eldest son, Theo, had been with his wife in Kenhardt, South Africa and had taken an cption to purchase a business there to be run by his wife. His wife wanted to leave Okahandja because she could not handle the pressure and she and Theo had problems. The wife had in fact left the week before the application for cancellation of bail was heard and Theo had joined her in Kenhardt but had returned. Theo testified and said that he had indeed gone to Kenhardt to sign a surety for the business but although his wife and two children and the furniture were now in South Africa he himself had no intention of leaving Okahandj a.

The other allegations were disputed but putting those allegations to one side it was nonetheless common cause that the circumstances of the applicants had changed and that with the sale of the house they would change further. Although both had found work of a temporary nature they no longer had the secure, permanent employment they had enjoyed at the time of the original application and with the sale of

the house they would be in rented property.

Cancellation of bail in this case was governed by section 68 of the Criminal Procedure Act, no. 51 of 1977 (as amended) and it is clear that the Court hearing an application for cancellation of bail has a wide discretion. Section 68 (as amended) reads:

> "1) Any court before which a charge is pending in respect of which the accused has been released on bail may, upon information on oath that the accused is about to evade justice or is about to abscond in order to evade justice, issue a warrant for the arrest of the accused and make such order as it may seem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.
>
> 2) .....
>
> 3) The provisions of this section shall not be construed as preventing any court or magistrate, as the case may be, to cancel the bail and commit an accused to prison where the accused was released on bail in respect of any offence contemplated in section 61, if, notwithstanding that such accused is not about to evade justice or to abscond, it is in the opinion of such court or such magistrate, as the case may be, in the interest of the public or the administration of justice that the accused be placed in custody."

It was, therefore, open to the magistrate to cancel bail in the present case even if he was not satisfied that the applicants were about to evade justice or abscond provided he was of the opinion that it was in the interest of the public or the administration of justice to do so and that there was material upon which he could properly form such an opinion.

Mr Dicks, for the applicants, submitted that there was insufficient material before the magistrate for him reasonably to have formed such an opinion. Mr Dicks accepted, as he had to, that the circumstances

of the two applicants had changed but he submitted that plausible explanations had been given for this and in the light of these explanations it was totally unreasonable to read anything sinister into the changed circumstances so as to justify cancellation of bail in the interest of the administration of justice.

In State v Du Plessis and Another, NmHC (15th May, 1992) the Court recognised the difficulty in defining the concept of "the interest of the administration of justice" but said that it should be given a wide meaning. The Court then indicated that it would include a situation where there is a strong prima facie case against an accused who is charged with a serious crime and the court or magistrate is convinced that there is no more than a reasonable possibility that the accused will abscond. The passage containing this statement has been cited with approval in other cases: See for example, Botha v The State, NmHC (20th October, 1995) . In my view the statement is correct. If there is a reasonable possibility that an accused will abscond then there is a real risk that he or she will abscond and that is a risk that the Court should not take when the accused is charged with a serious crime and the case against him is strong. To do so would not be in the interest of the administration of justice.

Mr Dicks analysed each change of circumstance admitted to by the applicants and, as I have said, submitted that in the light of the explanations given nothing sinister should be read into them. But, in my opinion, it is wrong to isolate each fact, subject it to analysis, and arrive at a conclusion. It is the cumulative effect of the

circumstances which is of importance. What the magistrate was faced with was a situation where the two applicants were charged with a most serious crime and a concession had been made on their behalf that the case against them was a strong one. If convicted they would both almost inevitably receive very long sentences of imprisonment. The temptation to avoid standing trial would be considerable. Having been granted bail both then resigned their employment. That both did so is a curious coincidence particularly when regard is had to the unsatisfactory nature of the second applicant's explanation for doing so. Then there is the fact that the first applicant put her major asset up for sale and coupled with that is the fact that her daughter-in-law moved out of the house and set up home in South Africa. One perfectly reasonable interpretation of these facts was that the applicants were preparing to spread their wings and fly the nest in order to evade justice and I am unable to find that that was not the honest and fair opinion held by the magistrate based on the material before him.

This is an application to review the magistrate's decision in terms of the inherent common law right of this Court to review the proceedings of an inferior tribunal in certain circumstances. The approach of this Court when exercising its common law powers of review is, with one necessary alteration, set out in the following oft-quoted passage in African Realty Trust v Johannesburg Municipality, 1906 TH 179 at p. 182:

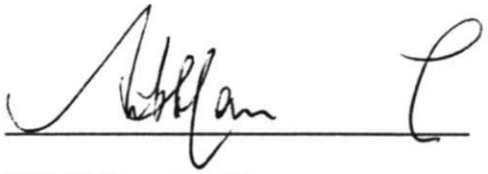
> "If a public body or an individual exceeds its powers, the court will exercise a restraining influence. And if, while ostensibly confining itself within the scope of its powers, it nevertheless acts mala fide or dishonestly, or for ulterior reasons which ought not to influence its judgment, or with an unreasonableness so gross as to be inexplicable, except on the assumption of mala fides or ulterior motive, then again the court will interfere. But once a decision has been honestly and fairly arrived at upon a point which lies within the discretion

of the body or person who has decided it, then the court has no functions whatever."

The alteration which I think should be made arises from Article 18 of the Constitution which provides, inter alia, that administrative bodies and administrative officials shall act fairly and reasonably. Although it was not a point which was argued before us it could be said that an application to cancel bail is not a criminal proceeding because no offence is created, there is no presentation of a formal charge to which the accused has to plead and there is no appeal. See Pillay v Regional Magistrate, Pretoria and Another, 1977(1) SA 533 (TPD) at p. 534 H. If this be right and the act of a magistrate in terminating bail is more in the nature of an administrative act then on one view it would be sufficient for the applicants to show unreasonableness rather than gross unreasonableness for this Court to exercise its powers of review. I will assume for the purposes of deciding this application that that is indeed the case but it does not avail the applicants.

Applying the applicable principles to the facts of the case **I** am unable to find that the magistrate acted in a manner so unreasonable as to be inexplicable on any basis other than mala fides or ulterior motives. On the contrary, **I** am satisfied that his decision was honestly and fairly arrived at and that no proper basis exists for this Court to interfere with his decision.

The application for review is accordingly dismissed.



HANNAH, JUDGE

I agree

STRYDOM, JUDGE PRESIDENT

ON BEHALF OF THE STATE:

ON BEHALF OF THE APPLICANTS Instructed by: