REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: A 331/2012

In the matter between:

WILLEM NAKALE	**1ST APPLICANT**
NAFTALI HAMUTENYA	**2ND APPLICANT**
MANDUME EDWARD	**3RD APPLICANT**
ARMAS HANGO	**4TH APPLICANT**
PETRUS SHOVALEKA	**5TH APPLICANT**

and

THE PUBLIC PROSECUTOR, MR LITUBEZI	**1ST RESPONDENT**
THE PROSECUTOR-GENERAL	**2ND RESPONDENT**

Neutral citation: *Nakale v The Public Prosecutor, Litubezi* (A 331/2012) [2012] NAHCMD 116 (21 December 2012)

Coram: GEIER J
Heard: **20 December 2012**
Delivered: **21 December 2012**

Flynote: Urgent application – Applicants failing to satisfy the requirements for urgency and unable to show that they could not be afforded redress at a hearing in due course – applicants thus failing to satisfy requirements for the hearing of an

urgent application as set by Rule 6(12)(b) of the Rules of Court – application accordingly struck from the roll.

Summary: The facts appear from the judgment.

ORDER

The application is struck from the roll

RULING

GEIER J:

[1] The applicants in this matter have approached the court on an urgent basis in which application they seek an order quashing the Prosecutor General's decision to arraign the applicants for criminal trial.

[2] Alternatively, they seek that they be admitted to bail in a reasonable amount.

[3] They also seek an order - I presume in the further alternative - that their criminal trial proceed on the date set - namely on the 8th to the 10th of April 2013 - strictly on the prosecution's disclosed evidence, failing which they should be liberated and exonerated. They also seek further relief.

[4] The applicants have all been incarcerated since 2005 and have not been admitted to bail. They claim essentially that their last appearance was on the 15th of

November 2012 and that their criminal trial, which had already been postponed on a number of previous occasions, could once again not proceed as it emerged that there was a great number of documentation which the prosecution had not disclosed. As a result the trial of the applicants was once again postponed, this time to a date in April 2013.

[5] Dissatisfied with this further lengthy postponement, they wrote a letter to the office of the Prosecutor General on the 19th of November 2012, giving notice of their intention to bring an urgent application in the High Court. This application was then brought approximately one month later, namely on the 13th of December 2012. The application was indeed served on the office of the Prosecutor General on the 13th of December and was set down for hearing on the 20th of December 2012.

[6] Inexplicably, the office of the Prosecutor General elected not to oppose this application.

[7] On the day set down for the hearing of the application all five applicants appeared unrepresented, although in the criminal trial, they all are defended by legal practitioners. Mr Nakale took it upon himself to argue the application on behalf of all applicants. After argument on the 20th, all five applicants indicated that they wished the matter to be postponed to the 21st of December 2012, to enable them to make contact with their legal representatives, which application was granted.

[8] At the resumption of the hearing of this matter on the 21st of December 2012 all the applicants, except for Mr Mandume, indicated that had been able to consult with their legal representatives.

[9] All the applicants, as a result, indicated that they wanted the court, nevertheless, to continue with the matter and to hand down its ruling.

REASONS FOR RULING

[10] The Applicants who have approached the court on an urgent basis have to comply with the requirements set by Rule 6(12)(a) and (b) of the Rules of High Court.

[11] In terms of Rule 6(12)(b) every affidavit filed in support of an urgent application shall set forth explicitly the circumstances which render the matter urgent and why an applicant or the applicants cannot be afforded substantial redress at a hearing in due course.

[12] The facts and circumstances which emerge from the founding papers show that the applicants find themselves in detention in excess of 7 years. Although they explained that the last postponement, which happened on the 15th of November 2012, was the last straw, they failed to explain why this application was not brought 6 months earlier or 1 year earlier or even 2 years ago.

[13] Without wanting to make a definitive finding in this regard and without having a full explanation on why the criminal trial or the commencement of the criminal trial in this matter was seemingly inordinately delayed, the applicants would have been free - some time ago - to already bring an application of this nature. There is nothing before the court which indicates that this application, which is now brought at short notice and on an urgent basis, could not have been brought a year ago or even two years ago.

[14] In this regard I find that the applicants have delayed the lodging of this application inordinately.

[15] An applicant cannot wait to the last moment and then come to court and claim to be heard on an urgent basis if such an application could have been brought quite easily a year or two earlier.

[16] Even if one considers that the last appearance before the Lower Court was on the 15th of November it took the applicants a further month to bring this application.

[17] Mr Nakale explained that one of the reasons why it took another month to bring this application was because the draftsperson of the applicants was writing examinations.

[18] A litigant who wishes to approach the court on an urgent basis must do so promptly and immediately upon the cause for the urgent application arising. Also the further delay of approximately one month after the 15th of November constitutes an inordinate delay.

[19] Therefore, not only have the applicants, on their own version, failed to show the necessary degree of urgency required of a litigant who wishes to approach the High Court on an urgent basis, they have also, through their actions, shown that they have inordinately delayed the bringing of this application. I have already indicated why the court considered that this application could have been brought at a much earlier stage.

[20] There is however also another reason why this application cannot succeed at this stage. The applicants in terms of the Rule also had to show why they cannot be afforded redress at a hearing in due course.

[21] During argument the point was made that it seemed very strange - given the long history of this matter – that their defence counsel at no stage applied for a final postponement. I can see no reason from the papers before me why the presiding magistrate would not have made such an order and why such application was not made before the Lower Court.

[22] Also if regard is had to the Supreme Court decision in *Malama-Kean vs Magistrate District of Oshakati & Another* [1] it appears that also the Lower Court is competent to grant certain relief, in terms of Article 12(1)(b) of the Namibian Constitution, if a trial has not taken place within a reasonable time.

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[1] 2002 NR 413 (SC) at p 426 H to p 427 D.

[23] In addition Mr Nakale has informed the court, although this does not appear from the application, that the applicants have lost confidence in the Lower Court. If this is indeed so, it is strange, that this was not contained in the papers before court. I will however assume in favour of the applicants that they, and given the length of their incarceration, have lost faith in the system. But the system would have afforded the applicants a further remedy in the form of a recusal application of the presiding officer. This remedy was not utilised by the applicants according to Mr Nakale.

[24] All these examples show that the applicants have a number of alternative adequate remedies available to themselves in their criminal trial which could afford them redress in due course.

[25] In the result it thus appears that the applicants have failed on two scores: they have not satisfied the requirements for urgency and they were not able to satisfy the court that they cannot be afforded substantial redress at a hearing in due course.

[26] The applicants have therefore not satisfied the requirements set by Rule 6(12) (b) of the Rules of High Court.

[27] The application is accordingly struck from the roll.

H GEIER

Judge

APPEARANCES

APPLICANTS:	In Person
RESPONDENT'S	No appearance