CASE NO.: A 16/2012

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

JOSHUA HECHT **APPLICANT**

and

THE STATE **RESPONDENT**

CORAM: GEIER AJ

Heard on: 29 February 2012

Delivered on: 29 February 2012-03-12 *(Ex tempore)*

JUDGMENT

GEIER AJ: [1]The Applicant in this matter has launched an urgent application. It is not opposed. It contains a notice that he shall lodge an urgent bail application for the following orders:

1.1 That the application for Applicant's bail be reinstated

1.2 An application for an order for Learned Magistrate D Uusiku to excuse herself from the Applicant's case, and

1.3 For further and or alternative relief.

[2]The application is dated 19th December 2011, but was set down for the 29th February 2012. It has an annexure, unsworn, which was most probably intended to be the founding affidavit. This application contains no annexures. It appears immediately that no sworn evidence served before the Court on the basis of which any relief can be granted. For that reason alone, the application is liable to be dismissed.

[3]However, and even if regard is had to the contents of the statement, it appears that the Applicant avers that he is a sentenced male prisoner currently at the Windhoek Prison. He states also that he was granted bail, but which has since 2008 been denied, since the bail monies were refunded to the depositor. He alleges that the State never had an objection to the granting of bail at the time and the Magistrate erred in not hearing his evidence at all before cancelling his bail. It is also alleged that Magistrate D Uusiku considered hearsay evidence when she stated, "you escaped from custody". These allegations, if proven, would most probably have constituted material irregularities, at the hearing, at the time.

[4]The problem with the Applicant's case, as I have already stated, is the fact that he has adduced no evidence in support of his case. It also appears that no documentary evidence has been handed in, in support of the application. Most importantly, there is no record available to this Court against which the Applicant's case can be evaluated.

It is also unknown, but this seems to be unlikely, whether the Applicant has ever taken the decision, not to admit him to bail, in terms of Section 65(1)(a) of the Criminal Procedure Act, 1977, on appeal. That would have been the correct vehicle to utilise, in my view. During oral argument the Applicant confirmed that he never noted an appeal.

[5]This application is headed “Urgent Bail Application”. On Applicant’s own version a bail hearing must already have been held and determined. Against such a decision an appeal should have been lodged. The Applicant cannot now bypass the mechanisms provided for in the Criminal Procedure Act by lodging an urgent application many months later, after having failed to appeal the decision now complained of.

[6]There is also no allegation that this further bail application is based on new facts. If so, such facts would first have to be placed before the Magistrate to give a decision on such new facts in terms of Section 65(2) of the Criminal Procedure Act. Also on this basis the application cannot succeed as the Criminal Procedure Act clearly prescribes the route that the Applicant had to follow in this regard.

[7] The applicant also seeks the recusal of Magistrate Uusiku. Such an application should firstly be heard by the magistrate herself. It is an application that would have had to be made substantively in which the grounds for the magistrate’s recusal should have been set out. No such application has been made.

[8]Finally, it should be mentioned that the Applicant has also filed heads of argument. In those heads he states that he was acquitted, yet he remains in custody. The Court enquired from the Applicant what the correct state of affairs in this regard was, and the Applicant confirmed to the Court that he is presently serving a term of imprisonment for a conviction of fraud, in respect of which he was also given an option to pay a fine. Such fine was not paid and therefore the Applicant finds himself serving out a two-year term of imprisonment.

[9]It is against this background that this application should also be viewed. A convicted prisoner - serving a sentence of imprisonment - while charged with further crimes - and I must add in this regard that it has also transpired from what the Applicant has said from the bench, that he was in the meantime acquitted of a further charge - but that there is also still one further outstanding criminal charge pending against him - therefore, and while charged with such further crimes - but whilst serving a period of imprisonment - surely such person cannot be admitted to bail as that would be tantamount to defeating, or interfering in the execution of a valid sentence which also, as the Applicant has indicated, has not been taken on appeal.

[10]Ultimately it would appear that the Applicant's quest to admit him to bail, in such circumstances, would obviously, and ultimately defeat the object of the sentencing exercise.

[11]It follows that the Applicant has not made out a case for the relief sought. The application therefore has to be dismissed.

_____

GEIER AJ:

ON BEHALF OF THE APPLICANT **IN PERSON**

Instructed by:

ON BEHALF OF RESPONDENT **NO APPEARANCE**

Instructed by: