



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
EX-TEMPORE JUDGMENT**

Case no: A 92/2013

In the matter between:

ALI MOUSSA

APPLICANT

and

THE PROSECUTOR-GENERAL

FIRST RESPONDENT

THE REGIONAL MAGISTRATE (KATIMA MULILO)

SECOND RESPONDENT

THE MINISTRY OF SAFETY AND SECURITY

THIRD RESPONDENT

Neutral citation: *Moussa v The Prosecutor-General* (A 92/2013) [2013] NAHCMD 103 (15 April 2013)

Coram: PARKER AJ

Heard: 15 April 2013

Delivered: 15 April 2013

Flynote: Practice – Applications and motions – Urgent application – Applicant seeking an order for release from further detention awaiting trial for criminal offences – Court not competent as court of first instance to grant such relief where applicant applied for bail on two separate occasions and the lower court refused to admit applicant to bail – Decisions of lower court valid until set aside by a competent court on review or appeal.

Flynote: Constitutional law – Applicant seeking order that the respondents (the Prosecutor-General and certain magistrates of the lower court) withdraw criminal

charges against him in a criminal proceeding – Court not competent to grant such order where set-down trial date of the applicant’s criminal trial has been ordered already by the trial court.

Summary: Practice – Applications and motions – Urgent application – Applicant as trial-awaiting accused person sought an order to be released from further detention – Applicant’s two separate applications to be admitted to bail were refused by the lower court – The court *qua* court of first instance is not competent to grant such order – Any such order would set at naught the decisions of the lower court which are valid and would not be in tune with the due administration of justice.

Summary: Constitutional law – Applicant sought the relief that the respondent (the Prosecutor-General and certain magistrates of the lower court) be ordered to withdraw criminal charges in a case he is facing – Court refused to make such order – Court held that the court cannot make such order without violating Article 88(2) of the Namibian Constitution where there is no justification for the making of such order.

ORDER

The application is dismissed with costs.

JUDGMENT

PARKER AJ:

[1] The applicant, an unrepresented litigant, has brought an application on notice of motion. There is also a ‘Certificate of Urgency’; and the applicant prays that the matter be heard on urgent basis (para 1 of the notice of motion). The respondents, represented by Mr Chanda, have moved to reject the application; and in that behalf

counsel did file a 'Notice to raise questions of law' in terms of rule 6(5)(d)(iii) of the rules of court; and they raise three issues. The first is the absence of a founding affidavit. To cure this non-compliance with the rules, the applicant handed in to the court at the commencement of the hearing an affidavit and said it should be read in conjunction with the Founding Statement which he had filed earlier with the notice of motion. After the applicant explained the handing in of the affidavit in court, Mr Chanda informed the court that the respondents were not objecting to the handing in of the affidavit. I accept counsel's concession. That being the case the first point of law was not pursued by counsel.

[2] The applicant prays that the court should (a) order the respondents to withdraw case R/C 05/09 from the court roll (para 2 of the notice of motion), (b) order the release of the applicant from further detention on conditions (para 3 of the notice of motion); and (c) that the date of 4 June 2013 set by the trial court for the trial of his criminal case in the lower court should be the last postponement (para 4 of the notice of motion).

[3] From the papers filed of record by the applicant and the points in law filed by the respondents and submissions by the applicant and Mr Chanda, the following findings are inescapable. The applicant who is being held in custody awaiting trial for criminal offences (together with his co-accused persons) applied for bail in the lower court – not once but twice. On the first occasion the applicant was not represented by counsel, but was represented by counsel on the second occasion. The lower court on both occasions refused to admit the applicant to bail. Most significantly, the applicant has not appealed against those decisions.

[4] It is clear that the accused has not being denied his right to apply for bail and his right to appeal from the decisions of the lower court. This court is therefore not entitled to order his release from continued detention awaiting trial. If the court *qua* a court of first instance in the present proceeding made such order the court would be setting at naught the decisions of a competent court, that is the lower court. Such an order would indubitably be offensive of due administration of justice. This disposes of the relief sought in para 3 of the notice of motion.

[5] This court is also not competent to make the order prayed for in para 2 of the notice of motion whereby the applicant prays that this court makes an order that the respondents withdraw Case R/C 05/09. Any such order will violate Article 88(2) of the Namibian Constitution which vests the power to prosecute in criminal proceedings in the Prosecutor General only. (See *Adriaan Jacobus Pienaar v The Prosecutor General and Others* Case No. A 72/2013 (judgment on 2 April 2013) (Unreported) para 4.)

[6] What remains is the applicant's prayer in para 4 of the notice of motion in which the applicant seeks an order that the date of 4 June 2013 which has been set by the lower court for the trial of his criminal case should be the last postponement. This court cannot make any such order when 4 June 2013 has not come. Any such order would be based on speculation. The court would be making an order based on conjecture and not having before it facts as to why the trial would or would not proceed. The court would on that score be anticipating facts which are not before it. Such conduct would be unjudicial; and such order would not be in tune with due administration of justice.

[7] For all the foregoing reasoning and conclusions, in my judgement, the application should fail; and it fails. Whereupon; the application is dismissed with costs.

C Parker
Acting Judge

APPEARANCES

APPLICANT: In Person

RESPONDENTS: C Chanda
Of Government Attorney, Windhoek