HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 444/2013 (A)

In the matter between:

1.1.1.1. **ADRIAAN JACOBUS PIENAAR**

APPLICANT

and

THE PROSECUTOR-GENERAL **1ST RESPONDENT**

THE REGIONAL COURT MAGISTRATE MARIENTAL **2ND RESPONDENT**

THE HEAD OF HARDAP REGION **3RD RESPONDENT**

Neutral citation: Pienaar v The Prosecutor- & Others (A 444/2013) [2013] NAHCMD 385 (16 December 2013)

Coram: SMUTS, J

Heard: 16 December 2013

Delivered: 16 December 2013

EX TEMPORE RULING

(b) On 9 December 2013, the applicant filed an urgent application in which

he applied for the following relief in addition to seeking condonation for the bringing of the application as one of urgency:

> ‘1. that a warrant issued in Mariental under case no.CRM1070-13 should be declared as invalid and not to authorise the detention of the Applicant;
> 2. that the court order that the applicant be allowed to pay a bail with immediate effect on the joined cases which now fall under the Regional Court under RC21/10/13;
> 3. that the court order the respondents to file certain certified copies in their reply to this application of transcripts in certain cases.’ (sic)

(c) There is also a prayer for further and alternative relief as well as an alternative that this court order that the Mariental regional court immediately ‘hear the applicant’s release’, presumably meaning release application.

(d)

(e) I understand the current position to be that the applicant is awaiting trial in the regional court and that the matter has been postponed to 19 February 2014 for this purpose. He is currently held at the Hardap Prison. I do not intend to spend much time on the question of urgency although the point was taken by Mr Ndlovu, who appeared for the respondents cited in this application, that the case was both not properly brought as one of urgency in that the applicant had failed to set out circumstances which would render the matter urgent and why the applicant would not be able to be afforded substantial redress at a hearing in due course. Although there is some substance to Mr Ndlovu’s submissions that the allegations regarding urgency are less than satisfactory, the matter does after all concern the liberty of a person. The liberty of any person, whether a subject or not, is invariably viewed as a matter of inherent urgency by this court. I decided in the circumstances that I would hear the matter as one of urgency and accordingly grant condonation to do so. The second basis of Mr Ndlovu’s argument in that regard essentially also touches upon the merits which I deal with below.

(f)

(g) The applicant stated that he had appeared before the regional court on the 4 November 2013 in Mariental, but that it could not proceed on that date

because his Legal Aid lawyer was busy with another case and that he had wanted a bail application to be brought on that date. The matter was then remanded to 11 November 2013. But on that occasion his lawyer was not at court and he decided to terminate his mandate.

(h)

(i) The applicant made it clear to the court that there was a point of law which he wanted to address the regional court on in order to seek his release from detention and incarceration. A date was arranged for hearing this point, namely 15 November 2013. But on that date, he appeared in the Keetmanshoop magistrate's court on a charge of contravening immigration legislation. He could thus not attend the regional court on that date. He subsequently discovered (on 26 November) that the matter had instead been postponed to 19 February 2014. The applicant questioned the basis for that, both in correspondence attached to his founding affidavit as well as in the course of his submissions in this court.

(j)

(k) The issue raised in the merits of this application relates to a contention made by the applicant that he should be entitled to pay bail in respect of the cases in district courts in which bail was granted to him and that he should be thus granted bail in the regional court in respect of the consolidate case. He referred to the various cases which are pending against him in various district courts.

(l)

(m) I pause to point out that the Prosecutor General had decided to join these cases or consolidate them and to have them heard in the regional court at Mariental. They comprise some 40 charges. Most of them concern fraud, but there are also other charges and there are also alternatives to the fraud counts. In some of those cases he had been granted bail by different district courts where he had appeared, but not in all of them. There was one case which he referred to in the Mariental district court where bail was refused. The applicant referred in argument to a case in which this court had, according to him, apparently held that in the event of a consolidation of matters in this way and where bail had been granted in one or more of those cases, the accused in that matter was entitled to be released on bail. The case's name, he said, was *S –v-*

Hijarunguru. This Court adjourned in order to search for the judgment in this case.

(n)

(o) When the matter was argued on Friday 13 December, the applicant was not in a position to provide a copy of the judgment in that case to this court or any further details of it. It is certainly unreported. The court and those assisting the court conducted a very thorough and diligent search in order to establish whether there had been a written judgment in a case by that name which had served before this court in order to consider the judgment which had been given in the matter. The applicant accepted in argument that it is the duty of a party, even if unrepresented, when relying upon a case which is not reported, to provide a copy to the court. But because of the importance of this case to the applicant, I decided on Friday 13 December 2013, to permit an adjournment until today to afford him the opportunity to obtain a copy or further details on that case. When the matter was called today he informed the court that he had not been able to do so but that he had not been afforded a full opportunity to do so. I then afforded him the opportunity to make further enquiries which, he indicated, could assist him in establishing the full details of the case. I indicated that even if a case number could be provided or a date of the decision, this would facilitate the task of the Court in securing a copy of that case.

(p)

(q) The court adjourned for approximately half an hour. On resumption, the applicant was unable to provide a copy or these further particulars to the court, although he said it had been decided in the High Court in 2011 and that it served before this court by way of a review. He indicated that he had made calls in order to establish the details of this case and may yet be able to do so. I afforded a further opportunity of approximately a further half an hour to the applicant to see if he could establish further particulars of or a copy of this case. Unfortunately for the applicant, he was unable to do so during this extended period.

(r)

(s) I indicated that I would then need to determine this application on the basis of the material which served before me together with the argument presented by both sides.

(t)

(u) The applicant had initially earlier on today sought a postponement until tomorrow to secure the services of legal aid counsel. Mr Ndlovu objected to this further postponement and requested that the matter be finalised. I declined a further postponement for that purpose

(v)

(w) I have considered the provisions of section 75 of the Criminal Procedure Act, 51 of 1977 together with section 90 (8) of the Magistrate's Courts Act with regard to the consolidation of the criminal prosecution against the applicant. I am not able to accept that if bail had been granted in one or more of the component cases which was subsequently consolidated before a regional court that this would automatically entitle an accused to bail in respect of the entire matter where a court had refused bail in respect of one of the component cases. Even if this court had made a finding that an accused in that case was entitled to bail where there had been a consolidation of cases, it would seem to me that the facts of that matter would need to be carefully considered and would be distinguishable from these facts before me as I do not accept that on these facts that such a principle would apply.

(x)

(y) Once consolidation has occurred as it has, and the matter has already served before the regional court, it is clear to me that that the regional court would be the proper forum to hear a bail application and not this court. That court would then take into account what the district courts had done in certain of the matters which were then consolidated in exercising its discretion together with any further factual matter which the applicant and prosecution were then to place before that court. The applicant however relied upon *S v Acheson*[1] in submitting that this Court should determine the question of bail as considered appropriate. In the *Acheson* matter, the court had stressed the importance of the right to a fair trial and the fundamental nature of the right of liberty of a person to have a proceeding finalised within a reasonable period of time. The case in question actually concerned an application for a further postponement of a murder trial. That trial was before the High Court, and not as the applicant contended, a matter which had served before a district court. What is however

[1] 1991 NR 1 (HC).

clear in that matter, is that a district court had refused bail and this court, which considered the postponement application, was seized with the murder trial. There was not a sufficient explanation given for the postponement of the matter and the court then decided to grant bail as it was competent for it to do so as it was the trial court in that matter. The *Acheson* matter is thus entirely distinguishable.

(z)

(aa) The applicant also asked me to compel the regional court to convene and to hear a bail application on the basis of the prayer for alternative relief as well as the alternative prayer contained in the notice of motion which stated that the court should order the Mariental regional court to immediately hear the applicant's release. But the case which the respondents had to meet was one based upon the warrant which the applicant said is defective on the basis of the *Hijarunguru* matter and not in the form of a mandamus to compel the regional court to hear a bail application. I am not able to consider that form of relief where a respondent has not been properly apprised that such an order would be sought against it. I could only grant relief of that nature as alternative relief if the order would arise from the facts before me and if that issue had been sufficiently raised so as to alert the respondent as to that eventuality. I therefore declined that invitation by the applicant.

(bb)

(cc) The applicant's primary basis for the relief sought has been the alleged invalidity of his detention warrant on the basis of the consolidated case and that it would not be competent for the regional court to refuse bail given the fact that bail had already been granted in certain of the component cases. As I have already indicated, the applicant has not made out a proper case for this relief. The further relief set out in paragraph 3 in the notice of motion is consequential upon that portion of the notice of motion and must also fail. Then there are copies of transcripts sought in paragraph 4. As Mr Ndlovu pointed out, it would not be competent for relief of this nature to be sought and obtained on an urgent basis as the applicant has done in this manner. It is also declined.

(dd)

(ee) The applicant is of course at liberty to approach the regional court to hear his bail application, given the fact that, as far as I can understand from the facts

that he has put before me, that court has not as yet considered the question of bail for him in the consolidated trial. He has indicated today that he would want to apply for legal aid representation again for this purpose. I would encourage him to do so, so that this application can then proceed in due course. But on the facts of this matter and on the basis upon which this application was brought before me, I find that the applicant has not set out a sufficient basis for the relief sought in the notice of motion. I accordingly dismiss the applicant's application with costs.

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DF SMUTS

Judge

APPEARANCES

APPLICANT:	A. Pienaar in Person
RESPONDENTS:	M. Ndlovu Instructed by Government Attorney