



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 331/2012

In the matter between:

WILLEM NAKALE

FIRST APPLICANT

NAFTALI HAMUTENYA

SECOND APPLICANT

MADUME EDWARD

THIRD APPLICANT

ARMAS HANGO

FOURTH APPLICANT

PETRUS SHOVALEA

FIFTH APPLICANT

and

THE MINISTER OF JUSTICE

FIRST RESPONDENT

THE PUBLIC PROSECUTOR: MR LUTIBEZI

SECOND RESPONDENT

THE PROSECUTOR-GENERAL

THIRD RESPONDENT

Neutral citation: *Nakale v The Minister of Justice* (A 331/2012) [2016] NAHCMD 98 (7 April 2016)

Coram: PARKER AJ

Heard: 18 February 2016

Delivered: 7 April 2016

Flynote: Practice – Applications and motions – Applicants seek orders that court not competent to grant – Court not competent to give advice to litigants – Court not competent to order mandamus generally to public authorities to obey the Namibian

Constitution – Court not competent to order respondents to grant bail when they have no power to grant bail.

Summary: Practice – Applications and motions – Applicants seek orders that court not competent to grant – Court not competent to give advice to litigants – Court not competent to order mandamus generally to public authorities to obey the Namibian Constitution – Court not competent to order respondents to grant bail when they have no power to grant bail – Originally five applicants brought the application – Key grievance is that their criminal trial has been ongoing since 2005 – The five applicants had applied for bail in the lower court – Only first applicant was admitted to bail – Upon refusal of lower court to admit second to fifth applicants to bail the remedy open to applicants was to appeal from that decision – Applicants submitted to court they have a right to appeal or not to appeal from that decision and they exercised their right not to appeal – In that case court not competent to interfere with decision of lower court in the absence of an appeal from that decision or application to review that decision – Consequently, court dismissed the application.

ORDER

The application is dismissed, and I make no order as to costs.

JUDGMENT

PARKER AJ:

[1] This application is brought on notice of motion filed on 22 September 2015 by first, second, third, fourth and fifth applicants. They seek the relief set out in the

notice of motion. A preliminary hearing took place on 9 February 2016 during which the court explained to applicants the nature of the relief they seek and the legal impediments that stood in their way. And since they represented themselves, they were asked to seek legal representation – particularly from the Directorate of Legal Aid. They submitted that while they have been granted legal representation for their criminal trial; they have not been given legal representation for this application. And they informed the court they would like to move the application in person themselves. The hearing was accordingly set down for 18 February 2016.

[2] On that date applicants represented themselves, and Ms Ndungula represented the respondents. Ms Ndungula filed heads of arguments. The applicants also did.

[3] The five applicants have been in custody awaiting trial since December 2005. The key grievance that runs through their papers is that their trial has not been concluded for some 10 years. Ms Ndungula submits at the threshold that the application is not properly before the court, considering rule 65(3) of the rules of court. Counsel submitted further that as the court held in *Heita v The Minister of Safety and Security* (A 416/2013) [2013] NAHCMD 383, that the court ought to construe generously and in the light most favourable to a lay litigant representing himself or herself pleadings filed by such litigant should not be taken too far as to render the rules of court otiose because that would not conduce to due administration of justice. More important, Ms Ndungula submitted that the founding affidavit, and indeed, confirmatory affidavits, have not been duly commissioned.

[4] I have noted Ms Ndungula's submission which has merit – in principle. During the preliminary hearing of the application on 9 February 2016, the court did not bring this primary point to the attention of the applicants, and so, in my opinion, they might have entertained the legitimate expectation that their application would be heard on 18 February 2016. And they say they are lay litigants representing themselves and therefore they could not comply with the rules. Of course, I agree with Ms

Ndungula's submission that that should not excuse them from complying substantially with the rules.

[5] Be that as it may, I agreed to hear the application in order to dispose of it finally; and so, I heard applicants on the basis of the papers they had filed with the court whose substance was sufficient for the court to determine the application. Considering the papers filed of record and submissions made by the applicants and Ms Ndungula and for the sake of clarity and in order for the applicants to comprehend this judgment, I shall deal with each order they seek in the notice of motion under separate headings.

Para 1: Condoning the applicants' non-compliance with the rules of the High Court

[6] I accept Ms Ndungula's submission that the court is not competent to grant this order. The court cannot grant this order without setting at naught and without undermining the rules that have been promulgated for the proper conduct of proceedings in the court, including the instant proceedings. Put simply, I can see no reason to grant this order.

Para 2: Interpret article 12(1)(b) and Articles of the Namibian Constitution

[7] The court is not competent to grant this order simply because the court does not give legal advice to litigants.

Para 3: That the respondents will comply with Article 12(1)(b) and Article 18 of the Namibian Constitution

[8] The court is not competent to grant this order. There is no reason for the court to order mandamus generally addressed to public authorities to obey the Constitution of Namibia.

Para 4: That the respondents will grant the applicants bail

[9] None of the respondents has power to grant bail in criminal proceedings. And it is noted that all five applicants pursued their entitlement to apply for bail in the lower court; whereupon, the application of first applicant succeeded, and the applications of the rest of the applicants failed. And so, this is not a case where the applicants were denied the opportunity to apply for bail in the lower court. As Ms Ndungula correctly submitted, upon the lower court's refusal to admit second, third, fourth and fifth applicants to bail, the remedy open to each one of them was to appeal from the court's decision. These applicants submitted that it was their right to appeal or not to so appeal. Indeed, it is their right. And they elected not to appeal. All well and good. This court is not then competent to interfere with a decision of a lower court where there is no appeal before the court from that decision or an application to review that decision. For these reasons, the order sought in para 4 is refused.

[10] Based on all the foregoing reasons, the application should fail, and it fails. I note that the trial of the applicants was set down to continue in the lower court on 18, 19 and 20 April 2016. What this court is prepared to do is to urge persons concerned, through the respondents' counsel, to do their best to expedite the trial and bring it to a speedy conclusion.

[11] In the result, I make the following order:

The application is dismissed, and I make no order as to costs.

C Parker
Acting Judge

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APPEARANCES

FIRST APPLICANT : W Nakale
No appearance

SECOND APPLICANT: N Hamutenya
In person

THIRD APPLICANT : M Edward
In person

FOURTH APPLICANT: A Hango
In person

FIFTH APPLICANT : P Shovalea
In person

RESPONDENTS: A Ndungula
Of Government Attorney, Windhoek