REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

LEAVE TO APPEAL JUDGMENT

PRACTICE DIRECTION 61

Case Title: *The State v Albert Ombili Kahembe*	**Case No:** CC 11/2023 **Division of Court:** Northern Local Division
Heard before: Kesslau J	**Heard on:** 20 September 2024 **Delivered on:** 4 October 2024
Neutral citation: *S v Kahembe* (CC 11/2023) [2024] NAHCNLD 109 (4 October 2024)	
The order: 1. The applicant's application for leave to appeal against granting of bail is refused.	
Reasons for decision:	

KESSLAU J

[1] The applicant applied for bail in the lower court which was denied. Thereafter an appeal was lodged against the refusal of bail which was dismissed.[1] The matter has since been transferred to this court for trial before Justice Salionga. The applicant then brought a bail application on new facts which was dealt with by myself. Bail was granted after I concluded that some of the new facts presented have tipped the scale in favour of the

[1] *Kahembe v S* (HC-NLD-CRI-APP-CAL-2022/00026) [2023] NAHCNLD 61 (6 July 2023).

granting of bail to the applicant.[2]

[2] This is an application by the State for leave to appeal to the Supreme Court in terms of s 316 of the Criminal Procedure Act 51 of 1977, as amended, (the CPA) against the granting of bail. Such application should be considered objectively and dispassionately to determine if, realistically, a court of appeal could arrive at a different conclusion.[3]

[3] The test to be applied, in an application for leave to appeal, was restated in *Thomas v State*[4] as follows:

'It is trite that in an application for leave to appeal, the test to be applied is one of reasonable prospects of success on appeal. Both applicants in their respective applications, must satisfy the court that there is a reasonable prospect of success on appeal and 'the mere possibility that another Court might come to a different conclusion' is insufficient to justify the granting of leave to appeal (*S v Ceasar*[5]; *S v Nowaseb*[6]). The test is whether applicants have shown on a balance of probabilities that, on the strength of the grounds of appeal raised, there are reasonable prospects of success on appeal.'

[4] The applicant casted a wide net and listed twelve grounds on which they desire to appeal. I will proceed to list and discuss them below.

[5] The 1st ground was that:

'The court erred in law by overemphasizing the constitutional principle that the accused is presumed innocent until proven guilty in favour the accused, without paying due regard to the equally important constitutional protection of the fundamental rights of all the citizens and the responsibility of all citizens including the accused to obey the law and maintain law and order.'

[6] This ground amounts to the opinion of the applicant. Furthermore, the presumption of innocence should be regarded in favour of an applicant in a bail application, even when there is a prima facie case made out against him.[7]

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[2] *S v Kahembe* (CC 11/2023) [2024] NAHCNLD 55 (3 June 2024).
[3] *S v Kuzwayo* 1949 (3) SA 761 p765; *Smith v S* 2012(1) SACR 567 (SCA) (15 March 2011).
[4] *Thomas v State* (CC 19/203) [2024] NAHCMD 524 (9 September 2024).
[5] *S v Ceasar* 1977 (2) SA 348 (AD) at 350E.
[6] *S v Nowaseb* 2007 (2) NR 640 (HC).

[7] The 2nd ground was:

'The court misdirected itself on the facts and the law by ignoring the apparent fact on the record of bail proceedings in the court a quo, that the Respondent has been implicated in multiple cases while on bail and granted him bail on new facts without taking into account the interest of the administration of justice as contemplated in section 61 of the Criminal Procedure Act, 51 of 1977, as amended.'

[8] This court did not ignore the multiple cases against the respondent, however, as discussed in par 22 to 23 of the ruling, these cases were since withdrawn or struck from the roll. In many instances without much opposition from the relevant prosecutors. To ignore that fact would certainly not be in the interest of justice. Further to that it was stated in *Boulter v State*[8] that s 61 of the CPA 'cannot be the easy way out catch-all stratagem'.

[9] The 3rd ground was:

'The court misdirected by not attaching sufficient weight to the evidence and opinion of the investigating officer in the court a quo, particularly concerning the seriousness of the charges and the strength of the State's case against the Respondent.'

[10] The strength of the State's case and seriousness of the offences were considered by this court before bail was granted as is apparent from paras 2, 5 and 10 of the ruling.

[11] The 4th ground was:

'The court erred in law and or facts by finding that the Respondent is in custody at the behest of the State, while the contrary is true, that the Respondent was detained and denied bail subsequent to his arrest upon a legitimate complaint of a crime committed against a public member and he had to remain in custody to protect legitimate public interest.' (Emphasis added).

[7] *Kamoruao v S* (CC 64/2011) [2011] NAHC 64 (10 March 2011).

[8] *Boulter v State* (HC-MD-CRI-APP-CAL-2021/00045) [2021] NAHCMD 330 (15 July 2021) par 29.

[12] Counsel for the applicant took offence by the use of the word 'behest' in the bail ruling. The State, representing the complainant in this matter, requested/applied for the continued incarceration of the respondent by opposing bail. In fairness, which, ultimately, as presiding officer is my goal, I had to weigh the new facts presented against the public interest. It was my opinion, and still is, that the public interest was no longer served by denying bail to the respondent. The protection of the public is but one of the factors to be considered. Refusing of bail should not be used as a form of anticipatory punishment.[9]

[13] The 5th ground was:

'The court misdirected itself by finding that the court a quo mainly relied on multiple similar cases which were pending in various courts all over the country to deny the Respondent bail, while on the contrary, the court a quo's emphasis was on the fact that the Respondent has been involved in multiple cases which tended to demonstrate his propensity to commit crimes while on bail.' (Emphasis added).

[14] Counsel for the applicant frequently referred, in the notice of leave to appeal and heads of argument, to crimes committed instead of alleged crimes. The fact remains that these cases has since all been withdrawn which shed them in a different light than before as discussed in paras 4, 22 and 23 of the bail ruling. By stating that he committed the offences, whilst there was no conviction yet, is too completely ignore the presumption of innocence.

[15] The 6th ground:

'The court erred in law by finding that, the fact that there is no evidence to suggest the cases withdrawn or removed from the court roll will be re-enrolled soon warrant's the Respondent's release on bail, while ignoring section 18 of the Criminal Procedure Act No. 51 of 1977 and its practical application as set out in the Supreme Court case of the *Prosecutor-General v Namholo and Others* 2020 NASC 18 (19 August 2020) to the effect that before the prescription period lapses those cases can be re-enrolled appropriately.'

[9] *S v Acheson* 1991(2) SA 805 (Nm).

[16] It is a fact that the withdrawn cases can be re-enrolled by summoning the respondent. With all due respect, that was not the issue. The reality was that since they were withdrawn/removed the respondent was neither re-summoned on any of the cases nor was it argued that it will happen any time soon. No reason was provided for same.

[17] The 7th ground:

‘The court misdirected itself by attributing fault to the police, for alleged failure to take the Respondent to courts where his cases were pending which resulted in the withdrawal or removal of those cases from the court roll, instead of blaming the Respondent who was already granted bail in those cases for his failure to update the police about the next court dates to enable the police to transport him there for court attendance.’

[18] Some degree of blame can be put on the respondent for not alerting the police of the various court dates as he was on bail in these matters. However, to submit an ‘alleged’ failure to transport the accused to his various court appearances, whilst that was a fact, is taking it too far. Further to that, there was no indication that the various courts officials, where the respondent had to appear, made any effort to request his presence at court on the relevant dates.

[19] The 8th ground:

‘The court erred in law by granting bail based on two new facts without weighing those two new facts against the totality of all facts, old and new, before deciding that the two new facts were sufficient to displace the court a quo’s perspective that in terms of section 61 of the CPA, it was not in the interest of the administration of justice to grant the Respondent bail.’

[20] This ground amounts to an opinion of the writer. This court was involved in the initial appeal as well and therefore was very much alive to circumstances of this matter. The fact that every single piece of evidence is not explicitly mentioned does not necessarily mean it was not considered and weighed.

[21] The 9th ground:

'The court erred on the facts and or law by not finding that the dietary needs of the Respondent form part and parcel of his health needs which have already been met while he is in police' custody, by being taken to hospital when the need arises and through an arrangement and or authorization to receive food from family members as per the testimony of the welfare officer.'

[22] The respondent was in the care of the State whilst being held in custody. It is not the responsibility of family members to provide food to an inmate. What if such family is financially struggling or living far from the facility? Undisputed evidence was presented in the form of oral evidence from the welfare officer and a visiting list, indicating that on a regular basis the respondent received visits. It only served to strengthen the allegation of the respondent that his dietary needs were not catered for by the authorities.

[23] The 10th ground:

'The court erred on the facts by finding that, because the dietary needs of the Respondent cannot be met by the police from their own funds, it warrants the Respondent's release on bail while ignoring the fact that the Respondent did to produce proof of such a dietary prescription to the court, for the court to see whether or not it consists of food that the police can reasonably be expected to provide.'

[24] It was the evidence presented by the State of a welfare officer, who conceded that the respondent had dietary needs. He informed the kitchen thereof without afterwards enquiring if they could comply with it. It was thus an undisputed fact that the respondent had dietary needs.

[25] The 11th ground:

'The court erred on the facts by finding that because the police will not provide the prescribed diet, is a new fact which warrants the Respondent's release on bail while ignoring the evidence of the welfare officer that the Respondent is allowed while in custody, to be provided with the prescribed diet by his family as evidenced by the visitor's list handed up on record.'

[26] This ground is nothing more than a duplication of the 9th and 10th ground and will therefore not be entertained.

[27] The 12th ground:

'The court erred in law when it found that the inability of the police to provide a prescribed diet to the Respondent, is a new fact which warrants the Respondent's release from police custody, while it ignored the legal precedent previously set down and followed in the case *Matheus v The State* (CA 35/2016) [2016] NAHCMD 167 (13 June 2016) and other cases, to the effect that bail is not the appropriate remedy to the failure by the relevant Authority to provide basic amenities and medical care while in detention and that there is an appropriate remedy available to aggrieved persons, to vindicate their rights under Article 25 (2), (3) and (4) of the constitution.'

[28] In the Matheus matter (supra) the issue was a lack of medical care and it was determined that same was provided. Furthermore, the relevant sentence in that judgment reads: '. . . in so far as accused does not receive proper medical attention whilst in detention, he has other legal remedies at his disposal and <u>in general</u>, bail is not a remedy for actions and omissions of the prison authorities . . .'[10] (emphasis added) This was a general remark, stating that other remedies are available to a disgruntled inmate. That does not mean same is excluded from a bail application.

[29] Considering the above, I am not convinced that the applicant has shown that there are reasonable prospects of success on appeal. This court accordingly stands by its findings.

[30] In the result, it is ordered:

1. The applicant's application for leave to appeal against granting of bail is refused.

Judge's signature:	**Note to the parties:**
E.E. Kesslau Judge	**NOTE TO THE PARTIES** **The reason(s) hereby provided should be**

[10] *Matheus v The State* (Supra) par 8 and 9.

	lodged together with any Petition made to the Chief Justice of the Supreme Court
Counsel:	
Appellant:	**Respondent:**
Ms. M. Nghiyoonanye Office of the Prosecutor General Oshakati	Mr. P. J. Greyling Greyling & Associates Oshakati