CASE NO. CC 38/2009

SUMMARY

REPORTABLE

JULIUS DAUSAB
APPLICANT

and

THE STATE
RESPONDENT

HOFF, J

2010/09/15

Bail application – applicant applied to Court to order that State has onus to prove why applicant should not be released on bail and Court ordering State to lead evidence. It was submitted that Article 7 of Constitution protects personal liberty thus State depriving applicant of personal liberty must lead evidence first in order to justify detention. Furthermore in criminal matter onus on State to prove commission of offence – discriminatory if accused in bail applications required to bear the onus – against provision of equality before the law in terms of Article 10 of the Constitution of Namibia. Applicant referred Court to South-African authories.

Applicant in terms of South-African Constitution in general has fundamental *right* to be released on bail. In terms of the amended section 60 of Criminal Procedure Act 51 of 1977 onus on applicant charged with certain serious offences to prove that the interests of justice do not require his or her continued detention.

No provision in Namibian Constitution that accused person has a fundamental right to be released on bail – Constitution protects personal liberty and demands a fair trial.

Constitutional Court in South-Africa held that onus on applicant, charged with certain serious offences, not unconstitutional in the sense that such onus is a justifiable limitation in terms of the provisions of their constitution.

Duty to lead evidence first in bail applications on the accused person.

If in constitutional dispensation where the right to be released on bail is entreched and where an applicant bears the onus in certain instances to show why such applicant should be released on bail then the contention that applicant shoud be relieved of such an onus in constitutional dispensation where the right to be released on bail is not categorically entrenched, appears to be less persuasive.

Rights contained in Articles 7 and 10 of the Namibian Constitution not infringed by placing an onus on an accused person in bail applications.

We must caution ourselves against overzealous judicial reform. No need to reverse the existing procedural and evidential law regarding bail applications in Namibia.

CASE NO. CC 38/2009

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JULIUS DAUSAB
APPLICANT

and

THE STATE
RESPONDENT

CORAM: HOFF, J

Heard on: 15 September 2010

Delivered on: 15 September 2010 *(Ex temporae)*

Reasons on: 05 October 2010

JUDGMENT
Bail application

HOFF, J: [1] The applicant is charged with two counts of murder and two counts of contravening the provisions of the Arms and Ammunition Act, Act 7 of 1996.

[2]At the inception of the application Mr Neves who appeared on behalf of the applicant raised what he referred to as a constitutional point.

[3]The first contention was that Article 10 of the Constitution of Namibia provides that all persons shall be equal before the law. The State in a criminal trial has the onus to prove the commission of an offence beyond reasonable doubt. However, in a bail application the onus is on the applicant (accused) to prove on a preponderance of probability that he will stand trial. This is discriminatory against an accused person in a bail application it was submitted.

[4]It was secondly contented, that the right to liberty is protected in terms of the provisions of Article 7 of the Namibian Constitution. When one is arrested the State deprives one of such liberty. It is therefore the duty of the State to lead evidence first and to prove why it was necessary to deprive an accused person from this constitutionally guaranteed right.

In amplification of this second contention it was argued that since the applicant did not know on what grounds the State opposed bail, the duty rested on the State to lead evidence first, whereafter the applicant would reply to the evidence so presented by the State.

[5]Mr Eixab on behalf of the State opposed the application. He referred this Court to authority which in effect confirmed the present approach regarding bail applications, namely, that the onus is on the applicant to prove on a preponderance of probability that he would stand trial and should be released on bail.

[6] This Court was not referred to any Namibian authority where the constitutional issue raised had been considered.

[7]This Court dismissed the application and indicated that reasons would be provided in due course. These are the reasons.

[8]This Court in the matter of the *State v Geoffrey Mwilima and Bernard Mucheka Case No. CC 32/2001*, an unreported judgment delivered on 12 December 2002, considered the very same constitutional issue, and I shall to a large extent repeat what I said in that bail application, hereinafter referred to as the *Mwilima* application.

[9]In the Mwilima application this Court was referred to the provisions of Article 10 of the Namibian Constitution, the presumption of innocence, and the fact that the Courts in Namibia has given meaning to the provisions of Article 12 of the Namibian Constitution beyond the mere wording contained in that Article in order to give effect to the principles of a fair trial and the values inherent in that concept.

(*S v Nasser 1994 NR 233 HC; S v Strowitzki 1994 NR 265 HC; S v Heidenrich 1995 NR 234 HC; S v Van den Berg 1995 NR 23 HC at 39 B – D;*

S v Shikunga an dAnother 1997 NR 156 (SC); Monday v The State unreported judgment of the Supreme Court of Namibia delivered on 21 February 2002 at *p. 70 – 72*).

[10]This Court was also referred to the provisions of section 25 (2) (d) of the South African Interim Constitution Act 200 of 1993 and the subsequent amendments to the South African Criminal Procedure Act 51 of 1977 which firmly placed the *onus* in bail applications on the State in most matters regarding bail.

[11]Section 35 (1) (f) of the final Constitution of South Africa is similarly worded.

The language used in this section is clear and unambiguous. An accused person has a *right* to be released from detention subject to only one qualification i.e. that the interests of justice not require otherwise. It follows that the State, the authority who seeks the continued detention of an accused person, must prove that the release of such accused person is contrary to the interests of justice. An *onus* in the true sense is thus placed on the State to prove why the accused person should not be released on bail. By clearly placing an onus on the State it becomes absolutely clear, in my view, that it is the State which must lead evidence first.

[12]The Namibian Constitution does not in the chapter under *"Fundamental Human Rights and Freedoms"* (Chapter Ш) specifically refer to a right to be

released on bail but it does provide for the right to a fair trial, the protection of liberty and reinforces the presumption of innocence.

[13]In *Charlotte Helena Botha v The State Case No. CA 70/9*5 an unreported judgment by the High Court of Namibia delivered on 20 October 1995 O'Linn J, first dealt with the nature of a bail enquiry where the role of the Court as administrator of justice was stressed, stating that the Court should play a more *"activist"* and /or inquisitorial role and then on p. 10 – 11 said the following regarding bail applications:

> "It is obvious that the applicant should first move the application and the State then indicate its attitude. This may be the stage to indicate which relevant facts, if any, are common cause. There are not and should not be, any hard and fast rules who should first lead *viva voce* evidence, if any. The aforesaid notwithstanding, onus to show that he or she is entitled to bail remains on the applicant."

[14]My experience is that in practice the duty to lead evidence first in bail applications usually rests on the applicant.

[15]In Namibian courts of law the approach that the *onus* of proof is upon the applicant to prove that bail should be granted is still the applied norm.
See *Albert Ronny du Plessis and Another unreported judgment of this Court delivered on 15.5.1992; Fouche v The State Case No. CA 20/1993 an unreported judgment of this Court delivered on 17.8.1993.*

[16]Section 60 of the Criminal Procedure Act 51 of 1977 (the same Act is applicable in South Africa) provides that an accused who is in custody may at his first appearance or at any stage after such appearance apply to a Court of law to be released on bail.

[17]The section 60 which is applicable in Namibia consists of only two subsections. Section 60A deals with bail in rape cases was added by section 12 of Act 8 of 2000 and is not applicable in the present matter.

[18]In the Republic of South Africa section 60 of Act 51 of 1977 has extensively been amended and revised and their section 60 now consists of eleven sub-sections. Section 60 (11) (a) provides that an accused who is in custody shall be entitled to be released on bail at any stage preceding his or her conviction unless the court finds that it is in the interest of justice that the accused be detained in custody.
Section 60 (11) provides that in the case of certain serious offences the person charged shall be detained unless he or she *"satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release".*

[19]It has been held that in those cases where section 60 (11) is not applicable a practical burden is on the State to establish the likelihood that the applicant if released on bail would attempt to influence or intimidate witnesses or would attempt to conceal or destroy evidence, or endanger the safety of the public or jeopardize the objectives of the criminal justice

system, or that the accused will evade his or her trial or undermine the public security.

[20]Where section 60 (11) is applicable the *onus* is reversed and an applicant in bail proceedings must satisfy the court on a preponderance of probability that the interest of justice does not require his or her continued detention. Section 60 (11) is applicable *inter alia* where an applicant is charged with high treason, murder, attempted murder, rape and offences under the Arms and Ammunition Act 75 of 1969.
See *S v Tsabalala 1998 (2) SACR 259 (C).*

[21]From the decided cases it is apparent that although the right of an accused to bail is entrenched in the South African Constitution, the provisions of section 60 (11) make it more difficult for accused persons charged with certain serious offences to be released on bail.

[22]Regarding the *onus* of the applicant which section 60 (11) of Act 51 of 1977 prescribes, the Constitutional Court in South Africa in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (2) SACR 51 CC,* has held that such *onus* on the applicant was not unconstitutional, in the sense that such *onus* is a justifiable limitation as provided for in terms of Article 36 of the South African Constitution.

[23]Referring to section 60 (11) (a) which requires that a applicant must adduce evidence which satisfies the court that exceptional circumstances

exists which in the interest on of justice permit the release of the applicant, Kriegler J said the following on p. 90 h – 91 b:

> "But it was argued that the subsection imposes an *onus* which is so difficult to discharge that the right to release on bail is illusionary. In practice, so it was submitted, the accused would face an impossible hurdle: the *onus* is on the accused to prove the exceptional circumstances; so is the duty to begin; evidence has to be adduced, but an accused, with no knowledge of the prosecution case, cannot hope to discharge the *onus* in the dark. If that were indeed what the subsection demanded, the contention would probably well-founded. However the argument overlooks the important qualification built into ss (11) (a) that the accused must be 'given a reasonable opportunity' to establish what the subsection requires."

and continues at 90 (c)

> "they are indeed faced with an uphill battle, and they have to be given a fair chance, e.g. by ordering the prosecutor to furnish sufficient details of the charge(s) to enable the applicant to show why the circumstances are exceptional."

[24]The applicant in this application is not required to discharge an *onus* in the dark. He knows what the charges against him are, he has been provided with witness statements and he knows the reasons why the State is opposing the granting of bail, namely that he is likely to abscond, that there is likelihood that he may commit further offences and that it would not be in the interest of justice to release him on bail.

[25]If one has regard to the fact that even in a constitutional dispensation where the right to be released on bail is entrenched and where an applicant

bears the *onus* in certain instances to show why he or she should be released on bail, then the contention, that an applicant should be relieved or absolved from such an *onus* in a constitutional dispensation where the right to be released on bail is not categorically entrenched, appears to be less persuasive.

[26]I am not convinced that the provisions of Article 10 of the Constitution in respect of equality before the law and the protection of personal liberty (Article 7) in the Namibian Constitution is in any way infringed by saddling an applicant with an onus in bail applications to prove on a preponderance of probability that he or she should be released on bail.

[27]In the matter of *Albert Ronny du Plessis v The State (supra)* the constitutional point, namely that the onus should be on the State to prove that the accused will not stand his trial was raised but not considered.

[28]O'Linn J in this matter cautioned against the selective emphasis placed by some accused persons and their legal representatives on certain sections of the Namibian Constitution and certain fundamental rights such as *"the liberty of the subject", "a fair trial"* and the principle that an accused person is *"regarded as innocent until proven guilty"* and stated that these very important fundamental rights are, however, not absolute but circumscribed and subject to exceptions.

I endorse this approach.

[29] The following appears at p 13 of the judgment.

> "The particular right relied on must be read in context with other provisions of the Constitution which provides for the protection of the fundamental rights of *all* the citizens or subjects, provides for responsibilities of the subject, for the maintenance of law and order, for the protection of the very constitution in which the rights are entrenched and for the survival of a free, democratic and civilized state."

[30] We must caution ourselves against overzealous judicial reform. (See *Carmichelle v Minister of Safety and Security 2001 (4) SA 938 at 962 A).* The reason why Judges should not overzealously be involved in law reform is because the principal organ for such reform should be the Legislature. In this regard it is apposite to repeat the dictum of Jacobucci J in the Canandian decision of *R v Salituro 1992 (8) CRR (2d) 173 cited by Kentridge AJ in Du Plessis and Others v De Klerk and Others 1996 (3) SA 850 CC at 886 C – D:*

> "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law … In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform …. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."

[31] I am of the view, respectfully, that the applicant would not be prejudiced should he be required to lead evidence first since he has been informed of

the grounds on which the State opposes bail and he is acquainted with the charges preferred against him. Furthermore for the reasons mentioned *(supra)* there is no need to reverse the existing procedural and evidential law regarding bail applications in Namibia by way of judicial reform.

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HOFF, J

ON BEHALF OF THE APPLICANT:

MR G NEVES

Instructed by:

NEVES LEGAL PRACTITIONERS

ON BEHALF OF THE RESPONDENT:

MR J EIXAB

Instructed by:

OFFICE OF THE PROSECUTOR-GENERAL