CASE NO.: A 120/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

KEVIN DONNEL TOWNSEND	**1ST APPLICANT**
MARCUS KEVIN THOMAS	**2ND APPLICANT**

and

MINISTER OF SAFETY & SECURITY **THE COMMISSIONER OF PRISONS**	**1ST RESPONDENT**
WINDHOEK CENTRAL PRISON	**2ND RESPONDENT**
THE PROSECUTOR-GENERAL	**3RD RESPONDENT**
THE LEARNED MAGISTRATE – MRS R. HERUGA/ **WINDHOEK MAGISTRATE'S COURT**	**4TH RESPONDENT**
THE ATTORNEY-GENERAL	**5TH RESPONDENT**

CORAM: **MILLER, AJ**

Heard on: 14 May 2011

Delivered on: 14 June 2011

JUDGMENT

MILLER, AJ.: [1] On 7 January 2011 a certain Mr. Heckmeier was shot to death in Windhoek. Soon after his body was found and on the same day members of the Namibian Police including Sergeant Ndokosho and Sergeant Alfonso visited a certain guest house in Windhoek, where the applicants occupied a room, ostensibly in connection with the death of Mr. Heckmeier. During a search of the room occupied by the applicants the police discovered 22 grams of cannabis.

[2] The applicants were thereafter arrested and detained at the Wanaheda police station. There is a dispute on the papers as to why the applicants were arrested. According to the applicants they were informed upon their arrest that they were being arrested on a charge of murder. The respondents allege that the applicants were arrested for the unlawful possession of cannabis. To the extent necessary I will deal with that dispute in due course.

[3] On 8 January 2011 the applicants were formally charged with the unlawful possession of cannabis. They appeared on that charge before the magistrate on 10 January 2011. It is common cause before me that the appearance before the magistrate took place within a period of 48 hours following their arrest as provided for in section 50 of Act 51 of 1977. Given the fact that the 8th and 9th of January was a Saturday and Sunday respectively these days must be excluded from the calculation of the 48 hours period in terms of section 50 (1)(a) of the Criminal Procedure Act.

[4] The learned magistrate before whom the applicants appeared postponed the case and ordered the further detention of the applicants until their next appearance.

[5] Having consulted with their legal representatives and having decided to plead guilty to the charge of the unlawful possession of cannabis, the applicants were again brought

before the magistrate on 12 January 2011. The applicants thereupon pleaded guilty to the charge and were convicted and sentenced to pay a fine of N$300-00 or in default of payment to undergo 3 months imprisonment which fines the applicants paid on 14 January 2011.

[6] Following their appearance in court on 12 January 2011 the applicants, accompanied by their legal representatives were taken by the police to the Bahnhof Street police station where they were advised by Detective Chief Inspector de Klerk that they were arrested and charged with various offences relating to the death of Mr. Heckmeier including his murder. The applicants were formally charged with these crimes and again appeared before the magistrate on those charges on 14 January 2011. The learned magistrate postponed the matter until 7 March 2011 and ordered that the applicants be detained in custody until then.

[7] Following further appearances before the magistrate the matter was postponed from time to time and the next date for the appearance of the applicants before the magistrate is the 8th of July 2011. The applicants remain in custody upon the order of the magistrate.

The present application:

On Friday the 13th May 2011 at 15h40 the applicants filed an application with the Registrar of this court. The Notice of Motion reads as follows:

"

1. Condoning Applicant's non-compliance with the Rules of this Honourable Court with regard to service and filling and that this matter be dealt with as one of urgency in terms of Rule 6(12) of the Rules of this Honourable Court.

2. That a Rule Nisi be issued calling upon the Respondents to show cause on the **10th** day of **June 2011** at **10h00**, why an order in the following terms should not be issued:

Declaring the continued detention of the Applicant after 14 January 2011 unlawful;

2.1 The Applicant be released from custody and further detention for the crimes for which he is arrested under CR number 192/01/11 and/or WHK/CRM 940/2011;

2.2 Declaring the Court Order ordering the further detention of the applicant dated 14 January 2011 delivered by the learned Magistrate Mrs. R. Herunga in the Windhoek Magistrate's Court in *S v Thomas Kevin Markus and Another CR No: 192/01/2011 and WHK-CRM 940/2011* null and void.

2.3 Declaring the Court Order ordering the further detention of the applicant dated 07 March 2011 and 10 May 2011 delivered by the learned Magistrate Mrs. R. Herunga in the Windhoek Magistrate's Court in *S v Thomas Kevin Markus and Another CR No: 192/01/2011 and WHK-CRM 940/2011* null and void.

2.4 Ordering the 1st Respondent and/or 2nd Respondent to release the Applicant from its custody.

3. That prayers 2.1 to 2.4 shall operate as an interim interdict with immediate effect pending the Return date of the Rule Nisi.

4. That the 1st Respondent bears the costs of this application.

5. Further and/or alternative relief."

The application was served on the respondents at 16h27 on the 13th of May 2011. Mr. Uanivi conceded that in essence the application is for final relief.

[8] When the matter was called before me at 9h00 on 14 May 2011, Mr. Uanivi appeared for both the applicants. Mr. Oosthuizen SC assisted by Mr. Mostert appeared for the respondents. The respondent took issue with the applicant that the matter ought

to dealt with as one of urgency and further that in any event the application should be dismissed as being without merit.

[9] I heard argument from counsel for the applicants and for the respondents on both these issues. I thereafter made the orders which appear at the end of this judgment and indicated that I will prepare and deliver my reasons in due course which I now proceed to do.

[10] **URGENCY:**

The argument for urgency is tenuous indeed. The only submission made by Mr. Uanivi is that the applicants were deprived of their liberty and that fact by itself requires that the application should be heard as one of urgency. That does not mean, however that an application can be brought as one of urgency some five months after the applicants were arrested. As I will indicate when I deal with the issue of costs much of the delay in bringing the application was caused by Mr. Uanivi: I nevertheless made an order condoning the non-compliance with the Rules of the Court as an exercise of the discretion I have. As I indicated I heard argument on the merits of the application, and given the history of the matter it was my view that the matter must be brought to finality.

The merits of the application:

[11] The foundation upon which Mr. Uanivi based his argument is the fact that according to the applicants they were arrested on a charge of murder on 7 January 2011. Therefore, so the argument went the applicants should have been brought before a magistrate on that charge within 48 hours. The failure on the part of the State to do so renders the detention of the applicants unlawful from the outset.

[12] Once the continued detention on the charge upon which they were arrested became unlawful, the applicant's were entitled to their release, regardless of whether or not they were subsequently brought before a magistrate, it was submitted.

[13] The submission is over-simplified and at odds with the facts. In this case it is common cause that upon their arrest upon whatever charge, the applicants were found to have been in unlawful possession of cannabis. They were subsequently charged with that offence and brought before a magistrate who ordered their further detention. The fact that they were not also charged with murder at that time does not render their detention consequent upon the cannabis charge unlawful. Upon a proper reading of Section 50 of Act 51 of 1977 it is abundantly clear that the requirement is not that the applicants must be charged and brought before a magistrate on the exact charge for which they were arrested. All that the section requires is that the person, once arrested must be brought to court "on any charge". It goes without saying that the charge preferred must arise from pre-existing facts, as was the case here. It follows that the detention of the applicants were lawful.

[14] Having come to that conclusion it is not necessary to deal with the factual dispute whether or not the applicants were arrested on a charge of murder or for the unlawful possession of cannabis.

Costs

[15] The award of costs are *de bonis propriis,* although on the discretion of the Court, is nonetheless guided by principles. In **Vermaak's *Executor v Vermaak's Heirs 1909 675 679 Innes CJ*** at p. 691 summed up the position as follows.

"The whole question was carefully considered by this court in ***Potgieter Case (1908 TS 982)*** and a general rule was formulated to the effect that in order to justify a personal order for costs against a litigant occupying a fiduciary position his conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable". This dictum was consistently accepted in several judgments thereafter and I adopt it as a correct statement of the law.

[16] The same considerations must apply in relation to legal practitioners. There are additional considerations as well. Legal practitioners are officers of the court and in fulfilling their functions in that capacity they must likewise not conduct themselves in a manner which is *mala fide* negligent or unreasonable. Furthermore by accepting a brief from a client, a legal practitioner becomes obliged to conduct the case for his client with the skill, diligence and care that the circumstances of the case require.

[17] Against the backdrop of these considerations I was of the view, mindful of the fact that cost orders *de bonis propriis* are not be granted lightly, that the conduct of the applicants legal practitioner warranted censure. To that end a brief summary of the course this application took is necessary.

[18] On 7 March 2011, Mr. Uanivi who was then representing the first applicant in these proceedings informed the magistrate that a pending bail application was not proceeded with. Instead an urgent application for the release of the accused was to be brought in this Court. Nothing further was done to pursue that application however until the 7th April 2011 when the matter was enrolled before me as an urgent application to be heard the next day. The only reason for this inordinate delay was that Mr. Uanivi was engaged in other matters and could not attend to this matter.

[19] Having enrolled the matter for 8 April an application to remove the case from the roll was filed shortly before the matter was to be heard.

[20] This was because Mr. Uanivi became ill. I would have been inclined to grant a postponement to enable Mr. Uanivi to recover from his illness had that been asked for. I was advised, however by Mr. Haifidi who appeared for the applicant, in the place of Mr. Uanivi that the instructions received from the applicant was that he wished to have the application removed from the roll. It transpired however that a postponement was not asked for because once again Mr. Uanivi's diary was full.

[22] I ordered that the application be struck from the roll and ordered the applicant to pay the costs of the application.

[23] There the matter remained until the afternoon of Friday the 13th of May 2011. At 15h40 on that afternoon the present application was filed with the Registrar to be heard on Saturday the 14th of May 2011 at 9h00. I was told by Mr. Uanivi that the reason for this was essentially that any other day did not fit his diary. Once more his other commitments prevented him from attending to the matter prior to 13 May 2011.

[24] Such conduct is grossly negligent and irresponsible. Not only did Mr. Uanivi fail to act in the best interest of his clients, but he abused the process of this Court. I wish to emphasize that the court should not be required to sit over weekends solely for the reason that a legal practitioner is otherwise too busy during the week. Such conduct is in my view is irresponsible and disrespectful.

[25] I consequently made the following orders:

1. That the applicant's non-compliance with the Rules of this Honourable Court with regard to service and filling is condoned and that this matter be dealt with as one of urgency in terms of Rule 6(12) of the Rules of this Honourable Court.
2. That the application is dismissed.
3. That the Respondents are awarded costs of this application.
4. That the costs are to be paid *de bonis proriis* by the legal practitioner of the applicant.

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MILLER, AJ

ON BEHALF OF THE APPLICANT:	Mr. Uanivi
INSTRUCTED BY:	Nambahu & Uanivi Attorneys
ON BEHALF OF THE RESPONDENTS:	Mr. Oosthuizen
INSTRUCTED BY:	Government Attorneys