

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
BAIL APPLICATION JUDGMENT

Case no: CC26/2019

In the matter between:

**GUSTAV PIENAAR**

**APPLICANT**

And

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Pienaar v The State* (CC 26/2019) NAHMD 234 (17 May 2021)

**Coram:** JANUARY J

**Heard:** 03 May 2021

**Delivered:** 17 May 2021

**Flynote:** **Criminal procedure** — Bail - Trial at advanced stage — Accused epileptic – Most purported grounds of appeal are alleged irregularities in the previous bail application and trial — Not relevant for this bail application – Not in the interest of justice to release on bail – Application refused.

**Summary:** The applicant in this matter is trial awaiting for about more than 2 years' and 11 months in custody. His trial has commenced and is at an advanced stage. He was placed on his defense and he wants to call his last witness. He has medical

conditions and is on a special diet. He faces *inter alia* a charge of murder read with the provisions of the Combating of the Domestic Violence Act 4 of 2003. If convicted, he faces a lengthy period of imprisonment. He is now acquainted with the particulars of the alleged crimes. This may prompt him not to stand his trial if released on bail. This court finds that he did not convince that he is a good candidate for bail. Bail is accordingly refused.

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### ORDER

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1. The bail application is refused.
2. Applicant is remanded in custody.

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### BAIL APPLICATION JUDGMENT

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**JANUARY, J**

*Introduction*

[1] The applicant in this matter is a Namibian male who stands trial on charges of murder read with the Combating of Domestic Violence Act 4 of 2003, assault by threat and defeating the course of justice. The applicant already unsuccessfully applied for bail in the lower court in October 2018. His trial is partly heard in this court and enrolled for continuation of trial today, 17 May 2021. The State closed its case in the trial. The applicant opened his case and called a number of witnesses. There is only one witness to be called in the defense's case.

[2] The applicant is representing himself and the respondent is represented by Mr Olivier. The applicant applied for the matter to be set down as a matter wherein he is applying for bail for the first time. Mr. Olivier in the meantime discovered that there was a previous bail application in the lower court and availed the record of those proceedings. Mr. Olivier objected to the application as it was not properly before court.

The applicant allegedly did not raise any new facts justifying him to bring another bail application in the matter.

[3] On the day of hearing the applicant requested the matter to stand down to file additional document (his heads of argument). This court granted the application to stand the matter down in fairness to the applicant who is undefended. The applicant eventually presented his heads of argument wherein he raised purported new facts justifying the application to be heard.

[4] Mr Olivier opposed the bail application in view of the fact that the applicant raised no new facts in documents that he filed in support of his application. This court entertained the bail application on the alleged new facts.

#### *The applicant's case*

[5] The applicant listed 24 issues in what purports to be his typed heads of argument which in his view are new facts on which this court should adjudicate the bail application: The issues are the following:

1. "The investigation has been finalized and his trial has commenced.
2. Fear of interference with state witnesses is no longer existence.
3. Accused person is innocent until his guilt has been proven beyond reasonable doubt as per Article 12 of the Namibian Constitution.
4. The state witness Joyce Pienaar has indicated that the knife was handed to the Police Officer, on their request. Therefore defeating and obstruction of the course of justice is non-existent.
5. The state failed to call two of their witnesses, namely Clerence Skrywer and Ronald Basson.
6. I took the onus and called those two witnesses (Clerence Skrywer and Ronald Basson) to come and testify / who came and testified that Dina Smith who was a state witness is the one who admitted to them that she killed the deceased person.
7. The Honourable Justice Liebenberg misdirected himself when I requested Legal J.N/ representation and gave an order to be removed from the court room under section 159 of

the Criminal Procedure Act which was not fair to me as per Article 12 of the Namibian Constitution.

8. Honourable Justice Liebenberg misdirected himself and refused me to call city of Windhoek Emergency and Rescue personnel Senior Officer Lenga as my witness.
9. It is alleged that the Judge and the Prosecutor are relying on false evidence and can prove in court now.
10. The accused person has been in custody from the time of his arrest on 26 May 2018 to date making it a period of two (2) years and 11 months.
11. No pending cases are in existence since his arrest.
12. The state witness Dina Smith statement says I was still pulling and forcing the deceased to go with me on the way, which is way different from the statement she gave in the trial.
13. In her viva voce that the deceased pleaded for help and said I will kill the deceased (contradictory).
14. The document that are handed up/in are false documents, namely the autopsy photo plan as well as the post mortem.
15. The bail application transcript are also fabricated and gave complain hereof and has enquiries document as prove here to submit.
16. I might later be found not guilty for lack of evidence while due consideration must be given to the risk of harm, posing to the community if such person were to be released.
17. It is clear that proper investigation was not done and that the culprit is free on the streets.
18. The police officers whom testified in court on trial gave contradictory statements, which indicate that the eye witness has changed her clothes after the incident transpired, Officer A. Amakali and Officer M Shivolo.
19. Consideration must be taken between the interest of society and the balance of liberty of an accused who is in terms of the country's constitution presumed innocent until proven guilty.
20. The document that are handed in are misleading the plea of the accused person and are not authentic to use in the trial.
21. On the 25 January 2021, the Judge stated that the transcript of the eye witness got lost from the system, which he said he will give me the notes he wrote as transcript but the transcript he gave me was not complete at all. I have decided to reschedule the trial or to recall the crucial witness, Hilaria Hamukoto.

22. Everytime new interruptions in court that is prolonging the trial while I request the court to speed the trial, CPA section 235.
23. The Prosecution objecting to bail to the accused person, Gustav Pienaar can be addressed by attaching strict bail conditions.
24. There is no public outcry for further incarceration or public petition to keep me behind bars.'

[6] In addition, written points were submitted wherein *inter alia*, the applicant alleges misdirection's by both the judge and public prosecutor in the current trial and misdirection's by the magistrate in his bail application in the lower court. He further alleges that witnesses gave false statements in the trial and in the previous bail application. The applicant further alludes to how he intends to continue with his trial, which witnesses he wants to call and documentary evidence he wants to use. In short these issues are irrelevant for purposes of this bail application. This is not an appeal against the previous refusal of bail or an appeal against the proceedings in the current trial.

[7] The applicant prays to be released on bail because he is the sole breadwinner of his family. In addition his health condition does not allow him to be in custody because he is epileptic, he needs medication and care. He developed a food allergy in 2019 and is on a special diet. He is willing to be released on N\$1000 at most or requested to be released on warning with conditions of reporting at a police station somewhere in Windhoek.

[8] The applicant refers the court to case law relating to bail applications on new facts and the considerations in general when a court adjudicates on a bail application. I will later in this judgment deal with those issues.

#### *The respondent's case*

[9] Mr. Olivier submitted that the trial is at an advanced stage. The State already closed its case. The applicant has commenced with his case and only one witness is outstanding to be called in his case. When the State closed its case the applicant was

undefended. It was submitted that the trial court in the circumstances *mero motu* found that there is a strong *prima facie* case after the closing of the State's case. That was why the applicant was put on his defense.

[10] In relation to the submission of the unnecessary prolonging of the trial, Mr. Olivier submitted that the record reflects that the applicant terminated the services of lawyers at least on three occasions since the commencement thereof. This conduct continued until an official of the Directorate Legal Aid testified in the trial court that no new legal aid counsel will be appointed. Hence the applicant is now a self-actor.

#### *The delays*

[11] I appreciate the applicant's right to legal representation. There is however a misunderstanding amongst accused person that an appointed legal representative by all means have to comply with clients instructions no matter what. Legal representatives are officers of court and has a duty to advise clients what is in client's best interest and judicially what is acceptable or not. The right to legal representation is not absolute. When client gives instructions that is/are not ethical justifiable, it usually leads to a conflict of interest culminating in either the termination of service by an accused or the withdrawal of the legal representative. This leads to the unnecessary delay in the finalization of cases.

[12] At the last appearance, the applicant refused to continue with the case because he did not have the transcribed record of proceedings. The matter was then postponed for continuation of trial to 17<sup>th</sup> May. The delays in the finalization of the trial can thus not be blamed on the presiding judge and prosecutor.

#### *The previous bail application*

[13] The grounds of objection in the previous bail application were that: there was a fear of absconding; a strong case against the applicant; interference with the investigation and /or State witnesses; the interest of justice and society.

[14] The allegations are that on the 8<sup>th</sup> of May 2018, the accused at or near Havana in the district of Windhoek did unlawfully and intentionally kill Christiana Cloete by stabbing her with a knife. The applicant was in a domestic relationship with the deceased as boy and girlfriend. Hence the charge is to be read with the provisions of the Combating of Domestic Violence Act 4 of 2003. A child was born in the relationship. There is evidence that they were in an abusive relationship.

[15] On the day of the incident, the applicant allegedly went to a tombo house to collect the complainant. When she refused, he forced the deceased to go with him. He eventually stabbed the deceased in the neck in the presence of the child. The applicant fled the scene with the child and dropped the child at his father's house. He was only arrested two or three weeks after the incident. The applicant allegedly ran away. There is no information on the charge of assault by threat and only scanty information on the charge of obstructing or defeating the course of justice. It seems that the applicant in some or other manner disposed of the knife and a bloody T-shirt which are needed by the police.

[16] The lower court found that there is a *prima facie* strong case justifying a lengthy sentence which may sway the applicant not to stand his trial. The applicant does not have a passport, has no family abroad and has not travelled abroad. He informed the lower court about his health condition i.e. asthma, heart disorder and hypertension. There is no evidence of epilepsy but only that he allegedly sometimes fainted in the cells.

[17] The learned magistrate refused bail because in the circumstances it was not in the interest of justice, considering the constitutional right to liberty, to grant him bail.

*This bail application*

[18] It is by now trite that when an application for bail is brought on new facts, the courts approach is to consider whether there are new facts against the background of old facts.<sup>1</sup> The only new facts are that the trial has commenced, is at an advanced stage and that the applicant is now suffering from epilepsy. The allegation of murder is indeed serious and it is an offence mentioned in Part IV of Schedule 2. Section 61 of the Criminal Procedure Act, Act 51 of 1977 is in the circumstances applicable.

[19] It is my view, unlikely that the applicant will interfere with State witnesses at this stage of the trial. I am however, of the view that the applicant is at this stage fully conversant with the case he is facing. Considering the fact that the applicant was put on his defence, it is an indication that he is facing a strong *prima facie* case. If convicted, he is likely to be sentenced to a lengthy period of imprisonment for murder. This expectation may prompt him to rather abscond and not face the consequences of his actions.

[20] Mr Olivier submitted a portion of the case record of proceedings in the trial court which reflects that the applicant suffers from epilepsy. This record reflects that the applicant receives treatment for it currently and that the ailment is under control with medication. It seems that this ailment and treatment occurred when the accused was in custody trial awaiting. Since the ailment is under control and was attended to while he is incarcerated, this is not a ground to release the applicant on bail.

[21] The applicant raised a new ground during his oral submissions in court. He stated that it is common knowledge that the government currently is facing a financial crisis. Since he is on a special diet, the correctional facility at times does not provide him with the required diet. It is trite law that this court is not prone to adjudicate on issues not raised in the initial papers and heads of argument. In my view the principle that issues and grounds should be crystalized beforehand to the court and respondent to inform respondent clearly and specifically of the case to meet and to inform the court about it, is likewise applicable in bail applications. Be that as it may, the applicant

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<sup>1</sup> See: *Noble v State* (CA 02/2014) [2014] NAHCMD 117 (20 March 2014)



testified in the lower court that; although he is poor and has no money, he could ask for assistance from someone to assist in raising money to pay the bail. I am of the view that he can likewise ask for assistance to cater for his special diet.

[22] The applicant referred the court to case law where the approach to bail applications was restated. It reflects that the court is required to balance competing interest i.e. the freedom and liberty of the accused against the interest of the administration of justice to keep an accused in custody pending his/her trial. Having approached this case likewise, I am not convinced that the applicant made out a case that he is a good candidate to be released on bail. In the circumstances it is not in the interest of justice to grant the application.

[23] The applicant also referred the court to serious cases where bail were granted. It is however trite that each case is adjudicated upon the peculiar circumstances of the case. Charges of cases may be similar but the merits can differ substantially. It does not follow that because bail was granted in a serious charge like murder or rape in one case, bail in another similar case should automatically be granted.

[24] In the result:

1. The application for bail is refused;
2. The applicant is remanded in custody.

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H C JANUARY  
JUDGE

APPEARANCE:

For Applicant: Mr. Pienaar  
In Person  
Windhoek Correctional Facility

For Respondent: Mr. Olivier  
Office of the Prosecutor-General  
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