REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

BAIL RULING

Case no: CC 30/2019

In the matter between:

ABRAHAM MAASDORP **APPLICANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Maasdorp v S* (CC 30/2019) [2022] NAHCMD 111 (15 March 2022)

Coram: CLAASEN J
Heard: **02 – 03 December 2021; 06 – 07 December 2021; 27 January 2022; 28 February 2022.**
Delivered: **15 March 2022**

Flynote: Criminal Procedure –Application for bail – Applicant bears the onus to prove on balance of probability that his release on bail will not be prejudicial to the administration of justice –State opposing bail on grounds of the seriousness of the offence – It is not in the interest of the public and the administration of justice that applicant be granted bail – Fear that if released on bail the applicant will interfere with state witnesses – Fear that if granted bail the applicant will abscond – Court should

strike a balance between the interest of society and the liberty of the applicant – Concerns of the respondent to be met with stringent conditions – Application granted.

Summary: The applicant was indicted on charge of murder and defeating or obstructing or attempting to defeat or obstruct the course of justice. The deceased was in a romantic relationship with the applicant. She was stabbed on 02 August 2019 and passed away eleven days later. The applicant as well as two state witnesses, being the investigating officer and the deceased's sister testified in the bail application. Court should strike a balance between the interest of society and the liberty of the applicant. Applicant satisfied court on balance of probabilities that the granting of bail is not likely to prejudice the interest of justice. The concerns of the respondent can be met by the imposition of conditions.

ORDER

The applicant is granted bail in the sum of N$2000 with the following conditions:

(a) That the applicant reports once a week, on Mondays, between the hours of 9h00 – 17h00 at Du Plessis Police station;
(b) That the applicant have no direct or indirect contact or communication with any of the state witnesses;
(c) That applicant not leave the district of Gobabis without the written permission of the investigating officer, Warrant Officer Shuuma;
(d) That the applicant notifies the investigating officer Warrant Officer Shuuma if there is any change in his residential address; and .
(e) That applicant appears on the dates and times to which his case has been postponed at the High Court in Windhoek.

BAIL RULING

CLAASEN J:

[1] The applicant was charged with one count of murder, read with the provisions of the Domestic Violence Act, 4 of 2003 (Domestic Violence Act) as well as one count of defeating or obstructing or attempting to defeat or obstruct the course of justice. He lodged a formal bail application with this court pending his plea and trial in the High Court.

[2] Mr Siyomunji and Mr Lilungwe represented the applicant and respondent respectively. The bail application commenced in December 2021, but had to be postponed on two occasions in order to secure the services of an interpreter in the San language.

[3] The respondent opposed the granting of bail on the following grounds:

(a) The seriousness of the offence;

(b) The fear that if released on bail the applicant will interfere with state witnesses;

(c) The fear that if granted bail the applicant will abscond; and

(d) It is not in the interest of the public and the administration of justice that applicant be granted bail

Applicant's Evidence

[4] The applicant is a 21 year old Namibian from the Omaheke Region, who has been incarcerated for two and a half years in connection with this case. He is a father to a three year old daughter, who currently resides with her unemployed mother. He financially supported his daughter from casual farming jobs from which he earned an average monthly income of about N$1000. He resided in an outside room in his grandfather's yard at! Agab, Du Plessis, before his arrest. His assets include furniture namely a bed, a couch and a television, which he valued at approximately N$7000 as well as 20 goats, valued at around N$800 each and a few chickens.

[5] The applicant does not own any travel document and stated that he has never been found guilty of any offence in the Republic of Namibia. The applicant informed this court that he does not have the means to run away and will also not interfere with state witnesses. As far as he was concerned the relatives of the deceased indicated that they do not have a problem with him getting bail and they did not open this case

against him. Applicant testified that he could afford N$ 1000 bail and will abide to any conditions.

[6] He does not dispute his romantic relationship with the deceased, but he denies being responsible for her death. His version is that when he arrived at the particular shebeen, he found that the deceased had already been stabbed. The deceased told him that she was stabbed behind the shebeen when she tried to stop people that had been fighting and she didn't know who stabbed her. The deceased showed him a small stab wound on the left breast towards her armpit and he escorted her to the Clinic where the medical staff put a plaster on the wound, instead of stitching it and allowed her to go home. In as far as the second charge is concerned, the applicant informed the court that he was not aware of the knife that was referred to.

[7] During cross-examination, applicant admitted that the charge allegations are of a serious nature. He also agreed to the proposition that absconding does not necessarily mean beyond the borders of the country and can be on farms or isolated areas within the country for which a passport is not needed. The applicant reiterated that his grandfather informed him telephonically after his arrest that the deceased's family do not have any problem with the applicant. Upon being questioned by Mr Lilungwe about how the court can verify such information, the applicant responded that he was with the deceased after she was stabbed and her family could have laid a charge against him then, but they did not.

[8] Counsel for the respondent also accused the applicant of having misled the court that he has not been found guilty of any other matter when he in fact served time on a stocktheft matter. The applicant conceded that he served one year and 6 months on a stocktheft charge. As for the obstruction charge he alluded that it was not possible for him to have thrown away the knife during the period alleged by the state as he was already in custody by then.

[9] During re-examination, the applicant clarified that his understanding of having been found guilty. He explained that for him it's different where one pleads guilty as opposed to a court finding him guilty after evidence was heard. He further indicated

that he will continue to reside with his grandfather should he be granted bail and his elder sister who works for a government institution, will pay his bail.

Respondent's Evidence

[10] Detective Warrant Officer Brian Kandoni, the arresting and investigating officer, testified in opposition of the granting of bail to the applicant. He got information on 29 August 2019 that a certain lady was stabbed by her boyfriend, that she was taken to a hospital in Windhoek and passed away on 13 August 2019. Investigations revealed that she was stabbed on 02 August 2019 and the post mortem stated the cause of death as a stab wound to the chest. He spoke of a witness statement by an eye witness, one Angelica Britz. According to his investigations the deceased told her sister Dina Langman that it was the applicant who stabbed her and the deceased showed the knife to Ms Langman that was used to stab her. Detective Warrant Officer Kandoni testified that when the witness, Dina Langman, wanted to take the victim to the hospital, the applicant refused.

[11] On one occasion after the arrest, the applicant approached Warrant Officer Kandoni to talk. He and another police officer, Sergeant Haukambe went to an office with the accused and Warrant Officer Kandoni cautioned the applicant that he did not need to tell him anything and can engage a lawyer. The applicant proceeded to inform him that he sold the knife they were looking for to a certain Peter. On that basis the police recovered a small folding knife with a wooden handle, from Peter. This differed from the knife described by the witnesses as being a stainless steel table knife.

[12] Furthermore, Detective Warrant Officer Kandoni objects to the granting of bail due to the seriousness of the matter, if convicted it will attract a long prison term and in his view there is a strong *prima facie* case. He also said that the people of Du Plessis have enquired about the matter and that it will not look good if the applicant is released on bail.

[13] Additional reasons for his stance on bail was that there is a fear of absconding and possible interference. In support of the absconding he stated that he knew the applicant for five years and the applicant already knows the inside of a prison which

can tempt the applicant not to stand trial. He also stated that given that the applicant knows four of the state witnesses the applicant might influence them regarding their testimonies. The police officer testified that the informal settlement Du Plessis, has no erf numbers or street names, but that he knows the applicant's grandfather's place which is the fixed address of the applicant.

[14] During cross examination, the police officer was interrogated about information in a certain Dr Peter's statement who examined the deceased on 09 August 2019. In particular, the statement revealed that the deceased was 10 weeks pregnant with a history of ectopic pregnancy, that the deceased was fine at the time, however, she had difficulty breathing after an operation. She was placed back in the ward on 11 August 2019 and complained of a sore wound pain before she died on 13 August 2019. Detective Warrant Officer Kandoni responded that he stands by his point that the deceased succumbed to stab wound injuries.

[15] In addition Mr Siyomunji also confronted the police officer with several features in the respondent's version that were not put to the applicant in cross-examination, namely that it was not the applicant who took the deceased to the clinic, that the state has a *prima facie* strong case and his contentions that the public will not approve of the applicant being granted bail. Obviously this witness, could not answer as to the reason why the counsel for the respondent omitted to pose these questions to the applicant in cross-examination. The witness was further asked whether knowing the state witnesses meant that the applicant would interfere with them, to which he responded that the applicant's grandparents did so by wanting the case to be withdrawn.

[16] Ms Dina Langman, the deceased's sister, testified that she did not want the accused to get bail because he killed her sister. She learnt about the incident from a certain 'Oumeid' who on the night in question came to tell the people outside at the fire that the applicant had stabbed her sister, whilst Ms Langman was inside the house. Ms Langman did nothing to investigate the news that night but went to the place where the deceased and the applicant resided the next morning. The deceased informed her that the applicant had stabbed her the previous night and showed her a wound mark with blood on her left breast. The deceased also showed her the knife

that the applicant had used. Thereafter the knife was put under her pillow, but the applicant removed it. She then asked the deceased if she could take her to the clinic, but the applicant refused and the witness requested her aunt, one Ms van Wyk to take the deceased to the clinic.

[17] She testified that the family of the deceased and the family of the applicant never spoke about anything. Despite being aware that the deceased was pregnant at the time, she was not aware of what transpired in Windhoek and as such could not confirm the medical information as contained in Dr Peter's statement. She further confirmed that she was not present when the stabbing occurred. Mr Siyomunji again confronted this witness with questions as to why the material aspects of the state's allegations as to how the murder occurred was not put to the applicant, nor the part that the deceased imputed the stabbing to the applicant, as the deceased had told the accused a different story, namely that she was stabbed by an unknown person. The witness had no comment. Counsel further put it to the witness that her evidence about wanting to take the deceased to the clinic and the applicant refusing or her aunt eventually taking the deceased to the clinic were never put to the applicant, to which she had no comment.

Closing Submissions

[18] Counsel for the applicant submitted that from the evidence adduced, the applicant demonstrated that he is rooted in Namibia and based on a balance of probabilities he would not abscond. Mr Siyomunji took issue with the failure of counsel for the respondent to challenge the applicant's version as to the murder allegations in cross-examination and provided a plethora of cases in that regard.[1] It was Counsel's submission that although the investigating officer had a suspicion that the applicant might interfere with state witnesses, he could not substantiate it with concrete evidence. In as far as the state's opposition to bail on grounds of public interest and administration of justice, Mr Siyomunji submitted that there was no evidence put to the applicant to demonstrate that the state has a *prima facie* case against the applicant or that he is a danger to society in any way.

[1] See *Auala v S* (SA 42/2008) NASC 3 delivered 27 April 2010 at par.10; *S v Boesak* (CCT25/00) ZACC 25 delivered 01 December 2000 at par.26 and *President of the Republic of South Africa and Others v South African Rugby Union and Others* (CCT16/98) ZACC 11 delivered 10 September 1999.

[19] Mr Lilungwe submitted that the applicant bears the onus to prove on balance of probability that his release on bail will not be prejudicial to the administration of justice. In reply to the criticism of not putting forward the state's version as regards to how the stabbing occurred to the applicant, while he was on the stand, counsel for the state somewhat conceded that point, but at the same time referred to *Shekundja v S*[2] wherein it was stated that bail proceedings should not be viewed as rehearsals for trials. He emphasized that the seriousness of the offence was not disputed and that it is not in the interest of the public and the administration of justice for persons who are charged with serious offences to be seen roaming around.

The law and application thereof

[20] It is trite that the applicant bears the onus to prove on a balance of probability that his release on bail will not be prejudicial to the administration of justice. The state is however not relieved of the duty to lead evidence in support of its objection to the release of the appellant on bail. Both parties therefore are under the obligation to place sufficient evidence and factual material before the court to assist it in balancing the two competing interests to arrive at a just and fair decision.[3]

[21] The central thread that weaves through a bail enquiry is whether the interest of justice will be prejudiced if bail is granted.[4] This on the one hand requires the bail court to be mindful of the presumption of innocence and balance that against the reasonable requirements of the administration of justice. The *Pineiro* matter cited an excerpt from Du Toit *et al* in Commentary on the Criminal Procedure Act in his notes on s 60 at 9-8B which postulates four subsidiary questions namely:

(a) If released on bail, will the accused stand his trial?

(b Will he interfere with state witnesses or the police investigation?

(c) Will he commit further crimes?

(d) Will his release be prejudicial to the maintenance of law and order and the security of the State?

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[2] *Shekundja v S* (CC19/2017) [2018] NAHCMD 374 (22 November 2018).

[3] *Mulandi v S* (2020/00113) NAHCM 136 (29 March 2021).

[4] *S v Pineiro* 1992 (1) SACR 577 NM at 580 C-D.

At the same time the court should determine whether any objection to release the accused on bail cannot be suitably met by appropriate conditions pertaining to being released on bail.

[22] There is no doubt about the serious nature of the offence in question and if the applicant is convicted thereof he will face lengthy imprisonment. The crux of the applicant's version on the murder allegations is that he denies having caused the death of the deceased, he postulated an explanation that the deceased told him it was another person who stabbed her behind the shebeen. It also appears that the applicant is likely to invoke the defence of an intervening act which can be gauged from the questions to state witnesses about the time lapse and an operation that occurred between the stabbing incident and the death of the deceased. This court endorses the view that a bail hearing is not a trial and that a full ventilation of issues in dispute are reserved for trial. However, the glaring omission of the respondent to confront the applicant in cross-examination with the basic evidential indicators that underpin the state's case, if the respondent was of the opinion that it indeed had a *prima facie* strong case, does not bode well for the respondent. Nonetheless, that on its own, does not entitle the applicant to bail. It is but one of several factors to be considered.

[23] Salionga J in *Katsamba v S*[5] held that in assessing the risk of absconding, the court has to assess the likely degree of temptation to abscond which may face the applicant. The applicant is a Namibian national who has never owned travel documents and whose fixed residential address at his grandfather's residence is known to the investigating officer. He is a person with limited means and assets. There was no evidence presented by the state indicating that he has a tendency of absconding.The rationale of the police officer that because the applicant has experienced the discomfort of prison he is likely to not attend trial does not hold water.

[24] In moving to the risk of interference, the main concern revolves around whether the applicant will interfere with state witnesses, as opposed to might interfere. The investigating officer spoke about the grandparents of the applicant that

[5] *Katsamba v S?* (CC 14/2018) [2019] NAHCNLD 60 (11 June 2019).

wanted the matter withdrawn. That train has left the station, as the prosecution of the case is definitely continuing. A further consideration is that the police investigations are complete and all witness statements have been filed. This further mitigates against possible interference.

[25] As for the remaining ground of s 61 of the Criminal Procedure Act, as amended, it has been said numerous times that a proper evidentiary basis should be laid to support that conclusion and in this regard the respondent failed to properly substantiate this ground of objection. Nor was there testimony that that the security of the public is at risk. The court is also mindful that bail cannot be used a measure to anticipate punishment. Mahomed AJ in *S v Acheson*[6] emphasised this as follows:

> 'An accused cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The court would ordinarily grant bail to the accused person unless this is likely to prejudice the ends of justice.'

[26] After having considered the evidence, the applicant has satisfied the court on a balance of probabilities, that the granting of bail is not likely to prejudice the interest of justice. In light of that the court will grant bail with conditions to address the concerns of the respondent.

[27] In the result, the applicant is granted bail in the sum of N$2000. on the following conditions:

(a) That the applicant reports once a week on Mondays, between the hours of 9h00 – 17h00 at Du Plessis Police station;
(b) That the applicant have no direct or indirect contact or communication with any of the state witnesses;
(c) That the applicant not leave the district of Gobabis without the written permission of the investigating officer, Warrant Officer Shuuma;
(d) That the applicant notifies the investigating officer Warrant Officer Shuuma if there is any change in his residential address, and;

[6] *S v Acheson* 1991 NR 1 HC at 19 E

(e) That the applicant appears on the dates and times to which his case has been postponed at the High Court in Windhoek.

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C Claasen

Judge

APPEARANCES

For the Applicant:	Mr Siyomunji Siyomunji Law Chambers Windhoek
For the Respondent:	Mr Lilungwe Of the Office of the Prosecutor-General Windhoek