

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
REVIEW JUDGMENT

Case No.: CR 141/2023

In the matter between:

**THE STATE**

v

**WALTER ROOIES MOSTERT**

**1<sup>ST</sup> ACCUSED**

**JOYLINE PUVITANDA KAMBATUKU**

**2<sup>ND</sup> ACCUSED**

**EVELINE MERERO**

**3<sup>RD</sup> ACCUSED**

**JORAM SALOMO**

**4<sup>TH</sup> ACCUSED**

**(HIGH COURT MAIN DIVISION REVIEW CASE NO. 1694/2023)**

**Neutral citation:** *S v Mostert* (CR 141/2023) [2023] NAHCMD 787 (4 December 2023)

**Coram:** USIKU J *et* CHRISTIAAN AJ

**Delivered:** 4 December 2023

**Flynote:** Criminal Procedure – Bail application abandoned – Accused abandoned bail application after close of its case and states case is open - Magistrate's Court deems the matter to have reached its end, and does not pronounce itself on available evidence – Magistrate referring matter for special review before sentencing of the accused takes place – Court having jurisdiction in

terms of s 20(1) (c) of the High Court Act 16 of 1990 to review proceedings of a Magistrates' Court.

**Summary:** Accused after leading evidence and after closing his case whilst the state's third witness is on the stand, abandoned his bail application and requested for a fresh bail hearing. Presiding magistrate deemed the accused's case to have closed, without pronouncing herself on the available evidence, as it would not be in the interest of the administration of justice. Magistrate referring the matter for special review before sentencing of the accused persons and citing gross irregularity on the part of the presiding magistrate. Court finds that it has jurisdiction in terms of section 20(1)(c) of the High Court Act 16 of 1990 to review the proceedings of a Magistrate's Court – Proceedings remitted to the Regional Court to be dealt with in terms of the relevant provisions of the Criminal Procedure Act 51 of 1977.(as amended)

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### ORDER

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1. The matter is remitted to the Regional Court magistrate or an alternate Regional Court magistrate to urgently make a determination of the accused person's bail application in accordance with section 60(1) of the Criminal Procedure Act 51 of 1977.
2. The accused person is to be afforded the opportunity to adduce evidence in support of his bail application in respect of evidence that he wishes to lead in support thereof.
3. The state is to be afforded a reasonable opportunity to adduce evidence in response to any evidence presented by the accused in accordance with paragraph 2 above.

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### REVIEW JUDGMENT

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CHRISTIAAN AJ (USIKU J concurring):

[1] This review matter came before me in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 (the Act) and was sent by the Regional Court Magistrate of Windhoek with the following remarks:

'Prayer

My humble prayer to the reviewing Judge/Judges, is for an order directing

19. Magistrate Savage to allow the State (Respondents) to continue leading their evidence because as it stands the Respondents case is open and there is a witness (Ms. Justine Kanyangela) under oath. By so doing that will eventually bring the bail application to its natural conclusion.'

[2] From the record, accused no.1, Mr Mostert, first appeared before the Regional Court on the 6 August 2021, in accordance with the Prosecutor General's decision dated 7 August 2018, on several counts, of contravening certain provisions of the Anti-Corruption Act 8 of 2003. The accused person is in custody, awaiting trial, which is set to commence from 2 -5 April 2024. The accused person was at that stage represented by Mr Gouws for purpose of the bail application and the state by Mr Lisulo.

[3] The accused person lodged a formal bail application on the 9<sup>th</sup> of September 2021 in the Lower Court. The bail hearing commenced on 10 September 2021 until 3 November 2021. During this period, the accused person testified and called one witness in support of his application, before closing his case. The state opened its case and led the evidence of two witnesses. The state's third witness was still under oath, when the matter was postponed to 3 November 2021 for the continuation of the bail application.

[4] On 3 November 2021, the matter was postponed to 17 November 2021 for continuation of the bail application, and no reasons were advanced on record for the postponement. However, on 17 November 2021, the matter returned to court, and the court was informed that Mr Mostert absconded from court and a warrant for his arrest was issued. As a result, his attorney of record withdrew. Mr Mostert was re-arrested and brought to court on a warrant of arrest on 31 March 2022. At this stage, the formal bail application of the accused person was partly – heard and pending before the court. The matter was postponed numerous times from 31

March 2021 until 3 August 2023. On the 3<sup>rd</sup> of August 2023, the state, now represented by Mr Gaweseb and the accused now represented by Mr Kanyemba, approached the regional court magistrate requesting for the availability of the magistrate to agree on dates for the hearing of a bail application.

[5] This request was turned down by the regional magistrate, as he enquired from the parties, whether the bail hearing before Magistrate Savage was finalised. The parties informed the magistrate that the accused abandoned the bail application, which was part heard before her, and elected not to pronounce herself on the available evidence, stating that it would not be in the interest of the administration of justice to do so. The magistrate further deemed the bail application to have ended in the lower court. Thereafter, the regional court magistrate requested the parties to address him on the following *points in limine*:

(a) What are the consequences that flow from the remarks by Magistrate Savage, did such remarks constitute a nullification of the proceedings that took place before her, to enable Mr. Mostert apply for bail afresh?

(b) Did the Remarks constitute a ruling to the effect that bail was refused, which would then entitle Mr. Mostert to apply for bail on new facts before me?

(c) Whether the matter should be sent on special review?

[6] I take it that the parties were in agreement that Magistrate Savage was supposed to pronounce herself on the evidence that was available before her. The matter was ultimately referred by the Regional Court Magistrate, on the 25 September 2023 to this court for special review.

[7] From the record, it appears that the alleged irregularity referred to above, arose as a consequence of the accused's decision to abandon his part-heard bail application and the pronouncement by the presiding officer that she will not pronounce herself on the available evidence and that it is considered to be the end of the matter.

Applicable legal principles and discussion of the application

[8] The present review matter comes before me in terms of s 304(4) of the Act. However, that section provides for review proceedings in circumstances where a Magistrate's Court has imposed a sentence which is not subject to review in the ordinary course, and it appears that the proceedings in which the sentence was imposed were not in accordance with justice. It is apparent from the foregoing that, the Act does not provide for the review of proceedings, before a sentence is imposed.

[9] In the review case of *S v Asino and Another*<sup>1</sup> this court, dealing with a similar matter, held that this court may review the proceedings of the Magistrates' Court in terms of section 20(1)(c) of the High Court Act 16 of 1990 on the ground of gross irregularity committed in the proceedings held in the Magistrates' Court. In the *Asino* matter, Liebenberg, J, remarked as follows:

'This Court in terms of s. 20(1)(c) of the High Court Act 16 of 1990, may review the proceedings on the grounds that a gross irregularity was committed in the proceedings held in the Magistrate's Court and, in my view, this case falls in the category of cases where grave injustice would result if the trial were to proceed; and where justice cannot be attained by any other means. Even though the requirements of s.304 (4) have not been satisfied in that the proceedings are not terminated, it would be in the interest of justice to have this matter be dealt with as expeditiously as possible.'<sup>2</sup>

[10] From the authorities that I have referred to above, we are of the view that this ground of review is factually incorrect as this case does not fall within the category of cases where the presiding officer committed a gross irregularity in the proceedings, but, it rather falls in the category of cases where grave injustice would result if the accused is not allowed to exercise his right to bring a bail application afresh; and it would be in the interest of justice to have this matter be dealt with as expeditiously as possible. The above remarks apply with equal force to the present matter. Having considered the basis upon which this application rests, I now proceed to consider the issues placed before me for consideration.

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<sup>1</sup> *S v Asino and Another* Case No. 281/2011, (Unreported) delivered on 18 November 2011.

<sup>2</sup> *S v Asino and Another* (supra) para [7].

[11] It is now well established that courts have been at pains to set out the preferred procedure applicable to bail proceedings. Section 60(1) of the Criminal Procedure Act<sup>3</sup> (the Act) provides that:

‘Any accused who is in custody in respect of any offence may at his or her first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in the High Court, to that court, to be released on bail in respect of such offence, and any such court may release the accused on bail in respect of such offence on condition that the accused deposits with the clerk of the court or the registrar of the court, as the case may be, or with the officer in charge of the correctional facility where the accused is in custody or with any police official at the place where the accused is in custody, the sum of money determined by the court in question.’

[12] It is clear from the above that the Act does not prescribe the procedure to be followed in bail applications and more specifically when an accused abandons his or her bail application at any stage of the proceedings, before the court pronounces itself on the evidence presented. In the matter of *S v Shekundja*<sup>4</sup>, the following was said at par 10:

‘Bail applications are neither civil nor criminal proceedings, they are *sui generis*, (in a class of their own). Bail is unique in nature, procedure and purpose. It is not aimed at ascertaining the guilt of an accused or determining the liability of a person for injuries caused to another.’

[13] We will now proceed and highlight the part of the record that precedes the review application. The record in part reads (I quote verbatim) as follows:

‘Adv Gariseb: matter on the roll today to (sic) addressing the bail application issue that was done some time ago.

Ms. Kharugas: confirm appearance. My instructions are that the bail application that has taken place before this court, my client wish to (sic) abandon and start a new one afresh.

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<sup>3</sup> Criminal Procedure Act 51 of 1977.

<sup>4</sup> *S v Shekundja* (2) [2020] NAHCMD 339 (22 July 2020).

Adv Gariseb: Confirm that yesterday I have indicated to Mr. Kanyemba evidence has been led and defence indicated they wish to start a new bail application afresh. As evidence has been led I Request the court to rule on the whether it is sufficient to deny the accused bail or not. The defence can then appeal if they so wish.

Court: After hearing both defence and state, the court welcomes the direction taken by the defence in this regard. The intention of court today was to have defence and state address me on my recusal before taking a final decision in this regard however that has been laid to rest by defence.

On State's request for the court to pronounce itself on the available evidence, if sufficient to release the accused on bail or not, the court is of the opinion that this will not be in the interest of the administration of justice, taking into account the record and what was related to court by defence on 17 November 2021. The accused today abandoned/aborted his bail application and that is considered to be the end of the matter before this court.

PP: That is in order, dates remain the same for plea and trial. Parties will liaise with regard to a new bail application date.

Ms. Kharugas: I confirm submissions by state

Crt: Remand to 2, 5 April 2024 for plea and trial.'

[14] From the above reading, it is clear that the accused, through his legal counsel elected to abandon his pending bail application. The state requested the court to pronounce itself on the evidence that was already placed before it in the bail hearing, which is the evidence of the accused and his witness and that of the states three witnesses. It was further stated by the regional court magistrate that the accused was duty bound to motivate his application to its logical conclusion.

[15] We point out that one searches the CPA in vain for an express provision dealing with the term 'abandonment' of bail applications. 'Abandonment' literally means the act of giving up an idea or stopping an activity with no intention of returning to it.<sup>5</sup> This simply means in the context of the current matter that the

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<sup>5</sup> (Concise Oxford Dictionary, 11<sup>th</sup> ed).

accused in the bail application gave up or stopped with the exercise of his right to apply for bail, before the application was finalised and the state afforded the opportunity to address the court why bail should or should not be granted. As a natural consequence, abandonment of the application entails that the matter is not heard further and no decision is taken on the merits of the application between the parties. This, can thus not be said amount to a nullification of proceedings, as the proceedings cannot be rendered meaningless.

[16] On the other hand, the legal position in respect of bail was immaculately confirmed by Salionga J in *Sheelongo v S*<sup>6</sup> at para 10:

'It is settled law that once a bail application is heard and concluded, there can be no new bail application on the same facts unless new facts exist.' (Underlining our emphasis)

[17] As we understand the procedure as set out in law, once a bail application is heard and concluded, evidence has to be placed before court and on the evidence placed before court, the court needs to make a decision whether that evidence indeed constitutes new facts or not and then only take a decision and compare. Under the current circumstances, the bail application was abandoned, before it could be concluded.

[18] The accused in this matter initiated bail after his first appearance in court, which he abandoned and now wishes to start afresh. The presiding magistrate endorsed the course of action by ordering that she will not pronounce herself on the evidence led in the part heard bail application, as the matter came to an end after the applicant abandoned the bail application. This order by the presiding magistrate cannot amount to a refusal of bail order as that would entitle the applicant to bring a bail application on new facts. Rather it is a decision, in which the presiding magistrate endorsed the applicant course of action and as a result no decision was made on the merits that amounts to a refusal of bail. This order can also not be the basis, upon which the accused can apply for bail on new facts, but rather bring a new bail application in terms of section 60(1) of the Act. This brings us to the final aspect to be determined and that is, whether it would be competent for this court, under the circumstances of this matter, to order and/or direct the

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<sup>6</sup> *Sheelongo v S* (CC 16/2018) [2020] NAHCNLD 51 (8 May 2020).

presiding magistrate to continue with the bail application, so that it is brought to its natural conclusion.

[19] It was further argued in support of this application that the court should order or direct the presiding magistrate to continue leading their evidence because as it stands the respondents' case is open and there is a witness under oath, so that the bail application should be brought to its natural conclusion.

[20] It seems to us wrong, in principle, that the accused, having initiated the proceedings and put his opponent to inconvenience, trouble and expense, should at his mere whim have the right to abandon the action at any time before the hearing is finalised. We are alive to the fact that that it is not ordinarily the function of this Court to force a person to institute or proceed with an action against his or her will or to investigate the reasons for abandoning or wishing to abandon one. An exception, though one difficult to visualise, would no doubt be where the withdrawal of an action amounts to an abuse of the Court's process. Where the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the duty of the Court to prevent such abuse. But it is a power to be exercised with great caution, and only in a clear case.

[21] We are of the view that although no grounds for the action by the accused was placed on record, there is no evidence upon which we can conclude that the abandonment was done with an ulterior purpose. In the circumstances, the court has no legal basis, upon which to review and order the district court magistrate to continue with a bail application abandoned by the accused, as that would amount to compelling a person to proceed with an action against his or her will or to investigate the reasons for abandoning or wishing to abandon one. In our view, the regional court magistrate has failed to demonstrate that the district court magistrate committed a gross irregularity in the bail proceedings.

[22] In conclusion, the ruling in this matter should not be seen by counsel and accused in bail applications as an open door to bring applications, which will be abandoned if and when the accused so desires. It is therefore important that when the bail application has progressed, the parties can no longer do as they please, without reasonable and acceptable reasons. The court cannot be deprived of its

control merely by reason of the fact that the accused has communicated their intention to abandon an application.

[23] Having considered the circumstances of this case and the documents placed before this Court, we make an order in the following terms:

1. The matter is remitted to the regional court magistrate or an alternate regional court magistrate to urgently make a determination of the accused persons bail application in accordance with section 60(1) of the Criminal Procedure Act 51 of 1977.
2. The accused person is to be afforded the opportunity to adduce evidence in support of his bail application in respect of evidence that he wishes to lead in support thereof.
3. The state is to be afforded a reasonable opportunity to adduce evidence in response to any evidence adduced by the accused in accordance with paragraph 2 above.

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P Christiaan  
Acting Judge

I concur

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D Usiku  
Judge