

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 55/2016

In the matter between:

LUCIE GADZA

APPELLANT

and

THE STATE

RESPONDENT

**Neutral citation:** *Gadza v S* (CA 55/2016) [2017] NAHCNLD 31 (11 April 2017)

**Coram:** JANUARY, J

**Heard:** 02 November 2016

**Released:** 11 April 2017

**Flynote:** **Criminal procedure** — Bail — Appeal against magistrate's refusal to grant bail — Appellate court must not set aside decision of lower court unless satisfied that decision wrong — Criminal Procedure Act 51 of 1977, s 65(4).

**Criminal procedure** Not necessarily a misdirection for court to invoke provisions of Criminal Procedure Amendment Act 5 of 1991 in refusing bail — Act 5 of 1991

introduced to give courts wider powers and additional grounds for refusing bail in order to combat escalation of crime – Magistrate misdirected herself to refuse bail - In interest of justice to grant bail in this appeal - Bail granted.

**Summary:** The appellant in this appeal was refused bail. She applied for bail and was willing to pay bail in the amount of N\$10 000 with strict conditions. The appellant is a Zimbabwean citizen but is on an employment contract in Namibia. Her husband stays with her in Namibia and her children are schooling here. The magistrate found that there is a strong *prima facie* case against the appellant. Very scanty information about the charges was presented in court. The magistrate's finding in this regard is a misdirection. The record reflects that the appellant was arrested because she refused to surrender her passport. The investigating officer conceded that the appellant was not otherwise supposed to be arrested. The appellant proved on a preponderance of probability that she will stand her trial. The magistrate found that it is unlikely that the appellant will escape as she has strong ties in Namibia. The refusal of bail in the circumstances was a misdirection and wrong. Bail is granted with strict conditions.

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## ORDER

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1. The appeal succeeds;
2. The refusal of bail is set aside and substituted with the following order:
3. The appellant is granted bail in the amount of N\$10 000 on the following conditions;
  - (a) Appellant is ordered to report to the Eenhana Police station every Monday and Friday between the hours of 08h00 to 11h00 and 16h00 to 19h00; alternatively, for purposes of when her secondment terminates that she is ordered to report to any police station in any town in Namibia where she may be deployed as aforesaid,
  - (b) Appellant is ordered not to leave the district of Eenhana without the knowledge of the investigating officer or any other designated police officer,

- (c) Appellant should not interfere with any witnesses or potential witnesses for the State and/or the investigations of the police and not tamper with evidence,
  - (d) Appellant shall appear on the date and time in the magistrate's court, Eenhana to which her case is remanded,
  - (e) Appellant shall on the day of release point out her residential address to the investigating officer or any other designated police officer and inform them of any change of residential address whilst on bail,
  - (f) Appellant is ordered to surrender any travelling document to the investigating officer in this matter and further is prohibited from applying for any travel document pending the finalisation of this matter,
  - (g) It is further ordered that this order be served on the embassy of Zimbabwe in Windhoek;
  - (h) Any application for the variation of the above conditions must be made to the Magistrate's Court, Eenhana.
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## **JANUARY, J**

[1] The appellant in this matter appeals against the refusal of bail by the magistrate Eenhana. The appellant faces charges of; 1) A contravention of section 27(6) of the Immigration Control Act, Act 7 of 1993- Acting in conflict with the conditions of her employment permit; 2) Forgery and 3) Fraud. No particulars of the allegations are reflected on the record.

[2] The appellant was represented in the court *a quo* by Mr Muhongo who also argued the appeal in this court. The respondent was represented in the court *a quo* by Ms Andima. Mr Pienaar is for the respondent in this appeal.

[3] The appellant brought her application for bail by way of notice of motion in the magistrate's court and filed a founding affidavit. She did not testify under oath but set out the grounds for the application in the court *a quo* in the founding affidavit. The

respondent opted not to file any answering affidavit and opposed the application by *viva voce* evidence from the investigating officer.

[4] This court hearing an appeal against a refusal to grant bail is bound by the provisions of subsection (4) of s 65 of the Criminal Procedure Act 51 of 1977 not to set aside the decision against which the appeal is brought, `unless such Court or Judge is satisfied that the decision was wrong, in which event the Court or Judge shall give the decision which in its opinion the lower court should have given.<sup>1</sup>

[5] This court is further bound to consider the appeal on the record and no new information or alleged facts or evidence can be introduced by way of affidavit or statements from the bar.<sup>2</sup>

[6] The grounds of appeal are that:

'The Magistrate erred in both facts and law by unreasonably finding that the Appellant had not on a balance of probabilities discharge her onus in terms of Section 61 of the Criminal Procedure Act, Act 51 of 1977 (as amended), more particularly in that, there exist a reasonable fear that the Appellant would interfere with the potential witnesses for the prosecution and police investigation and or tamper with evidence, and thereby denying the Applicant bail.'

[7] The appellant stated in her founding affidavit that she was seeking bail with stringent conditions as follows;

4. This is an application in terms of section 61 of the Criminal Procedure Act, Act 51 of 1977(as amended) (hereinafter, "the Act") wherein I humbly seek that the Honourable Court forthwith commit me to bail on the following conditions:

4.1 I be ordered to surrender my travelling document to the investigating officer in this matter and further be prohibited from applying for any travel document pending the finalisation of this matter ( a further order that this order be served on the embassy of Zimbabwe in Windhoek);

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<sup>1</sup> See: S v Du Plessis and Another 1992 NR 74 at 78

<sup>2</sup> S v Du Plessis (*Supra*) at p78

4.2 I be ordered to report myself to the Eenhana Police station every Monday and Friday between the hours of 08h00 to 11h00 and 16h00 to 19h00;alternatively, for purposes of when my secondment terminates that I be ordered to report myself to any police station in any town in Namibia where I may be deployed as aforesaid.

4.3 I be ordered not to leave the district of Eenhana without the knowledge of the investigating officer or any other designated police officer;

4.4 I be ordered not to interfere/tamper with the police investigations/witnesses.

4.5 I be ordered to deposit an amount of N\$10 000 for bail (I am in a position to pay bail in this amount. I humbly submit that when benchmarked against my assets, together with my personal circumstances that the amount proposed is more than reasonable set out hereunder); alternatively,

Such other or further practically reasonable conditions that this Honourable Court may deem fit. I am advised that the above proposed bail conditions are more than sufficient and appropriate to alleviate the Respondent's grounds of opposition to me being granted bail.'

[8] On the second appearance of appellant, the respondent objected to bail being granted on the following grounds/reasons;

- 'investigations early stage
- Another charge of fraud would be added
- Interfere with investigations
- Interfere with witnesses
- More accused to be added
- No Namibian, not fixed property
- Might abscond
- Won't be in the interest of public interest to release
- Strong case against accused.'

[9] The appellant states in her affidavit that she is a Zimbabwean national, 42 years of age and employed as an Occupational Safety, Health and Environmental Officer

employed at Bomac Auto & General Engineering (Bomac) at No. 542, Trans Caprivi Highway, Katima Mulilo. She is currently based in Eenhana, Namibia and working at Evinha Diagnostic Centre (Evinha) situated at Shop 1, JP Investment Building, Eenhana. She is seconded by her employer to work at Evinha. She resides at No 339, NHE, Eenhana, Namibia. A letter of confirmation from Bomac in relation to her employment and secondment to Evinha was handed up in the court *a quo*.

[10] The appellant states that she does not know; at what stage the investigations are; how many statements were obtained and from whom; how many statements are still to be obtained; who the witnesses are; where the evidence was gathered; where it is kept in the interim and in whose custody it is. She states that she does not have any intention to impede or interfere with any of the above processes.

[11] She further states that she was arrested on 15 July 2016 at around 17h00 at her house No 339, NHE, Eenhana by an Immigration officer and a police officer. She was informed that she was charged with; 1. Defrauding Standard Bank Namibia to the amount of N\$250 000; 2. Forgery and Uttering; 3. Money Laundering. No further information was revealed in relation to charges 2 and 3. The immigration officers were to determine another pending charge on 18 July 2016. She denies that she ever engaged in any activity that is capable to give impetus to these charges.

[12] The appellant further states that she does not have fixed property in Namibia and only a plot valued N\$30 000 in Zimbabwe. Her relatives are in Zimbabwe. Her immediate family i.e. husband and 3 children are with her in Namibia. She is the sole breadwinner as her husband does not have a work permit in Namibia. She admitted of having registered Munashe Investment CC, and LuMak Welfare Organization. She however alleges that she is an owner or co-owner and this can thus not be in conflict with her work permit. She stated further that both entities are dormant. There is no evidence to gainsay this. Various documents were handed up in court in support and opposition of the bail application setting out the personal circumstances of the appellant. These documents are the following;

## IN SUPPORT

- A letter to the Prosecutor-General requesting for bail with more or less the same strict bail conditions as stated in paragraph 7 above.
- A certified copy of the appellant of an entry of her birth registered in the district of Chimanimani in Zimbabwe.
- Three copies of her Zimbabwe General Certificates of Education Ordinary Level.
- A copy of her certificate from a Computer Training Centre of an award of a Diploma in Information Processing.
- A copy of a certificate from Computer Training Centre awarding her with a certificate of accomplishment in MS DOS and Lotus 1-2-3
- A copy of an entry of her marriage from a Duplicate Original Register in accordance with the Marriage Act (Chapter 5:11) of Zimbabwe
- A copy of her certificate in Education certifying that she has completed an approved course at Mutare Teachers College an Associate College of the University of Zimbabwe. The course included a general study of the Theory of Education and Practice in Education and special study of the education of children **AT PRIMARY SCHOOL LEVEL.**
- A copy of her husband's passport.
- A copy of her lease agreement of property on Erf No. 339 Johannes Mwandangi Street, Eenhana.
- A copy of the ID of the Lessor.
- A copy of a certificate from the Nurses Council of Zimbabwe certifying her as a Primary Care Nurse.
- A copy of her certificate of "advanced security in the field" from the United Nations Department of Safety and Security.
- A copy of a certificate on training in Management of Sexual Violence from the United Nations Population Fund (UNFPA).

- A copy of a Bachelor of Science Honours in counselling degree from the Zimbabwe Open University.
- A copy of a certificate in Basic (Occupational) Safety, Health & Environment (O) SHE from Safety Risk Services (SRS) Business Risk Solutions in Namibia
- A copy of her payslip from Bomac Auto & General Engineering
- A copy of her passport
- A copy of her Employment contract with Bomac Engineering
- A copy of an Amended Founding Statement in terms of the Close Corporations Act 1988 of Namibia
- A copy a letter from the Omusati Regional Council, Directorate of Education, Shoopala Combined School Onesi Circuit certifying that the appellant is paying for and helping for 5 (five) orphaned learners at the school.
- A letter from Dr Albert Kawana Combined School certifying that the appellant is supporting learners (orphans) at the school.
- A copy of a Registration Certificate of LuMak Welfare Organization by the appellant. This organization was registered for the upliftment of needy people in the Namibian Society.
- Copies of birth certificates and passports of 2 children of the appellant

### **IN OPPOSITION**

- A copy of her bank statement.
- A copy of a certificate of fitness of business, Prophetic Healing Deliverance Ministry, registered by the appellant.
- A certificate of fitness of a business, Munashe Makanaka Investments CC, registered by the appellant.
- A copy of an application of name or translated or shortened form for Reservation of name of Evinha Diagnostic Center.
- A copy of an application of name or translated or shortened form for Reservation of name of Munashe Makanaka Cash Loan.



- A copy of an application for an Amended Founding Statement for Munashe Makanaka Investment CC.
- A copy of a letter from (PHD) Prophetic Healing and Deliverance Ministries to the Immigration Officer, Namibia for the clearance of items listed.
- A copy of a price list for items listed in the abovementioned paragraph
- A copy of the registration of Munashe Makanaka Investment CC by the appellant.
- A copy of the Protocol on Mutual Legal Assistance in Criminal Matters signed *inter alia* by a Representative of Zimbabwe.

[13] The record reflects that the respondent was informed at her first appearance that the investigation was at an advanced stage. The investigating officer testified that the charges are fraud, forgery and uttering, alternatively money laundering. He testified that he is opposed to the appellant being granted bail.

[14] He stated that she will abscond because he received information that before the arrest she was not coming to work. She apparently went to Katima Mulilo for reasons unknown to the investigating officer. On the date of her arrest the investigating officer and a female colleague went to appellant's house and were informed that she (the appellant) was not around. Upon investigation the appellant was found in the house. Her bags were packed and on the bed in the main bedroom. The investigating officer found out that the appellant does not have a fixed address.

[15] The appellant registered a close corporation in Namibia wherein she has 49% shares according to the documents of registration handed up as exhibits by the investigating officer. Her address is indicated in these documents as NHE House 802, Eenhana. The investigating officer testified that her address is different than the one on her employment contract. He stated that he is of the opinion that she will abscond because she had been phoning the station commander to find out if there was a case against her. She has a valid passport and an employment contract entered into on a date before the passport was issued.

[16] The investigating officer further testified that the appellant knows the witnesses in this case. The witnesses are apparently employed at the same company where the appellant is employed. One potential witness is a person from whom the appellant is renting a house. No statements were obtained from these witnesses at the time of the bail application. The investigating officer testified that the investigation is still ongoing. Thus far it was established that the appellant is supposed to work at a company called Bomac only but she is conducting other work. It is not established if she pays income tax.

[17] From the evidence it seems that there is a suspicion that she owns a cash loan business. One of the copies of documents handed to court only indicates that an application for the reservation of the name of Munashe Cash Loan was made but not by the appellant. She has different payslips where it is not indicated that she pays income tax and the amounts she pays for social security differs. The investigating officer testified that the pay slips must be forged or altered. Apparently other amounts of money also come into her bank account. He testified about her salary being N\$11 250 which is maybe increased to N\$16 000. She has 5 cars. According to the investigating officer the salary does not compare or as he put it "add up" to what she owns. He stated that she must have another source. The appellant apparently has a contract with a company Evinha that she is not allowed to undertake any other business without their consent. The investigating officer stated that if the applicant is released she might interfere with the investigation. The case is allegedly serious. The investigating officer does not know if the appellant owns property in Zimbabwe.

[18] In cross-examination the investigating officer conceded that he did not read the documents filed in support of the bail application. He did not know the personal circumstances of the appellant. There was also no consultation with the public prosecutor. He conceded that 2 (two) of the appellants vehicles were confiscated and seized. It came out that the information on the charge of forgery is very scanty. In this regard, the investigating officer stated that he obtained a payslip from the employer of the appellant and established that it is different from a payslip that the appellant tendered at her bank. The issue is still being investigated.

[19] I find that the information of the investigating officer at most point to suspicion of possible criminal conduct by the appellant. There is no real evidence on a crime or crimes being committed. There is no evidence at this stage that the State has a strong case. The investigating officer conceded that the investigation was still premature and at an infant stage. He stated that the appellant was not supposed to be arrested. It seems that she was eventually arrested because she refused to surrender her passport.

[20] The investigating officer was objecting to the granting of bail on two grounds i.e. interfering with witnesses and absconding. This is contrary to the grounds submitted by the prosecutor to court. This is not surprising in view of the fact that the prosecutor did not consult with the witness. From the evidence it is clear that the fear of interference with witnesses and the investigation stems from a telephone call by the appellant to the station commander enquiring whether or not there was a case against her. In my view there is nothing sinister about that and this fear of interfering with witnesses is unfounded.

[21] The allegation that the appellant might abscond is based on the fact that her clothes were packed and on her bed and the fact that the appellant used different addresses and allegedly had no fixed address. The investigating officer on the other hand testified in cross-examination that the appellant was at some stage in Katima Mulilo. In my view that might be a reason why her backs were packed. In relation to the fixed address, the investigating officer knew where to find her for her arrest and on previous occasions sent immigration officers to her place of work. It is also known that the appellant rented property from one of the witnesses for which a lease agreement reflects her address. On the evidence before court, the fear of her to abscond also does not hold water. She is renting a house in Eenhana and the evidence indicates that her husband and children are in Namibia.

[22] The magistrate provided reasons. She considered the presumption of innocence and the fair trial provision in accordance with Article 12(1)(d) the Namibian Constitution. She considered section 61 of the Criminal Procedure Act, Act 61 of 1977(as amended) and cases relevant to bail.

(23) Her reasons *inter alia* reflect the following:

'The court takes into account the following factors (and other additional ones when considering bail.

1. Seriousness of the offence charged
2. Strength of the State's case;
3. Stage of the investigations;
4. {(appellant's) my insertion} Ties to the country.

Charges against the accused are indeed serious as opposed to what defence counsel stated that state prosecutors, always phrase their charges as such.

The charges against the accused involve the procedures to be followed when permitting foreigners into the country. As well as the economy of the country in relation to forgery and fraud. The court finds that there is a prima facie case against the accused in that the applicant would have to answer to the charges in a court of law. (my emphasis)

With regard to the stage at which investigations are the defence counsel stated that it was not known whether investigations were at advanced stage or not as it was on the first appearance of the applicant, stated to be so. And that later the state mentioned that investigations were at an early stage. The investigating officer testified that more time was needed as statements had to be obtained. Prosecutor also stated that more accused persons are to be added.

With the other ground of objecting to bail i.e. interference of investigations, there is such possibility as the applicant personally knows the witnesses and has access to her bank accounts as well, which may bring about justice not be done, as such bank accounts are crucial element to some of the charges against her.

When it comes to the aspect of abscondment, the court is of the opinion that this is unlikely to occur as the applicant has strong ties in the country and her family is also resettled, here even though such is not permanent. Her children are attending school in the country and she has engaged businesses in the country (dormant or not).

When weighing the interest of justice against the rights of the applicant, the court applies section 61 of the Criminal Procedure Act as Amended and finds that the interest of justice outweigh the interest of the applicant.

Application for bail is refused. May appeal to High Court.'

(24) I have emphasized above where the magistrate found that there is a *prima facie* case and that the appellant would have to answer the charges in a court of law. This is a wrong criterion for a bail application and is applicable in the trial after the State has closed its case. The magistrate misdirected herself in this regard. If she thereby wanted to state that there is a strong case against the appellant, I disagree with her. In my view the evidence presented is very scanty and with little information of what is alleged. I have already stated hereinbefore that only the label of the crimes of 1) A contravention of section 27(6) of the Immigration Control Act, Act 7 of 1993- Acting in conflict with the conditions of her employment permit; 2) Forgery and 3) Fraud are reflected on the record. No particulars are provided. Even after the testimony of the investigating officer the information still remains vague and scanty. In my view, the crimes as labelled are serious crimes but the substance to the crimes cannot be considered as serious on the available evidence. This in my view is another misdirection.

(25) I have already indicated that the investigating officer testified that the appellant was not supposed to be arrested and that the evidence reflects that she was arrested because she refused to surrender her passport. This was not a reason to arrest her and to investigate suspected criminal conduct thereafter. Any court cannot and would not condone such conduct. The magistrate applied 61 of the Criminal Procedure Act, Act 51 of 1977 (as amended) which provides as follows;

'If an accused who is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under s 60 to be released on bail in respect of such offence, the court may, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation, refuse the application for bail if in the opinion of the court, after such inquiry as it deems necessary, it is in the interest

of the public or the administration of justice that the accused be retained in custody pending his or her trial.'

[26] I agree with O'Linn J (as he then was) where he states the following in *S v Du Plessis & another* 1992 NR 74 at 82 F-H;

'Act 5 of 1991 must be seen as an expression of the concern of the Legislature at the very serious escalation of crime and the similar escalation of accused persons absconding before or during trial when charged with serious crimes or offences. The amending legislation was obviously enacted to combat this phenomenon by giving the Court wider powers and additional grounds for refusing bail in the case of the serious crimes and offences listed in the new part (IV) of the Second Schedule of the Criminal Procedure Act 51 of 1977. At the same time the substitution of the new s 61 for the previous section took away the power of the Attorney-General and since independence, the Prosecutor-General, to prevent the Court from considering bail.'

[27] I also agree with Parker J where he states in *S v Gaseb* 2007 (1) NR 310 (HC) at 312 D-E

'Doubtless, the enactment of Act 5 of 1991 must be seen as expressing the concern of the legislature - the representative body of the Namibian people - at the escalation of crime and ensuring that accused persons stand their trial for serious offences. Thus, the aim of the amendment to Act 51 of 1977 is to combat crime and to ensure the proper administration of justice, particularly in respect of serious crimes as adumbrated in the new Part IV of Schedule 2 to Act 51 of 1977.'

[28] In a bail application the overriding principle is whether the administration of justice will be served if the accused is granted bail? Where bail is refused in circumstances where an accused proves on a preponderance of probabilities that he or she will stand the trial, the interests of justice are also prejudiced.<sup>3</sup> "The purpose of bail is to strike a balance between the interests of society and the liberty of the accused that is presumed to be innocent in accordance with the Namibian Constitution. There should

<sup>3</sup> See Du Toit *et Al*, Commentary on the Criminal Procedure Act,[ Service 1, 1988] at p9-8

be no interference with the administration of justice and an accused should stand his trial."<sup>4</sup> A court should determine if objections to the release on bail cannot suitably be met with appropriate conditions pertaining to release on bail.<sup>5</sup>

[29] In my view, in the instant matter the learned magistrate exercised her discretion wrongly by refusing bail. The appellant indicated that she is willing to stand her trial and proposed stringent bail conditions to be attached to the granting of bail. I have already indicated that I disagree with the magistrate's finding of a strong case against the appellant and a strong likelihood that she might interfere with witnesses or the police investigation. I find that the appellant proved on a preponderance of probability that she will stand her trial. I agree with the learned magistrate that it is unlikely that she will abscond as she has strong ties in Namibia and her close family (husband and children) is settled here. She is employed in the country and her children are schooling here.

[30] As a result;

1. The appeal succeeds;
2. The refusal of bail is set aside and substituted with the following order:
3. The appellant is granted bail in the amount of N\$10 000 on the following conditions;
  - (a) Appellant is ordered to report to the Eenhana Police station every Monday and Friday between the hours of 08h00 to 11h00 and 16h00 to 19h00; alternatively, for purposes of when her secondment terminates that she is ordered to report to any police station in any town in Namibia where she may be deployed as aforesaid,
  - (b) Appellant is ordered not to leave the district of Eenhana without the knowledge of the investigating officer or any other designated police officer,
  - (c) Appellant should not interfere with any witnesses or potential witnesses for the State and/or the investigations of the police and not tamper with evidence,

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<sup>4</sup> Du Toit *et Al* (*supra*) at p9-1

<sup>5</sup> See; *S v Pineiro & others* 1999 NR 18 (HC) at 21

- (d) Appellant shall appear on the date and time in the magistrate's court, Eenhana to which her case is remanded,
- (e) Appellant shall on the day of release point out her residential address to the investigating officer or any other designated police officer and inform them of any change of residential address whilst on bail,
- (f) Appellant is ordered to surrender any travelling document to the investigating officer in this matter and further is prohibited from applying for any travel document pending the finalisation of this matter,
- (g) It is further ordered that this order be served on the embassy of Zimbabwe in Windhoek;
- (h) Any application for the variation of the above conditions must be made to the Magistrate's Court, Eenhana.

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**H C JANUARY**

**JUDGE**



**APPEARANCES:**

For the Appellant:

Ms Mugaviri

**Of Mugaviri Attorneys**

For the Respondent:

Adv. Pienaar

**Of Office of the Prosecutor-General**