CA 201/2008

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

SETH SHEEHAMA **APPELLANT**

and

THE STATE **RESPONDENT**

***CORAM*: LIEBENBERG, AJ *et* SHIVUTE, AJ**

Heard on: 20 March 2009.
Delivered on: 03 April 2009

APPEAL JUDGMENT

LIEBENBERG, A.J.: [1] Appellant and his co-accused appeared in the Regional Court Outapi on a charge of Robbery with aggravating circumstances, as defined in section 1 of the Criminal Procedure Act, Act No.51 of 1977 ('the Act'). This appeal only involves the appellant and lies against a ruling of the Regional Court magistrate delivered on the 13th of October 2008, denying appellant bail.

CONDONATION

[2] A Notice of Appeal was filed with the Clerk of the Court Outapi on 7 November 2008 outside the prescribed period of 14 days and thus, out of time. No notice of application for condonation of the late filing was filed prior to this Court hearing the appeal. The reasons explaining the late filing as well as the prospects of success were dealt with in an affidavit of appellant and when summarised, amount to the following: Appellant's legal representative advised him on 13 October 2008 to appeal the court's ruling of the same date and the costs involved would be approximately N$10 000, money appellant did not have; he was advised to approach Legal Aid but declined to do so for personal reasons; he instead approached his family for financial assistance, whereafter counsel of record decided to file the papers, notwithstanding lack of payment. Appellant furthermore relied on what was said in *Swanepoel v Marais and Others* 1992 NR 1 (HC) regarding what would constitute "good reasons" for failing to comply with the Rules of Court and averred that the prospects of success are "great". Also, that the State will not suffer any prejudice.

[3] It has repeatedly been said that condonation is not to be had merely for the asking and the applicant has to give a full and accurate account of the causes of the delay and the effect thereof, in order to enable the Court to understand the reasons advanced for the non-compliance with the Rules of Court. (*John Platt v The State,* Case No. 73/2001 (unreported) delivered 08.06.2005)
The need to give compliance to the Rules of Court was succinctly stated in the case of *Swanepoel v Marais* (*supra)* where the following was said at 2I – 3A:

> *"The Rules of Court are an important element in the machinery of justice. Failure to observe such Rules can lead not only to the inconvenience of immediate litigants and of the Courts but also to the inconvenience of other litigants whose cases are delayed thereby. It is essential for the proper application of the law that the Rules of Court, which have been designed for that purpose, be complied with. Practice and procedure in the Courts can be completely dislocated by non-compliance."*

The Court further said that the prospects of success are not in itself conclusive and that all the factors must be considered cumulatively. Also, that factors such as the explanation for the late filing, are important.

[4] In the present case Mr Shakumu, who appeared on behalf of appellant, took the blame for the late filing on him, however, when regard is had to the appellant's explanation set out in his affidavit, his counsel is not to be blamed for the late filing, as this was brought about solely by the appellant himself. Bearing in mind that appellant's Notice of Appeal was filed one week late; and that in the event of him having applied for Legal Aid, the late filing of such notice was inevitable; and appellant's circumstances at the time, the reasons given by him explaining the delay, seem reasonable. The prospects of success however, remain to be considered and will be dealt with later herein.

BACKGROUND

[5] Between the 2nd of March 2007, when appellant made his first appearance in the Regional Court and the 25th of July 2008, when the appellant's bail application was dismissed the first time, the matter had been postponed on a number of occasions and for diverse reasons. Appellant and his co-accused were earlier admitted to bail in the Magistrate's Court which was still the position when they were supposed to appear before the Regional Court on their first appearance, but both of them however failed to turn up when the case was called and warrants for their arrest were granted; with their bail provisionally cancelled and their bail money provisionally forfeited. This was the first of many subsequent warrants of arrest issued in respect of both the appellant and his co-accused and which, in all instances, were only to be cancelled later after they returned to court. They were never arrested on any of the warrants of arrest issued against them and appellant once reported himself to the district magistrate at Outapi before the provisional cancellation and forfeiture of his bail could be confirmed. The same applies to his co-accused.

[6] During these appearances the Regional Court did not sit and both inquiries in terms of section 67(2) of the Act (CPA) were conducted by the district magistrate. This matter was already transferred to the Regional Court and unless the district

magistrate was appointed to sit in the Regional Court on those dates, he had no authority to hold the inquiries he did. What he should have done (after being appointed) was to postpone the case for the Regional Court to hold the inquiries during its next session at Outapi or to bring the accused before the Regional Court sitting in Oshakati. The need therefore is evident from the facts of this case for instance, on the 14th of July 2008 the district magistrate *re-instated* the bail of the co-accused who failed to turn up at court on the 10th of July 2008, despite the provisional forfeiture of his bail money already made *final* on the 2nd of November 2007 and him being informed accordingly. I am convinced that had the Regional Court magistrate, who was acquainted with the earlier proceedings, conducted the inquiry himself, he would not have made the same mistake. Thus, to argue like the appellant's counsel did, saying that the Regional Court magistrate *condoned* the appellant's failure to come to court is without merit. The only inquiry that was held into the appellant's absence from court was conducted by the District Court magistrate on 29 October 2007, after appellant failed to appear in the Regional Court on the 19th instant.

[7] In respect of the appellant a total of 5 warrants of arrest were issued against him for failing to be at court while 4 were issued against his co-accused. The issuing of warrants of arrest were in some instances stayed for reasons not apparent from the record, but on one occasion (13.12.08), it was because the appellant's employer wrote a letter saying that appellant will not attend due to work commitment and would only be available during the December holidays. The majority of the warrants of arrest issued against the co-accused but stayed, were because he was in custody on another matter and not brought to court by the prison authorities.

[8] On 10 July 2008 both accused were again absent from court and warrants of arrest were issued. As mentioned earlier, appellant's co-accused came before the district magistrate 4 days later and had his bail re-instated, despite it already being declared forfeited to the State and the accused *warned* to be at court. Appellant only appeared on 21 July 2008 and was represented by his erstwhile lawyer, Mr. Lackey. The record of that day's proceedings reads:

> *"ON: 21.7.2008*
> *MAGISTRATE: AR SIMPSON*
> *STATE PROSECUTOR: S NDUNA*

FOR THE ACCUSED: W LAKAY

Accd 1 present.

Rem till 20.8.2008 for fixing of trial date.

Accd 1 i/c. Bail of accd 1 refunded to depositor who paid bail for accd 1.

Accd 2 still at large."

(The court at that stage clearly was unaware that appellant's co-accused had already appeared before another magistrate.)

The record does not reflect what prompted the court to order the cancellation of the appellant's bail and his detention, or to refund the bail money to the depositor. It could only have been the result of two possibilities namely, that an inquiry was held in terms of section 67 and the court not being satisfied by the reasons advanced by the appellant or secondly, that appellant in terms of section 68A, applied for the cancellation of his bail. The latter seems to be the least probable as he again applied for bail only 4 days later. Be that as it may, whatever the reason were, these are not on record and it is neither a ground of appeal that an irregularity has been committed in that the magistrate failed to record a material part of the proceedings on that date.

The outcome of an inquiry held in terms of section 67 is reviewable under section 304(4) of the Act, but not appealable.

See: *Hiemstra's Criminal Procedure*, Service Issue 1 at 9-26

[9] Appellant's counsel of record on the 25th of July 2008 informed the court that he "took over" from Mr. Lackey and applied from the bar for the appellant to be admitted to bail. In his submissions he advanced reasons why the appellant failed to turn up for court on the 10th of July i.e. that he had been in a motor vehicle accident near Otjiwarongo on the 30th of June and for medical reasons was found unfit for work from 02.07.08 until 04.07.08. It was further submitted that appellant in terms of section 67, had 14 days to show good cause why he failed to appear in court ("absconded") and that the reasons advanced, met the requirements. He proposed that more conditions be attached to the bail to be granted.

The State prosecutor replied that the reason initially advanced by his erstwhile legal practitioner is, that the appellant was *hospitalised*, thus rendering him incapable of attending court proceedings on the 10th of July 2008. No evidence was led during what appears to have been, an 'informal' bail application.

The magistrate dismissed the application giving the following reasons: that there was no proof of appellant being admitted to hospital; that it was not in the interest of justice that witnesses had to be excused from court several times (in the past).
The matter was thereafter set down for trial to commence on 20 August 2008 and appellant remained in police custody.

[10] On the 20th of August appellant appeared in person and the record reflects that Mr. Lackey had withdrawn from record; however no reason was given why counsel of record did not represent appellant on that day. The matter was then postponed for the fixing of a trial date; as was the case in many previous postponements which, from my understanding of the record, was necessary in order to establish whether the State witnesses were still available for court.

[11] I only now come to the proceedings of the 13th of October 2008 against which this appeal actually lies, but I deemed it necessary firstly, to give the background against which the court *a quo* considered appellant's second application for bail.
Once again no evidence was led during this application, as only submissions were made by Mr Shakumu who stated that *"(t)his is actually a follow up of the previous Bail Application……and what happened was that the Accused person was ordered to bring or to subpoena a Medical practitioner to come and testify as to his medical condition."* He then deemed it necessary to recap what had transpired until then and questioned the magistrate's reasons for requiring medical evidence and whether it was really necessary. I pause here to say that there is nothing on the record stating that the magistrate *ordered* the appellant to call a medical doctor to testify. The magistrate when giving his ruling clearly stated that *"on the <u>previous occasion</u> the Court <u>indicated</u> that it needs the presence of a doctor to testify about the condition of the Accused before court…"* Such evidence was clearly lacking during the first bail application where the magistrate gave his ruling without postponing the application for *evidence to be brought to court.* The reasons why appellant failed to attend court on 10 July 2008 was then dealt with extensively, which was irrelevant to the application before the court.

GROUNDS OF APPEAL

[12] The grounds of appeal raised by the appellant mainly deal with the proceedings of the 21st of July 2008, (when the appellant's bail was cancelled), contending that the magistrate misdirected himself on a number of aspects which, for purposes of this judgment, require no consideration. Suffice it to say, this appeal is not against the cancellation of the appellants bail, but is against the court *a quo* refusing him bail on the 13th of October 2008 and secondly, the submissions made in par 1.4(a) – (f) are factually incorrect. When this was pointed out to Mr Shakumu by the Court, he readily conceded and requested that it be struck.

[13] The only relevant ground raised is in par 1.7 where it states that the magistrate failed to adequately take into account the personal circumstances of the appellant being a family man with two children of school going age; him having a flat; and the appellant still being "young with a life ahead of him". Although no mention is made in the Notice of Appeal about new facts, it would appear that what is stated in this paragraph refers to the appellant's circumstances after the cancellation of his bail on the 21st of July 2008. It was further submitted that appellant has "lost" the flat in Windhoek in the meantime as well as the furniture; and that the children are staying with family members. This was followed by a passionate plea to the magistrate to again admit the appellant to bail by saying that the appellant has learnt his lesson and will not abscond. As was mentioned by the learned magistrate in his ruling, that was not the reason why appellant's bail was cancelled, but, because he and his co-accused were not attending court in the past in compliance with their bail conditions, resulting in the matter not going on trial and the State witnesses having to be sent home without having accomplished anything.
Argument was put forward that appellant was already in custody for 4 months and that he would still be in for some time to come. These are obviously no new facts but merely a consequence of appellant's failure to comply with the bail conditions.

[14] Mr Shakumu conceded that no evidence was led during the second bail application, or on the perceived "new facts" as both he and the State merely addressed the court *a quo*. Understandably, the magistrate did not make any mention of new facts in his ruling and after giving an exposition of all the previous court proceedings

in which appellant and his co-accused failed to appear, he repeated his earlier finding that it was in the interest of justice that both accused persons were to attend court at the same time; and that there was a tendency for them not to be at court when the witnesses were in attendance, resulting in unnecessary postponements. He also expressed his concern about the matter not being heard within three years after their arrest.

[15] From the aforementioned it is clear that the magistrate's ruling was not based on any new facts placed before the court, but was merely a confirmation of his earlier ruling given on the 25th of July 2008. In our view, such a ruling cannot be subject to appeal. (*Lazarus Shakunga v The State,* Case No. CA 119/2008 unreported, delivered on 24.10.2008)

[16] There may be merit in the criticisms of the magistrate's handling of, what appears to be, an inquiry into appellant's absence from court on 10 July 2008, but those proceedings are not subject to appeal.

[17] I now return to the application for condonation dealt with earlier herein. Having come to the conclusion that the magistrate's ruling on 13 October 2008 was not appealable, it is then obvious that there can be no prospects of success either as there is no appeal at all.

[18] There however remains one more issue that needs to be addressed.
At the commencement of proceedings on the 13th of October 2008, appellant's counsel informed the court that "*I have never had time to consult with my client."* Bearing in mind that counsel was already on record since July 2008, I find this statement most disturbing; more so because the matter was already on the 18th of September set down for "a possible bail application" on that day. Consultation with witnesses or accused persons should not interfere with the hours of court, even when the accused is in custody; unless in *exceptional circumstances*, which clearly was not the position in this case. Counsel who wishes to appear in court must come prepared and should not be allowed to infringe on an already overburdened court roll.

[19] In the result the following orders are made:

1) The application for condonation is dismissed.
2) The appeal is struck from the roll.

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LIEBENBERG, A.J.

I concur.

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SHIVUTE, A.J.

ON BEHALF OF THE STATE	Adv. D. Lisulo
Instructed by:	Office of the Prosecutor-General
ON BEHALF OF DEFENCE	Mr. Silas Kishi Shakumu
Instructed by:	Tania Pearson & Shakumu Inc.