REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CRI-APP-CAL-2020/00082

In the matter between:

BERNARD MARTIN ESAU **1ST APPELLANT/APPELLANT**

TAMSON T HATUIKULIPI **2ND APPELLANT/APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Esau v The State* (HC-MD-CRI-APP-CAL-2020/00082) [2021] NAHCM 84 (26 February 2021)

Coram: TOMMASI J et JANUARY J

Heard: **25 January 2021**

Delivered: **26 February 2021**

Flynote: Criminal procedure — Bail Appeal – Appellants represented – Applications by way of affidavit – The use of affidavits reconfirmed – Advantages and disadvantages

- Strong *prima facie* case – Not in the interest of administration of justice and public interest – No misdirection by magistrate – Appeal dismissed.

Summary: Appellants in this matter stand charged of contravening section 43(1) of the Anti-Corruption Act, Act 8 of 2003: Using their positions in public bodies for corrupt purposes, Money Laundering, Fraud; contravening sections of the Prevention of Organized Act, Act 29 of 2004 and Fraud in relation to tax evasion. Appellants brought the application for bail on affidavits. Exculpatory statements amount to a mere denial of the allegations in the charges. The respondent presented *viva voce* evidence. A strong prima facie case was proved. The appellants did not discharge the onus that they are candidates for bail. It was found that it is not in the interest of the administration of justice and the public interest to grant bail. The appeal is dismissed.

ORDER

1. The appellants are granted condonation for non-compliance with Rule 118(5) and the appeal is considered on the merits.
2. The appeal by the appellants against the refusal of bail in the district court of Windhoek on 22 July 2020 is dismissed.
3. The matter is finalized and removed from the roll.

JUDGMENT

JANUARY J (TOMMASI J concurring)

Introduction

[1] Both appellants were arrested on 27 November 2019 on charges of: contravening section 43(1) of the Anti-Corruption Act, Act 8 of 2003 - Using their positions in public bodies for corrupt purposes, Money Laundering, Fraud, contravening

sections of the Prevention of Organized Act, Act 29 of 2004 and Fraud in relation to tax evasion.

[2] The appellants stand charged together with James Hatuikulipi (accused no. 2); Sakues E.T Shangala (accused no. 3); and Pius Mwatelulo (accused no. 6) in cases that are referred to as the Fishcor and Namgomar cases.

[3] The appellants are represented by Mr Metcalfe assisted by Mr Beukes and the respondent by Mr Iipinge.

[4] The appellants are appealing against the refusal of bail in the district court of Windhoek on 22 July 2020.

Background and History

[5] The appeal was initially scheduled for 26th October 2020 but could for various reasons not proceed. Mostly it could not proceed as scheduled because of an incomplete record. The matter was eventually enrolled on 07th December 2020 but could again not proceed. The court made an order on 07th December 2020 in the following terms:

1. The Appellants are to deliver their intended application on or before 18 December 2020;
2. The Respondent is to deliver answering papers thereto on or before 31 December 2020;
3. The Appellant's may reply thereto on or before 8 January 2021;
4. The Respondent is to deliver Supplementary Heads of Argument on or before 15 January 2021;
5. The Appellants may deliver Replying Heads thereto, if they so choose, on or before 22 January 2021.

[6] The appellants filed their initial heads of argument on 05 October 2020 and respondent filed on 12 October 2020. On 18 December 2020 the appellants filed an application for condonation for non-compliance with rule 118(5) of the Rules of the High Court. The record of proceedings was incomplete when the matter was allocated to a managing judge. The respondent is opposing this application for condonation. The appellants in the meantime withdrew their initial application of condonation and filed a new application for condonation. In the initial application for condonation the legal practitioners deposed to founding affidavits which turned out to be not in accordance with the rules of court. The founding affidavit in the new application of condonation is deposed to by the appellants with supporting affidavits by legal practitioners.

[7] In their opposition of the application for condonation, the respondent only filed heads of argument in relation to the opposition without supporting affidavit. Mr. Metcalfe is attacking the omission of filing an affidavit and submitted that the respondent failed to comply with the court order. As such, he submitted that there is no opposition and this court should grant condonation as the explanation for non- compliance and delay is reasonable. He further submitted that there are prospects of success in the appeal.

[8] Rule 66 (1) (a) of the Rules of the High Court stipulates amongst others that a person opposing the grant of an order sought in an application must file a notice in writing stating that he or she intends to oppose the application within the time stated in the notice; and within 14 days of the notice file an answering affidavit, if any. The usual explanation for non-compliance of rules of court is that it has become common practice. This practice of deliberate non-compliance of rules of court is not condoned and is strongly discouraged.

[9] The respondent initially did not raise any point *in limine* but subsequently filed supplementary heads of argument submitting that the fact that the appellant did not depose to the supporting affidavit on the application for condonation is fatal and that there is no reasonable explanation for the non-compliance with the court rules. The respondent indicated to court on the 07th of December 2020 that they are not opposing

the application for condonation. It needs to be noted that Mr. Ipinge thereafter only filed heads of argument without any notice of opposition and supporting affidavits opposing the application for condonation and the appeal itself.

[10] This court decided to hear the submissions on the application for condonation in relation to the explanation for the delay and on the merits as it is closely intertwined with the prospects of success.

Ad condonation
Reasonable explanation and the prospects of success

[11] When the matter was set down for argument on 07th December 2020, the record of proceedings was defective in that it was incomplete. It is trite law that the responsibility to ensure that a complete record of proceedings is before court is that of the appellant. The court issued an order on 07th December 2020 that:

1. The Appellants are to deliver their intended application for condonation on or before 18 December 2020;
2. The Respondent is to deliver answering papers thereto on or before 31 December 2020;
3. The Appellant's may reply thereto on or before 8 January 2021;
4. The Respondent is to deliver Supplementary Heads of Argument on or before 15 January 2021;
5. The Appellants may deliver Replying Heads thereto, if they so choose, on or before 22 January 2021.

[12] The court order was in the meantime complied with. The appellant failed however to file the current application for condonation on or before 18th December 2020 as set out in the court order of 07 December 2020 and only filed it on 06 January 2021. The respondent also opposed this application but again only filed heads of argument indicating the opposition. This court reserved judgment on the application for

condonation and allowed counsel to argue the appeal on both the prospects of success and the merits.

[13] The ruling in this matter was given on 22 July 2020. The appellants explained that the clerk of the court on 4 September 2020 informed their legal practitioner that the record was ready to be uplifted. When a candidate legal practitioner attended at the offices of the clerk of the court he was informed that the record had been sent to the Registrar of the High Court. When he attended at the offices of the Registrar he was advised that they will only upload the record once they received a certificate from the clerk of the court. The record was eventually uploaded by 14 September 2020 and the legal practitioner, Mr Beukes attended to checking the record. He realized that there were pages missing and he addressed a letter to the clerk of court to furnish the outstanding pages. This was uploaded on 22 September 2020 and Mr Beukes filed a certificate in terms of Rule 118(5) certifying that the record is correct. The matter was consequently enrolled. The appellants then thereafter uploaded additional parts of the record.

[14] It is common cause that this court on 7 December 2020 advised the appellant's legal counsel that the record is in fact incomplete and the appellants requested the court to give directions for the application of condonation for non-compliance which the court did.

[15] The appellants filed a complete record and a new index on 17 December and the application for condonation on 18 December 2020 in compliance with the court order.

[16] The court bears in mind that the record of proceedings are voluminous. A further complication is the uploading of the record on e-justice. The manner in which the record was uploaded made it difficult for the court to determine whether the record was complete. Legal Practitioners representing appellants however ought to understand the import of the certificate in terms of Rule 118 (5). The court places great reliance on the trustworthiness of such certificates.

[17] The court is satisfied that the explanation tendered is reasonable in the circumstances of this case and we are satisfied that the complete record was availed. We are also of the view that the order of 7 December 2020 was complied with and there was in fact no need to apply for condonation. This court is of the view that the appellants have an arguable case. In the premises the application for condonation is granted and the matter is considered on the merits.

The grounds of appeal

[18] There are 18 ground of appeal in the notice of appeal. The respondent submitted that the grounds are not clear as is required by the rules of court and precedent. It was further submitted that the grounds of appeal are repetitive and overlapping.

[19] There is merit in the submission of respondent. Although this court has expressed its disapproval as to the manner in which some legal practitioners draft notices of appeal as wide as possible hoping to find some merit in the case, the practice still continues. This practice is again strongly discouraged. It is not in the interest of justice.[1]

[20] The notice of appeal is the foundation on which an appeal may be successful or not. It informs the trial magistrate in clear and specific terms what is being appealed against, what the clear grounds are and whether it is in relation to facts, law or both. The respondent is informed of the case they have to meet and considering the reasons of the magistrate, whether it is a case to oppose or concede the appeal. The disputes and parameters within which the appeal will have to be decided are crystalized. It assists the judge to focus on the material issues in reading case records which may in some cases be lengthy.[2]

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[1] *Hindjou v The Government of the Republic of Namibia* 1997 NR 112.

[2] *S v Kakololo* 2004 NR 7 at 9H-I.

[21] This court allowed submissions on the following grounds.

1. The learned magistrate erred in finding that the appellants' decision to bring their bail applications by way of sworn affidavits was taken to protect themselves or another from questioning after having ruled that the appellants do not have to answer questions in cross-examination and that the court respects and upholds the appellants Constitutional Right not to incriminate themselves.

2. The learned magistrate further erred in finding that the issue of sworn affidavits in bail applications is normally to save time and due to the urgency of the matter and/or incorrectly in law ruled that in the absence of a valid reason for the use of sworn affidavits an inference could be drawn that the decision to bring the bail application by means of sworn affidavits was to protect the appellants or some unspecified other from questioning. In so doing, the learned magistrate in effect elected to disavow the use of affidavits in bail applications and failed to properly apply his mind.

3. The learned magistrate incorrectly found that it cannot be said that the onus was discharged by the appellants when there were so many unanswered questions which the court intended to ask despite the court having asked clarity from the appellants' legal practitioner during the reading of the appellant's founding affidavit during the proceedings before the court *a quo*.

4. The learned magistrate misdirected himself by finding that the fact that the appellants did not testify left the Honourable Court with many questions which was in fact cross-examination which the learned magistrate was not in law entitled to ask. In so doing, the learned magistrate usurped the function of the prosecution and fully descended into the arena and thereby showed absolute bias and denied the appellants their constitutional right to a fair hearing.

5. This ground was ignored….

6. This ground was ignored…

7. This ground was ignored…

8. The learned magistrate was further misguided in failing to discern that in any bail application the question of guilt should not displace the true issue, to wit, liberty pending the outcome of the trial. The learned magistrate failed dismally to appreciate the purpose of bail and was more concerned with descending into the arena to pose questions like a prosecutor to the appellants whilst such questions were focused exclusively on the alleged guilt of the appellants based on pure hearsay evidence.

9. The learned magistrate failed to guide himself in reaching misplaced conclusions on the guilt of the appellants that although hearsay evidence is admissible in bail proceedings, it carries less weight than if witnesses having personal knowledge of the facts of the matter were to have testified themselves. In so doing the learned magistrate in effect convicted the appellants incorrectly prior to a fair trial and on hearsay evidence

10. The learned magistrate further failed to apply his mind properly when he in effect made a finding on the alleged guilt of the appellants on the basis of hearsay evidence presented by the State and in so doing blindly denied the appellants bail by reaching an incorrect verdict that"… The question has to be asked, was this robbery in broad daylight…?

11. In incorrectly arriving at such conclusion in law, the learned magistrate was unable to discern that robbery is an offence which involves the use of violence to effect an unlawful theft and/or taking of property belonging to the person and/or entity of another. The learned magistrate by flawed reasoning failed to be able to apply his mind properly and forgot that it the function of the court to assess the

prima facie strength or weakness of the State's case in arriving at a decision to grant or refuse bail and not to make a finding of guilty.

12. The learned magistrate incorrectly and without any evidence in support of such inference posited that demonstrations had taken place at the court when no such evidence was provided in respect thereof.

13. This ground was ignored…

14. The learned magistrate further incorrectly found that the appellants had not taken the honourable court into his confidence in circumstances where both appellants had provided full written affidavits as the basis of their bail application which affidavits the learned magistrate incorrectly ruled "… should not have been used in the matter…" In so ruling the learned magistrate in effect violated the appellants'' entrenched constitutional rights in the expectation that by being allowed to question the appellants they would be compelled to incriminate themselves in order to discharge the onus to prove on the balance of probabilities that they were suitable candidates for bail in circumstances where the appellants had discharged the onus of showing, not proving, as was incorrectly stated by the learned magistrate that they were suitable candidates in the light of the substantial assets and effective house arrest of the 1st appellant with daily reporting conditions and restriction of the 2nd appellant to the district of Windhoek with reporting conditions twice daily.

15. The learned magistrate misdirected himself by concluding that it is in the public's interest to refuse bail in that fish from the Namibian coast is a national treasure and that is being plundered without accountability for the sole purpose of self-enrichment and greed. This conclusion was made without any basis and no evidence to support such finding placed before the honourable court.

16. The learned magistrate was wrong in finding that the public has lost its confidence in the justice system and that the court does not wish to portray a message that all persons accused of white-collar crimes are to be granted bail and/or that the amount involved in the present offences was the largest ever in Namibia. The learned magistrate confused the public interest with public expectation. In so doing the learned magistrate failed to have any regard to the particular circumstances of the appellants and/or the circumstances prevailing specifically in the bail applications before him and was prejudiced in his approach to the appellants.

17. The learned magistrate was further wrong in finding that it is in the (interest of the) administration of justice to refuse the appellants bail and ignore the fact that other criminals directly implicated in the same criminal offences which the appellants face are not arrested and/or do not have warrants of arrest issued for them yet the appellants must be refused bail in the public interest and/or the administration of justice and or the seriousness of the crime.

18. In rushing to a flawed conclusion, the learned magistrate simply ignored the fact that the investigations had commenced in 2014 and that the State was clueless as to when such investigations would be concluded with no end even in sight whilst the appellants are expected to languish in retributive custody.

[22] Having realized that the grounds were overlapping and ambiguous, the grounds of appeal were reduced to 4 grounds in the heads of argument and submissions. It is evident that some of the grounds are overlapping and repetitious. The 4 grounds are that: the learned magistrate erred by finding that sworn affidavits should not have been used in the applications for bail; that the magistrate erred or was wrong by finding that the fact that the appellants did not testify left the court with many unanswered questions; the learned magistrate erred and was wrong when he made a finding on the guilt of the appellants; the learned magistrate erred and/or was wrong in finding that it was in the public interest to refuse bail.

The grounds of objection

[23] The following grounds were raised:

1. The serious nature of the offences;
2. The public interest;
3. The interest of the administration of justice;
4. Interference with the ongoing investigations;
5. The risk of absconding.

The refusal of bail

[24] The learned magistrate found in his ruling that:

1. There is no risk of absconding as there is no evidence that the appellants absconded or attempted to abscond.
2. Likewise there is no evidence that the appellants interfered or tried to interfere with ongoing investigations.
3. The magistrate found that there was a strong case against the appellants;
4. It was found that the interest of the administration of justice is a valid ground to refuse bail.
5. The combination of the nature of the offences, the public interest and the interest of the administration of justice make it impossible for the court to grant bail to the appellants.

The law on bail applications and bail appeals

[25] The onus is on an accused in bail applications to prove on a preponderance of probability that the interest of justice permits his/her release on bail. An appellant must specifically make out his own case and not necessarily rely on the perceived strength or weakness of the state's case.[3] In so doing, an appellant must place before the court reliable and credible evidence in discharging this onus.

[3] *Mathebula and the State* (431/09) [2009] ZASCA 91 (11 September 2019) at para 12.

[26] In practice the duty to lead evidence first in bail applications usually rests on the appellant.[4] It is standing practice that bail applications are brought either from the bar, leading of *viva voce* evidence and through filing affidavits (the third method). An address from the bar is usually utilized when there are no disputes of facts. Submissions are made on predetermined issues like the amount of bail and conditions of bail to be set. The court decides the matter after the hearing of submissions. *Viva voce* evidence and affidavits are used when there is a dispute of facts. The first and second methods are utilized on a daily basis in court and do not pose any challenges. There is nothing wrong in making use of affidavits only in bail applications[5] and more particularly in Namibia.[6]

[27] The third method however poses certain challenges in relation to mainly the procedure to be adopted, the different tests to be applied, and the different evidential weights involved.[7] This court set out guidelines in *S v Sekundja* recently in relation to bail applications brought on affidavit by both parties. The court accepted that affidavits may be used in bail applications in Namibia. The test to be applied where disputes of fact arise, the court opined that the trite principles applicable in the matter of to resolving disputes of fact in motion proceedings, may be utilized[8]. The test is stated as follows:

> 'Where factual disputes arise from the affidavits in application proceedings, a final order sought by the appellant can only be granted, if the facts averred by the appellant, and facts admitted by the respondent, justify the order sought. If, however, the respondent's version consists of bare denials, fictitious disputes of fact or is far-fetched, then the court may reject such version on the papers. The factual averments in dispute must strictly speaking be real, genuine or *bona fide*, emanating from established facts. The court still retains the discretion to refer real factual disputes which cannot be resolved on the papers to oral evidence, and the referral is only on such limited disputed facts.' (Emphasis added).

[4] *S v Dausab* 2011 (1) NR 232 (HC).

[5] *S v Pienaar* 1992 (1) SACR 178 (W) at p. 180H.

[6] *Shekundja v S* (CC 19/2017) [2020] NAHCMD 339 (22 July 2020).

[7] *See at ft supra.*

[8] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-5.

[28] The abovementioned scenario refers to a case where both parties opt for affidavits. The scenario is different when for instance the appellant opt for an affidavit and the respondent opts to present *viva voce* evidence. This last mentioned scenario was discussed in *Nghipunya v S.*[9] An appellant in a bail application cannot be condemned for opting to use affidavits only but there are certain disadvantages that such appellant risks when exercising such option. It is trite that averments contained in an affidavit have less probative value when compared to oral evidence which can be subjected to cross-examination. An affidavit further will carry more weight than a mere statement from the Bar.[10]

[29] Bail application is *sui generis.* The strict principles of either civil or criminal procedure do not apply to bail applications. It is the constitutional right of an applicant to decide the procedure he/she wishes to follow to bring an application for bail. The State is however not bound by the course taken by the applicant.[11]

[30] Hearsay evidence, evidence of previous convictions and evidence of the propensity to commit crimes are admissible in bail applications. The normal strict evidentiary rules are relaxed in bail application.

[31] In practice, the applicant will give notice to the state as to the procedure opted for. The state is to notify the applicant whether it will proceed with the calling of witnesses or on affidavit. The stage where the applicant and the state have made their intentions clear is crucial to the applicant because the perceived advantages of proceeding on affidavit can only truly be reaped where both parties proceed with the filing of affidavits. This may not be as advantageous if the applicant and the state adopt different routes.[12] One of the disadvantages is that an applicant may not know what the evidence of the respondent will be to prove for example the strength of the State's case

[9] Nghipunya v S (2020/00077) [2020] NAHCMD 491 (28 October 2020).

[10] See ft 9 supra at paragraph 9 with reference to *S v Pienaar* (supra).

[11] *See ft 9* supra at paragraph 8.

[12] See ft 9 supra).

and other factors relevant to the bail application. This may lead to the applicant not presenting evidence to negate allegations emanating from the respondent resulting in the refusal of bail.

[32] At times therefore, an affidavit will not meet the complexity and gravity of the oral evidence presented by the state. The circumstances of the matter may call for oral evidence rather than on affidavit and *vice versa*. This will vary from case to case.

[33] The role of the court as administrator of justice is inquisitorial in nature. The court in bail applications should play a more activist and inquisitorial role where circumstances require it.[13] The court has to strike a balance between the interest of society, the interest of justice and the liberty of the accused. Sight should not be lost of the presumption of innocence; a fundamental right entrenched in our Namibian Constitution. An accused cannot be incarcerated pending his/her trial as a form of anticipatory punishment.[14] On the other hand, whilst this principle has always been of importance in bail applications, it should not be taken out of context and distorted. In the constitution of Namibia this fundamental right is contained in Article 12 under the heading “fair trial”. Article 11 however provides for arrest and detention notwithstanding the presumption of innocence contained in Article 12 (1) (d). The court is thus required to balance competing constitutional interests.

[34] This court’s powers are limited where the matter comes before it on appeal:

‘A High Court hearing an appeal against a refusal to grant bail is bound by the provisions of ss (4) of s 65 of the Criminal Procedure Act 51 of 1977 (RSA) 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'.

In S v Barber 1979 (4) SA 218 (D) at 220E-H, Hefer J explains the implication of ss (4) correctly where he says:

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[13] *Charlotte Helena Botha vs State* CA 70/95 at p7.

[14] *S v Acheson* 1991 NR 1 at 19E.

"It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.'"[15]

The evidence as per affidavits of appellants 1 and 2 in the court a quo

[35] The first appellant, Mr. Bernard Martin Esau is a 62 years old Namibian male. He was the minister of Fisheries and Marine Resources from 21 March 2010 to 30th November 2019. He was willing to surrender his passport to the court *a quo*. He stated that he is willing to report daily at the Witvlei police station and is prepared to be under house arrest at his farm Dakota in the Gobabis district. He applied for bail with stringent bail conditions. He was willing to cede immovable property, to wit: Dacota farm 35 in the Omaheke region and his house at 91 Papagaaien Road, Hochlandpark, Windhoek as security to the State. In addition, he further offered to pay N$50 000 bail money.

[36] Both appellants stated that because of their incarceration, the times for consultation with lawyers are restricted not affording them adequate time to prepare for their cases. They further complained that the consultations are recorded by prison authorities possibly infringing their attorney client privileges.

[37] First appellant stated that he lost all his income as a result of his incarceration. He resigned as Minister of Fisheries and Marine Resources. He lost his salary as a result and lost his income as a farmer. All his bank accounts are frozen. He stated that no money in the accounts was derived or paid from activities related to the charges preferred against him. His family is allegedly on the verge of starvation and employees are not paid for the last 6 months with dire consequences to their families. He is in

[15] *S v Du Plessis and Another* 1992 NR 74 at p78 B-C.

arrears to pay necessary accounts such as his municipal account. His wife has in the meantime depleted her savings in an attempt to cater for employees, the family and to keep assets in a sound condition. His medical condition is somewhat tenuous as he is on constant medication.

[38] First appellant stated that he is not a flight risk, has no previous convictions and that it is not in the interest of justice to be kept in custody. He is the father in law of appellant no. 2. He denies any involvement with appellant 2 in relation to the fishing industry. The appellant denies corruption and stated that he acquired all his property legally. He acquired money in his bank accounts by an early pension payout and the sale of cattle on his farm. He does not have any overseas bank accounts or in any foreign country. The appellant denies that he colluded with any of his co-accused to commit crimes that he is accused of. He denies contact with any of so-called corrupt lawyers or that money was channeled to him through so called corrupt lawyers.

[39] First appellant admitted that a bilateral agreement was entered into between Angola and Namibia with the companies Namgomar Pesca Namibia Pty Limited and Namgomar Pesca S.A Angola. This was done with the aim of strengthening regional integration between business people in Namibia and Angola. He stated that he was not involved in the selection of the companies. The shortlisting however was done and forwarded to him. He denies knowledge of the involvement of Ricardo Gustavo, a co-accused, in Namgomar. First appellant stated that the allocation of fishing quotas was done as per legislation and that there was no *quid pro quo.*

[40] His appointment as Minister of Fisheries and Marine Resources was based on the principles of collective leadership, collective responsibility and management. His affidavit contains a lot of information on the operations and responsibilities of the ministry of fisheries. He stated that only the president can enter into bilateral agreements with other SADC countries. He as minister only signed such agreements on instruction by the president. He stated that there is a full process of checks and balances in the execution of his duties and responsibilities.

[41] He admitted that the Marine Resources Act was amended with input by the Ministry of Justice after a High Court decision that non-right holders could not be allocated fishing quotas. The amendment went through cabinet, was approved and then provided to him. He stated that the allocations of quotas were done in accordance with government objectives.

[42] The second appellant is a 39 years old Namibian businessman who resided pre-arrest in Windhoek at Erf 865, Kleine Kuppe. He is married. He confirmed the affidavit of the first appellant, insofar as it relates to him (second appellant). He stated that he handed himself to the police after receiving information that there was a warrant for his arrest. He was aware of the allegations months before his arrest through media reports. He was in custody at the time of the bail application for 8 months.

[43] He had been an IT technician from 2002 until 2006. He is self-employed and in business from 2003. He is married with 2 minor children. He is also responsible for the caretaking of his retired mother and a brother who is currently unemployed. All his family ties are in Namibia. He is prepared to hand over his passport to the anti-corruption commission. He has a cousin in London but he has no contact with her. He has no previous convictions. He generates his income from various close corporations, some of which are registered solely in his name and some with a fifty percent share to his wife. All his assets are in Namibia. Founding statements of the close corporation are attached to the second appellant's affidavit.

[44] Second appellant is amongst others in the business of gaming and bought a gambling house in 2008. He is also in the import and export business of vehicles, developing of properties with assistance of bank financing, the tourism sector, buying and selling frozen fish in particular horse mackerel and hake, property developing and construction work. The appellant provided a list of all his close corporations and businesses with indications of how they suffered losses as a result of either his

incarceration or the corona pandemic. He also stated how many persons are in his employment and how his continued incarceration affects them.

[45] He listed immovable properties to the value of N$40 025000 (forty million and twenty five thousand dollar) he owns. He offered properties with a combined value of N$16 025 000 (sixteen million and twenty five thousand dollars) as security and is prepared to pay another N$200 000 for bail. He stated that he is currently unable to honor various obligations, amongst others bonds, municipal accounts and body corporate fees because of his incarceration. He owns 2 Mercedes Benz passenger cars, 2 Range Rovers, 5 Toyota pickup bakkies, an Amarok and a Toyota Corolla with a combined value of N$12 000 000. Some of them are still under finance from banks.

[46] Second appellant intents to plead not guilty to all charges. He is confident that he will not be convicted. He handed himself to the police and has strong ties in Namibia. He further stated that he does not hold fishing rights nor does any entity that he owns or controls have such rights. He denies any corrupt relationship with first appellant. He stated that he is not part of any conspiracy as alleged in the charges. He stated that he is willing to comply with bail conditions including reporting conditions. He will not interfere with any investigations or the administration of justice. Since his arrest, he did not interfere with police investigations.

[47] In relation to the charges in respect of the Namgomar case, he stated that he was introduced to Johannes Stefansson in 2011 at the Hilton hotel. He later again met Stefansson who then wanted to be introduced to joint venture holders. Eventually second appellant's cousin, James Hatuikulipi also a co-accused, was introduced to Stefansson. Second appellant received consultancy money honestly in this regard. This money was paid into 2 of his CC's, Erongo Clearing CC and Forwarding CC.

[48] Appellant 2 explains his involvement in Angola to the extent that he was with Johannes Stefansson and other persons of the Samherji group. A photo was taken of them with appellant 1 who at the time dropped off his grandson at the house of

appellant 2. No fishing was discussed at the time. The second appellant stated that Stefansson is a drug addict and embezzled money from the Samherji group. Stefansson received the money through Ricardo Gustavo of Namgomar. The money was for business arrangements in Angola as a percentage for a client list provider.

[49] Second appellant states that Stefanson and persons from Samherli sought introductions with new right holders who were in joint ventures in the fishing industry. They allegedly wanted to avail trawlers to harvest marine resources. The joint ventures comprised of companies to whom the minister of fisheries awarded fishing rights. Samherji also wanted to collaborate in new appointments such as fishing in Angolan waters and other African countries. Second appellant agreed to assist them and eventually introduced them to his cousin James Hatuikulipi who is a co-accused and a representative of Cutler Seafood/ James Hatuikulipi had a better understanding and appreciation of the fishing sector and had to assist second appellant.

[50] From his affidavit it is evident that second appellant played a significant role in setting up meetings and partaking in negotiations. It reveals that second appellant had an in depth knowledge of business in the fishing industry. He was a key person in interaction between joint ventures and foreign fishing companies to conclude transactions. Second appellant at a later stage also became involved in the fishing industry in that he established businesses to sell frozen fish in various regions in Namibia. He also exported frozen fish to Angola. From his affidavit it seems that he was a friend to Stefanson and played a crucial role in Stefansson’s operations and operations of Samherji. He claims that funds reflecting on his accounts are legal compensation for duties rendered.

[51] He confirms having received money from Ricardo Gustavo through Namgomar but claims it to be a percentage of legitimate sales where he played an important role. He claims not to be a shareholder in Namgomar and claims innocence on the charges of fraud and tax evasion.

[52] In the relation to the charges of fraud, money laundering and conspiracy in the Fishcor case, he states that he knows of money that were paid in to CC's that he owns. Money was received from Silex Investment or De Klerk, Horn and Coetzee (DHC) Incorporated and was paid into JTC Trading CC, Erongo Clearing and Forwarding CC. This money was allegedly for loans between James Hatuikulipi and the second appellant.

[53] With reference to section 61 of the Criminal Procedure Act, Act 51 the appellant states that he was advised to proof that it is not in the public interest or the public for him to be incarcerated pending his trial. According to him it is in the interest of the public that he be reunited with his wife and children as he is not accused of a crime of violence and is not a dangerous person. He employs over 30 permanent employees and had it not been for his incarceration, the number could have been higher as he planned to expand his businesses. The fact that some of his employees are also not having an income due to loss of income in his businesses, he alleges is also against their interest as members of the public. It is therefore in the interest of the public that he be released on bail.

[54] The second appellant confirms that first appellant had various meetings with fish industry players amongst other places at his farm. He however justifies these meetings as nothing untoward in the context of a minister of fisheries.

[55] Second appellant stated that he understands the serious nature and possible lengthy sentences in case of a conviction on the charges in both the Namgomar and Fishcor cases. He is however adamant that he is not guilty. He is aware that the cases were investigated since 2014. Despite that he stated that he did hand himself over to the police and ACC authorities and did not abscond as he wants the cases to be finalized.

[56] Both appellants deny their involvement in the alleged crimes and provided exculpatory explanations for money that is reflected in flow charts and bank statements presented by investigating officers.

The evidence of the respondents

[57] Willem Olivier is a senior investigating officer at the anti-corruption commission and one of the investigators in the matter. The matter involves two cases referred to as the Fishcor and Namgomar cases. He obtained statements of witnesses including a statement how the cases originated. According to witnesses, there are several role players involved. The two main role players are the appellants before court. The first appellant is the former minister of the Ministry of Fisheries and Marine Resources. The second appellant is son in law of the minister. It also involves the former chairperson of the law reform commission, Mr Sakeus Shangala, Mr James Hatuikulipi who was the CEO of a close corporation Investec, Ricardo Gustavo, employed by Investec and Mike Nghipunya.

[58] Mike Nghipunya was appointed as the CEO of Fishcor and James Hatuikulipi as the chairperson in a conspiracy involving Namgomar. Namgomar was a company established as a joint venture between Angola and Namibia. According to investigations there was a conspiracy before 2012. A certain Islandic company wanted to enter the Namibian fishing industry. They set up a plan accordingly. The company was introduced to appellant 2 who was the son in law of appellant 1.

[59] Meetings were held and eventually a meeting took place at the farm of the first appellant where both appellants and Mr James Hatuikilipi were present. A plan was discussed how to enter the fishing industry. Sakeus Shangala was roped in as a legal mind. A plan was set in motion to enter the fishing industry via bilateral agreements. They had to meet and consult with the Angolan government to arrange for the bilateral agreement. Minutes and other documents of such meetings are available and were presented to court. One of these documents is a photo depicting appellant 1 with other

role players in the house of appellant 2. It later appeared that this photo was taken to convince persons that appellant 2 was related to the minister of fisheries in Namibia.

[60] Certain businesses and entities (called special purpose vehicles) with their bank accounts were opened and registered through which the proceeds of the plan were channeled into for the benefit of the role players. In the process money was laundered to the role players' benefit.

[61] Some of the documents include letters by the first appellant arranging meetings with his Angolan counterpart to discuss the bilateral agreements. According to one letter dated 18 July 2013, the first appellant was to be accompanied by Mr. Sacky Shangala, a co-accused, the permanent secretary of the Ministry of Fisheries and the personal assistant of the minister. Another document reflects a summary and action point plan after a meeting held in Angola. Therein it is reflected amongst others that a company will be named by the Angolan counterpart. This company would have to procure services of Samherji (in Islandic fishing company) for fishing vessels. The Angolan counterpart had to identify a representative for consideration by Namibia. In this document it reflects that harvesting of marine resources, compensation and authority for fishing quotas had to be decided.

[62] One of the letters to appellant 1 and the minister of fisheries in Angola written by Mr. Sackey Shangala confirm that Namgomar Pesca S.A. was set up in Angola as a joint venture company owned by both Namibia and Angola. This company had to exploit the marine resources of the contiguous coastline of the two countries. The purpose was to contribute to food security within the 2 countries and to market harvested products into Namibia and Angola to achieve this objective. Namgomar in Angola was to use another company EDIPESCA (Fish Product Distribution Company) as a conduit to realize the objective.

[63] Other documents reflect meetings where the minister of fisheries Angola, representatives of Namgomar Angola, Samherji representatives including Johannes

Stefansson and representatives of Namgomar Namibia were participating. Namgomar Namibia was represented by Sacky Shangala, James Hatukuilipi, Tamson Hatukuilipi and Ricardo Gustavo. The meeting centered on *inter alia* the fishing industry, co-operation between the parties thereto, the joint venture and quotas. Some of the letters are about fishing quotas allocated by first appellant. Other letters are in relation to invitations to entities to apply for fishing quotas. The evidence revealed that at the time that the joint venture Namgomar features in the communications it was non-existent both in Namibia and in Angola. It was what was referred to as a shell company or skeleton company of the conspiracy according to the evidence.

[64] The crux of the evidence is that both appellants were allegedly part of a scheme together with co-accused where Namibia and Angola entered into a bilateral agreement in relation to the exploitation of marine resources of the contiguous coastline of the two countries. Allegedly planning meetings were held on the farm of the first appellant where co-accused participated. Eventually a representative or representatives of foreign fishing companies were allegedly reeled in to execute the alleged conspiracy. In the meantime various close corporations and entities were founded by second appellant and registered in the name of himself and his wife. One of the entities was founded overseas in Kazakhstan.

[65] The bilateral agreement involved the founding of a joint venture called Namgomar, a Namibian and Angolan company with Ricardo Gustavo, a co-accused in Namibia, as the director. His address was an Angolan address whilst he was working with James Hatuikulipi at Investec CC in Namibia at the time. The first appellant nominated Namgomar on 14 June 2014 to harvest as part of the bilateral agreement. Namgomar was informed of the nomination and invited to apply for fishing quotas. After the Angolan minister of fisheries accepted the nomination, first appellant allegedly allocated 7000 metric tons of horse mackerel to Namgomar. Thereafter allegedly another 8000 metric tons were allocated in December 2014 to Ricardo Gustavo, again 8000 metric tons in December 2015 for the 2016 season and another 8000 tons for the 2017 season. A letter from first appellant indicates that 25 000 metric tons were

allocated from 2014 to 2016 whilst nothing came from the Angolan side. 8000 metric tons were also allocated in June 2017, 2000 metric tons in November 2017 and 10 000 metric tons in January 2018.

[66] Documents indicate that at the time, Namgomar had a usage agreement with Samherji, the Islandic fishing company. It appears from documents that this company dictated to the minister how to allocate quotas and to whom. It further appears from documents that James Hatuikilipi as sole shareholder of Tundavala Investment invoiced the Samheji group for millions of dollars from September 2014 to March 2015. Tundavala Investment is an entity in Dubai. According to documents it appears that there was a fishing quota usage agreement. The documents and investigation revealed that fishing quotas were sold in Namibia to 25% under its market value. 75% of the market value was then paid into the bank account of Tundavala in Dubai. The Samheji group paid money to Namgomar Namibia Pty Limited under the quota usage agreement. Flow charts of cash were presented. Millions of Namibian dollars were thereafter channeled through close corporations and other entities for the benefit of the accused including the two appellants. There were representations that the money was for consultancy fees but the investigation revealed that there were no consultancies. The investigation revealed that the money was paid pursuant to the conspiracy.

[67] The investigation revealed that there was indeed a quota usage agreement between a subsidiary of the Samherji group and Ricardo Gustavo. The memorandum of understanding was gazetted on 17th July 2015 whereas the memorandum was already signed on 18th June 2014 before the gazzeting thereof. Fishing quotas were awarded since July 2014 before the gazetting of the memorandum. This was irregular. The investigating team concluded that the memorandum of understanding was part of the corrupt scheme to benefit role players.

[68] During the investigation the investigator seized a cheque made out to B E Farming belonging to first appellant. The cheque was from Erongo Clearing and

Forwarding CC belonging to second appellant. The amount is N$150 000 and was honored. There is no plausible explanation for this cheque.

[69] At the time the Marine Resources Act, Act authorized for the allocation of fishing quotas to persons who applied and who had fishing rights. Only persons with fishing rights could apply for quotas. It was difficult for individuals to obtain fishing rights because there were certain requirements before a person could apply for such rights. Persons who wanted to enter the fishing industry had to search for persons or entities that was/were awarded fishing quotas in order to team up with them or join them to get fishing quotas or usage agreements. The Marine Resources Act also authorized bilateral agreements between SADC countries. The appellants and other co-accused opted for the bilateral agreement as it was easier to enter the fishing industry. The scheme seems justified and legal on the face of it as there were documentation to proof that operations went through the proper channels with checks and balance. When one however digs deeper a different picture emerges.

[70] Mr. Olivier testified that a cell phone of Mr. James Hatiukilipi was recovered during the investigation. At the time that payments were affected to Namgomar it was established that Namgomar did not exist in Angola and no payment could have been made to it. The examination of the phone revealed that Mr. James Hatuikulipi at some time contacted the Samherji group convincing them to say that payments were actually made to Namgomar in Angola. The conclusion is that this was an attempt to cover up the illegality of the scheme.

[71] The investigation further revealed that Namgomar for instance did not pay tax on the money it received for the quotas.

[72] In the Fishcor case the investigation revealed that the laws were again amended to award fishing quotas to the entity to receive it under the pretext that it was for governmental objectives. Cabinet resolved that fishing quotas could be awarded to Namibian Fish Consumption Promotion Trust for drought relief programs and additional

objectives which were at the time under consideration. The quotas were then awarded to Fishcor reflecting as governmental objectives.

[73] These quotas were then sold under catching agreements and some of the money raised from sale of quotas went for the intended objective. The investigation however, revealed that some money obtained from quotas awarded under governmental objectives was paid to a law firm, De Klerk, Horn and Coetzee (DHC) in a trust account. The amount was N$75 000 650 (seventy five million six hundred and fifty dollars). At the law firm a so-called vehicle, Silex Investment CC was used to transfer money from the trust account of the law firm. Money was also transferred to other entities. One of them IGG CC. These payments were not for governmental objectives. The investigation revealed that the entities like IGG, Erongo Clearing and others were used to distribute and launder money.

[74] Another N$15 000 0000 was paid to another law firm, Sisa Namanje Legal Practitioners. This payment is still under investigation.

[75] It was further established that some of the laundered money was used for a campaign of the SWAPO party. The investigation revealed that the laundered money was in addition allegedly used by appellants and co-accused to pay personal loans, pay for luxury vehicles, materials, buy houses, plots and other property and to pay for personal benefits. It is certain that the N$75 000 650 were not used for governmental objectives, the Fish Consumption Trust, for the consumption of the public to be provided with nutrition or for draught relief.

[76] The investigation further revealed that quotas awarded to Fishcor were audited separately where after the confirmed audit was handed to appellant no.1 to verify and sign it off. It further appeared that appointment of amongst others, co-accused Mike Nghipunya who held a junior position in the Ministry of Fisheries and Marine resources is questionable. He was chosen, seconded and appointed as acting CEO which is a high and responsible position in Fishcor. He had amongst others the duty of carrying out

or executing governmental objectives. He benefited from the scheme as an amount of N$10 000 300 was used in relation to him.

[77] The first appellant appointed James Hatuikilipi as the board chairman. Hatuikilipi partook in the scheme. He was the CEO of Investec mentioned above. He is related to Tamson Hatuikilipi (second appellant). His appointment was not done in accordance with the Marine Resources Act, Act 27 of 2000 and the Public Enterprises Governance Act, Act 1 of 2019. The Marine Resources Act makes provision for amongst others, the number of board members to be appointed and how the chairperson is to be appointed.

[78] It was further established that the first appellant benefitted from the scheme. He owns a farm with a house on it. This dwelling was extensively extended which was paid for in cash. One of the payments was for N$600 000. Other payments were still under investigation. Materials for the extensions were also paid in cash. First appellant acquired property, a plot in or near Otjiwarongo. This property is not disclosed in first appellant's affidavit. It is registered in a close corporation with first appellant as a 50% shareholder and his wife the other 50% share. From the investigation it appears that the plot was bought with money from the law firm, DHC mentioned above.

[79] Huge amounts of money like N$100 000, N$150 000, N$250 000, N$800 000, N$250 000 and N$753 616.60 are reflected in the flow charts showing the bank accounts of the first appellant. No plausible explanation was given by the first appellant for these transactions.

[80] Ms. Selma Kalumbo is a senior investigation analyst in the forensic division of the anti-corruption commission, analyzed bank statements of various entities and persons in this case as requested by investigating officers. She prepared flow charts of money that were presented to court depicting money paid into and transferred from accounts to the accounts of different persons, entities and some law firms. It seems that huge amounts of money were exchanged. There were various instances where entities changed names.

[81] The flow chart confirms that money was paid from the Samherji group account to the account of Namgomar Pty Limited. In the Namgomar account it also reflects that money was deposited and thereafter paid to other entities. The flowchart of Erongo Clearing and Forwarding CC shows money coming into its account and paid to entities or persons.

[82] Manfred Yatamunua is an officer in charge of the Windhoek Correctional Facility. He knows both appellants. He testified that there is a facility especially suitable for inmates to consult with their lawyers. Warders assigned can see inmates and lawyers through a camera but cannot hear what is discussed. They can also not see what is written if writing is used as a means of communication. The camera is there for security reasons. When the camera is not operative, an officer is placed within seeing distance but not hearing distance. There are no cameras in the cells of inmates but only two cameras for security reason in the courtyard. According to him inmates are afforded enough time to properly consult. Consultations are allowed after hours and on week-ends provided that arrangements are made beforehand.

[83] Karel Cloete is a senior investigating officer employed at the anti-corruption commission. He is one of the investigators in the matter. He testified about the plot of the first appellant in Otjiwarongo. The witness obtained a sworn statement from the conveyancer of the plot. According to the statement a certain Marion/Mareen De Klerk approached the conveyancer late in November 2017 in relation of the plot. Thereafter a purchase document and letter of transfer was sent to the conveyancer. The purchase agreement is in the name of the first appellant and Ms. Swarma Esau, his wife. The person who sold the plot was a Ms. Badenhorst. The conveyancer registered the property in the name of a CC that was formed wherein first appellant had 50% shareholding and the wife the other 50% shareholding.

[84] Cloete testified that the investigation revealed that N$50 000 was initially paid for this property from an entity called Sealegs Investments. The background thereto is that

the Samherji group paid about N$75 million into the account of De Klerk, Horn and Coetzee legal practitioners (DHC). This money was paid, as is reflecting, for government objectives. Most of this money was transferred to Sealegs Investment solely owned by Mareen de Klerk. Mareen de Klerk transferred some of this money into an entity IJG Investment. For the transaction in November 2017 de Klerk transferred an amount of N$50 000 from IJG into the account of Sealegs from where the deposit of N$50 000 were paid for the plot.

[85] De Klerk thereafter transferred N$275 000 from DHC into the account of Sealegs. From that money De Klerk paid himself N$30 000 for the deal he made in relation to the plot. He paid N$243 445 to a certain Laurence Hangula for EMS. It appears this money was for part of the purchase price of the plot. Copies of e-mails reflect that first appellant was copied in for the paying of the balance of the purchase price for the plot. The price of the plot was N$1 700 000. After the payment of N$243 445, N$925 000 was transferred from IJG into the account of Sealegs and from Sealegs into the account of DHC. Again from DHC N$1 650 000 was paid to EMS or Laurens Hangula as the balance of the purchase price.

[86] Flow charts further reflect that N$10 000 000 was paid from government objective into the account of DHC. N$1 700 000 of this money was paid for the plot of first appellant and second appellant received about N$16 000 000 of money for government objectives through entities like JTH and Erongo Clearing and Forwarding CC.

The findings on appeal

[87] The findings of the court a quo that there is no risk of absconding or attempting to abscond and no merit in the objection that appellants tried to interfere or will interfere with the investigations are not the subject of this appeal. This court will therefore not consider those findings. This does not mean that the court on the facts agree or disagree with it.

[88] It is now settled law that bail applications may amongst others be brought by way of affidavits. We have already in paragraph 17 above alluded to the disadvantages that an applicant risks where an applicant opts to bring his/her application for bail on affidavit and the respondent opts for viva voce evidence. It is trite that averments contained in an affidavit have less probative value when compared to oral evidence which can be subjected to cross-examination. An affidavit on the other hand will carry more weight than a mere statement from the Bar.[16]

[89] The learned magistrate was alive to the different procedures that could be followed to bring bail applications. At the outset of his ruling the learned magistrate referred to the affidavits and indicated that he respected the appellant's constitutional right not to incriminate themselves. There is no indication that in general, the magistrate disapproved or denied the procedure to bring bail applications with affidavits. He considered the circumstances of this case and then made the remark. He in detail considered and adjudicated on the evidence contained in the affidavits. It therefore cannot be said or inferred that he disallowed the use of affidavits.

[90] Our interpretation of what was said by the magistrate is indicative that in the circumstances of this particular case the appellants should not have opted to bring their applications by way of affidavits. In our view, this remark was made considering that the appellants were at a disadvantage with their affidavits compared to the testimony of the respondent who presented elaborative and particularized *viva voce* evidence. We do not find misdirection in this regard.

[91] We do not agree with the inference that the decision to use affidavits instead of *viva voce* evidence was made to protect the appellants or others from cross-examination. There is no evidence direct or circumstantial to justify such inference. The magistrate himself stated that this procedure is usually used to save time due to the urgency of the matter. The magistrate is supported by what was stated by Sibeya J in

[16] See: *Nghipunya v S* (supra) at paragraph 9 with reference to *S v Pienaar* (supra).

Shekunja v S CC 19/2017 [2020] NAHCMD 339 (22 July 2020) 'A bail application can be heard and decided on affidavits, which process undoubtedly is cost effective and would also save the court's time and resources.' (our emphasis) Common sense dictates that where only affidavits are used and the accused do not testify that time will be saved with no cross-examination. The choice to follow such a procedure comes with disadvantages as already alluded to.

[92] It was contented that the court misdirected itself by alluding to the many unanswered questions. Further that the questions were in fact cross-examination questions; that the magistrate usurped the functions of the prosecution, fully descended into the arena and showed bias in denying the appellants bail. The fact of the matter is that the magistrate did not have the opportunity to ask these questions. Not any of the questions was asked during the proceedings. These questions, in our view, appear in the judgment as hypothetical questions in evaluating the evidence of the appellants in their affidavits. It shows to indicate the disadvantage of having opted for affidavits in thereby not proving that the appellants are candidates to be released on bail.

[93] It was submitted that the learned magistrate should have invoked the provisions of section 167, 168 and 274 to play a more inquisitorial role in the bail proceedings.[17] In this matter the legal representative of the appellants read the affidavits into the record. He specifically informed the court that the appellant were not going to testify or avail themselves for cross-examination. In our view the courts hands were tied in relation to the affidavits and the fact that the appellants did not avail themselves for cross-examination. The court certainly could not have called the appellants to ask them the questions. Al the more the questions could not have been posed to the legal representative.

[94] In as much as the appellant could make use of affidavits in their bail application, the law is clear that they had a duty to show on a balance of probability that they are suitable candidates for bail. The magistrate found on the evidence that they were not.

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[17] *See ft* supra at paragraph 12.

The learned magistrate making a finding of guilt

[95] The learned magistrate made a remark that it appeared on the surface that everything appears to be above board but: 'when you take a step back and look at the bigger picture, the question has to be asked: "Is this daylight robbery". He then proceeded to examine the evidence tendered by the respondent, which to a large extent was not disputed under oath by the appellants. He considered the strength of the state's case by examining the reliance by the state on a key state witness and the possible objections to his credibility. He recognized that the objections would negatively impact on the witness' credibility but took into consideration the fact that there appears to be documentary evidence corroborating his testimony. The learned magistrate concludes after considering the facts placed before him that there is a strong *prima facie* case against the appellants.

[96] It is evident that the words "Is this daylight robbery" is a figure of speech and not intended to allude to guilt of an offence of robbery. The appellants opting not to subject themselves to cross-examination, which is their constitutional right, can hardly complain that the learned magistrate relied on hearsay evidence. The learned magistrate in any event did not make a finding of guilt but concluded that there is a strong *prima facie* case against the appellants. This conclusion cannot be faulted when one considers that the explanations of both appellant amount to untested bare denials of the allegations whereas the allegations of the State has *prima facie* substance and proves that *prima facie*, the State has a strong case.

The public interest and administration of justice

[97] Section 61 of the Criminal Procedure Act, Act 51 of 1977 (the CPA) provides as follows:

'61 Bail in respect of certain offences

If an accused who is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under section 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 trail.'

[98] The appellants correctly submitted that the alleged contraventions of Anti-Corruption Act and alleged charges of money laundering are not amongst the charges listed in Part IV of the schedules to the CPA. It is evident that the crimes listed under Part 4 are all serious. It is surprising that corruption and money laundering irrespective of it being at common law or statutory are not included in the list. These crimes are, no doubt serious. It could perhaps be an oversight and should be reviewed by the legislature. Be that as it may, fraud is amongst others listed. The appellants are charged with fraud as well justified the application of section 61 of the CPA.

[99] We agree with Liebenberg J and Claasen J where they state in Nghipunya v S (supra):

'It must be remembered that traditional grounds relevant during a bail enquiry include *inter alia*, the seriousness of the offence; the strength of the state's case; whether the accused will stand his trial; will the accused interfere with witnesses; and whether the accused is likely to commit similar offences if released on bail.[18] These traditional grounds culminate in the ultimate question: whether the interests of justice will be prejudiced if the accused is granted bail?[19] It therefore follows that at the very least, the question of what is in the interest of the administration of justice is an overarching, all-encompassing consideration even when the offence does not resort under Part IV of Schedule 2 of the CPA, as the administration of justice would not permit the release on bail of an applicant who has failed on a traditional ground.'

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[18] *S v Acheson* 1991 NR 1 at p.5.

[19] *S v Pineiro* 1992 (1) SACR 577 (Nm). *Van Wyk v S* (HC-MD-CRI-APP-CAL-2020/00076) [2020] NAHCMD 399 (7 September 2020) at para 15.

[100] It is not always possible for the State to present complete evidence during a bail application before the trial commences like in this case. There are many reasons why this is the case. To mention a few examples: incomplete investigation, the complexity of the case, the severity of the offences, syndicate offences, the involvement of cross-border investigations, voluminous investigations, the number of accused and witnesses involved and whether those witnesses are local or international. In exercising his/her discretion, these factors need consideration in analyzing and evaluating the evidence.

[101] In this case, it is a notorious fact that the case enjoys huge public attention before and after the arrest of the accused. The matter is widely and extensively reported on by the media. This is not necessarily decisive that the public has an interest in the matter, because the public might have certain expectations which are not synonymous with public interest. It remains however, a factor to be considered. In this matter it needs consideration together with the fact that appellant 1 and some other co-accused held positions in public offices. In addition, the allegations involve serious charges where huge amounts of public money which should have been available for public benefits, is involved. Instead it is alleged to have been laundered and squandered for the benefit of a few individuals. The evidence alleges that several millions of tax payers' money is involved on which there was allegedly also tax evasion.

[102] In the circumstances, it was not a misdirection for the learned magistrate to apply section 61 of the CPA and refuse bail. The court *a quo* was completely justified in these circumstances to refuse bail on these factors in terms of section 61 of the CPA.

[103] The witnesses for the State were confronted with certain facts that they could not give answers to or otherwise had to speculate on. The fact of the matter is that the appellants did not testify. Many of the issues that were covered in cross-examination were not stated in their affidavits. Likewise many of the allegations and facts testified to by the respondents' witnesses were not challenged or meaningfully challenged. In our view, the magistrate was correct that there were many unanswered questions to the

effect that the appellants did not discharge their onus i.e. that they are candidates for bail.

[104] In conclusion we do not find any misdirection by the magistrate justifying this court to overturn his ruling to refuse bail.

[105] In the result the following order is made:

1. The appellants are granted condonation for non-compliance with Rule 118(5) and the appeal is considered on the merits.
2. The appeal by the appellants against the refusal of bail in the district court of Windhoek on 22 July 2020 is dismissed.
3. The matter is finalized and removed from the roll.

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H C JANUARY

JUDGE

I agree

_____

M TOMMASI

JUDGE

APPEARANCES

APPELLANT:	Metcalfe Beukes Attorneys Windhoek
RESPONDENT:	H Iipinge Of the Office of the Prosecutor-General, Windhoek.