

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 06/2021

In the matter between:

TAMSON TANGENI HATUIKULIPI

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Hatuikulipi v S* (CC 06/2021) [2022] NAHCMD 693 (27 December 2022)

Coram: MUNSU AJ

Heard: 13 - 15 July 2022, 23, 25, 30 - 31 August 2022, 1 September 2022, 10 - 14 October 2022, 12 December 2022

Delivered: 27 December 2022

Flynote: Criminal Procedure – Bail on new facts – Such facts must be new and relevant for purposes of the new bail application – The new facts must be such that they relate to, and change the basis on which bail was initially refused.

Summary: The applicant brought an application for bail on new facts. The application is opposed by the State. The applicant was arrested on 27 November 2019. He is indicted together with 27 others on charges ranging from racketeering, money laundering, conspiracy to commit crime, corruptly giving gratification for reward, fraud, theft, and fraud in relation to tax evasion.

The applicant initially applied for bail in the Magistrates Court. His application was dismissed. He appealed against the refusal of bail; however, his appeal was unsuccessful. He is now applying for bail on new facts. The new facts are that investigations are now complete, thus, there exists no threat of interference; that two cases have been joined and the disclosure runs into some 80 000 plus pages; that the applicant has been in detention for about two years between the time of his initial failed bail application and the current bail application whilst the trial is yet to commence; that the disclosure reveals that the State does not have a strong case against him; that the State added additional charges which were not canvassed in the initial bail application; and that his personal circumstances have deteriorated exponentially over the past two years since his last bail application.

The State opposes the granting of bail on the grounds that: the applicant is facing serious charges involving a criminal syndicate, and if found guilty, a lengthy custodial sentence will be imposed; that the State has a strong case against the applicant; that there is a strong possibility that he may interfere with state witnesses and the evidence; that it will not be in the interest of the public and the administration of justice for the applicant to be granted bail; and that there is a genuine concern that the applicant would abscond, particularly in light of the compelling evidence supporting the serious allegations against him.

Held that, on the authority of *Sheelongo v S* at para [10]: where an applicant relies on new facts which have come to the fore since the previous bail application, the court must be satisfied firstly, that such facts are indeed new and secondly that they are relevant for purposes of the new bail application.

Held that, the new facts must be such that they are related to, and change the basis on which bail was initially refused.

Held that, the facts set out by the applicant as new facts did not exist at the time of his initial bail application, entitling him to launch another bid to be released on bail.

Held that, the court is required to consider all the facts which the applicant has placed before the court, new and old, and decide on the totality of those facts.

Held that, the magistrate did not refuse bail on the basis of the likelihood of interference with investigations, thus, the fact that investigation is now complete has no impact upon the old facts.

Held that, a court considering a bail application must strike a balance i.e. weigh the necessity to protect the liberty of those who are presumed innocent until proven guilty against the interests of the proper administration of justice.

Held that, the grounds relied upon, being pre-trial incarceration, protracted trial, and deterioration of the applicant's personal circumstances, although new, they do not establish a new perspective that impacts on the old facts, considering the reasons upon which bail was refused.

Held that, the State made out a strong *prima facie* case against the applicant. Accordingly, the new fact that the disclosure reveals that the State has no *prima facie* case against the applicant has no impact on the old facts.

Held that, having taken into account all the facts placed before court, the new and old, the court is satisfied that the new facts did not establish a new perspective that impacts on the old facts. It is therefore not open to the court to admit the applicant to bail.

ORDER

1. The applicant's application for bail based on new facts is dismissed.
 2. The applicant is remanded in custody pending trial.
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JUDGMENT

MUNSU AJ:

Introduction

[1] The applicant, Mr. Tamson Tangeni Hatuikulipi brought an application for bail on new facts. The application is opposed by the State.

Background

[2] The applicant was arrested on 27 November 2019. He is indicted together with 27 others in the matter that has become known as the 'Fishrot Scandal'. The charges against him range from racketeering, money laundering under the Prevention of Organised Crime Act 29 of 2004, conspiracy to commit crime under the Anti-Corruption Act 8 of 2003 and the Riotous Assemblies Act 17 of 1956, corruptly giving gratification for reward in contravention of the provisions of the Anti-Corruption Act 8 of 2003, fraud, theft read with the provisions of the Criminal Procedure Act 51 of 1977, fraud in relation to tax evasion in contravention of the Riotous Assemblies Act 17 of 1956.

[3] The applicant initially applied for bail in the Windhoek Magistrates Court. His application was dismissed on 22 July 2020. He lodged an appeal to this court and same was dismissed on 26 February 2021. He is now before court with a fresh bail application on new facts.

[4] The new facts according to him are that investigations are now complete, thus, there exists no threat of interference; that case number CC 6/2021 and CC 7/2021 have been joined and the disclosure runs into some 80 000 plus pages; that he has been in detention for about two years between the time of his initial failed bail application and the current bail application whilst the trial is yet to commence; that the disclosure reveals that the State does not have a strong case against him; that the State added additional charges which were not canvassed in the initial bail application; and that his personal circumstances have deteriorated exponentially over the past two years since his last bail application.

[5] The State is opposing the granting of bail on the following grounds:

- a) That the applicant is facing serious charges involving a criminal syndicate, and if found guilty, a lengthy custodial sentence will be imposed.
- b) That the State has a strong case against the applicant.
- c) That there is a strong possibility that he may interfere with state witnesses and the evidence.
- d) That it will not be in the interest of the public and the administration of justice for the applicant to be granted bail.
- e) That there is a genuine concern that the applicant would abscond, particularly in light of the compelling evidence supporting the serious allegations against him.

Evidence in support of the new facts

[6] The applicant testified in support of the new facts upon which his bail application is premised. His evidence is briefly as follows:

Investigations are complete

[7] The applicant testified that he and his co-accused were informed during the criminal proceedings, in this court, that the investigations are complete. He was

provided with disclosure, including the indictment and a list of witnesses. Since being provided with the witness list, he has neither communicated nor interfered with any of the witnesses or the evidence of the State. Thus, there is no risk that he will interfere with the investigation or witnesses, more so when the evidence has been recorded and reduced to sworn affidavits.

Consolidation of two criminal matters

[8] The applicant testified that case number CC 6/2021 and CC 7/2021 have been joined. The disclosure constitutes about 90 arch lever files comprising 80 000 plus pages, a 144 page indictment; 44 page pre-trial memorandum, a 7 page summary of substantial facts and a witness list of 342 witnesses. The applicant testified that the disclosure envisages a protracted trial that will infringe on his constitutional right to a speedy trial. According to him, the trial will take up to 10 years, if not more before it is finalised.

[9] From the documents provided to the applicant, the ACC enlisted the help of several external consultants, including auditors like Deloitte. The applicant testified that in order to defend himself properly, he has to be able to fully and effectively consult specialists (including his own auditors) and his legal team, which he is unable to do while being held in custody.

[10] The applicant further testified that prison is a crushing environment, emotionally, mentally and psychologically. He testified that there are no adequate facilities in prison for proper preparation of his defence. He narrated that he cannot consult properly with his legal counsel in such an environment where attorney-client privilege is impossible to maintain.

[11] Given the voluminous nature of the disclosure and the charges the applicant is facing, he will need finances to retain his legal practitioners of choice, which he will not be able to do should he remain in custody.

[12] The applicant testified that there are limited facilities for consultation at the correctional facility where he is detained.

Pre-trial incarceration:

[13] The applicant testified that he has been in detention for more than two years since his initial bail application. Overall, he has been incarcerated for over three years, and his trial is yet to commence. He testified that interlocutory applications still appear to be imminent prior to commencement of the trial. There is currently a pending application by one of his co-accused for the recusal of the trial judge. He testified that this will delay the trial date even further. It was his testimony that at no stage did he bring any application which has resulted in any possible delay of the trial, yet he is caught up in the ongoing litigation and pays the penalty by remaining incarcerated without bail.

[14] Furthermore, the applicant testified that he is yet to answer to the pre-trial memoranda but he cannot, as one of the issues in the pre-trial report is whether they have secured sufficient funds to retain legal representatives. He testified that he does not have funds for legal representation for the trial nor does he have funds to pay his legal team for attending to the pre-trial memoranda due to his incarceration.

[15] Moreover, the applicant testified that the extradition of the Icelandic co-accused and Mr. Maren De Klerk are still outstanding which will delay the commencement of the trial with no date envisaged to secure the attendance of the fugitives from justice.

Strength of the State's case

[16] The applicant testified that the disclosure reveals that the State does not have a strong case against him. He pointed out that the disclosure reveals that one Mr. Willem Olivier, a witness called by the State in his initial bail application was dishonest in his testimony when he testified about how the applicant was introduced to Samherji representatives and their plans to access the Namibian Fishing industry.

[17] Contrary to what Mr. Olivier testified, Mr. Stefánsson, according to the applicant, does not state in his affidavit that there was a meeting at the farm of Mr. Esau, to plan how to access the fishing industry. He testified that there were no questions put to Mr. Olivier as the applicant was at that stage not privy to the affidavit of Mr. Stefánsson upon which Mr. Olivier based his false hearsay evidence.

[18] Further, the applicant testified that, contrary to the evidence of Mr. Olivier, Mr. Stefánsson states in his affidavit that he met Mr. Esau on few occasions but the details of the Namgomar project were not discussed.

[19] The applicant lastly testified that the disclosure does not reveal that he was involved in an illegal scheme or conspiracy with any of the co-accused to amend the law to sanction the award of fishing rights to non-right holders and in particular Fishcor.

Additional charges

[20] The applicant testified that during his initial bail application, he was charged with 6 counts, however, 11 charges have since been added to the indictment and he now stands accused of 17 counts.

Deterioration of personal circumstances

[21] The applicant testified that he has now been in custody for 2 years and 7 months (at the time of his evidence) during which period his assets have been placed under a provisional restraint order through an application brought by the Prosecutor-General. He further related that he has suffered irrecoverable damage since his arrest upon his tangible and intangible assets, His business reputation and family life have been shattered despite no guilty verdict being pronounced upon him.

[22] He testified that the separation from his two minor children has affected him emotionally and his minor children as he has not seen them since his arrest in November 2019. According to him, many moments have passed him, such as his

daughter's first day at school and their annual birthdays. He testified that he is not allowed access to see his minor children as an awaiting trial prisoner.

[23] Furthermore, the applicant testified that he is unable to care for his elderly mother of 77 years which is depressive. Worse, he is unable to care for his wife and minor children. He is further unable to honour the invoices of his legal representatives who are on the brink of withdrawal should they not receive payment.

[24] He testified that his five fish shops across the country which used to make him substantial monthly revenues are closed down. His employees who were earning enough to support themselves and their families are affected by the closure of the business. In his absence the business is unable to operate.

[25] The applicant testified that his tourist business namely, Zebra Travel and Tours CC lost 3 buses and the bank foreclosed on it during 2021 and auctioned the buses for arrear payments. The applicant remains responsible for the arrear payments to the value of the business loan. He testified that he intends to revive his tourism business.

[26] He testified that since his last bail application, he has been struggling to pay his monthly mortgage bonds on his properties, body corporate fees, and municipal accounts. He fears that the banks will foreclose on his properties. He has since been issued with summons for failure to make payments on some of his properties.

[27] The applicant's main concern is that he needs to work and earn a living prior to the commencement of the trial so as to cater for maintenance of his children, elderly mother, his wife, his debts and to ensure that he can retain his legal representatives in order to ensure that he has a fair trial.

Grounds on which the state opposes the granting of bail

[28] In opposition to the application for bail, the State led evidence of the lead investigations officer Mr. Andreas Kanyangela. Mr. Kanyangela testified that the investigations in the matter were carried out in conjunction with other stakeholders, such

as the Namibian police and Deloitte. Mr. Kanyangela narrated that the ACC obtained witness statements and other documentary evidence pertaining to the case.

Strong case against the applicant

[29] Mr. Kanyangela testified that the applicant and his co-accused committed offences in relation to fishing quotas allocated to Namgomar Pesca SA and Fishcor.

[30] Mr. Kanyangela testified that during 2011 Samherji, an Icelandic fishing company represented by Mr. Johannes Stefánsson and his colleagues came to Namibia with the intention of accessing the Namibian fishing industry. Despite engaging locals to assist them in securing fishing quotas, they were unsuccessful.

[31] Mr. Kanyangela testified that in October 2011 the applicant got married to the daughter of the Minister of Fisheries and Marine resources Mr. Bernard Esau. During November of the same year, one Mr. Nobert Rukoro introduced the applicant to Mr. Stefánsson of Samherji. At the meeting, the applicant showed photos from his wedding to demonstrate that he was in fact the Minister's son-in-law.

[32] Mr. Kanyangela testified that the applicant and his co-accused held several meetings to discuss how they could get access to the fishing quotas. The talks gave birth to the Namgomar project which was to be a vehicle to secure fishing quotas. The meetings were held in Namibia, Angola and Iceland during 2013 and 2014.

[33] According to Mr. Kanyangela, on 18 June 2014, the Minister of Fisheries and Marine Resources and his counterpart in Angola signed a memorandum of understanding (MOU). The two Ministers agreed to harvest resources under the MOU for the benefit of both countries (Namibia and Angola). In Namibia, a company called Namgomar Pesca Namibia (Pty) Ltd was established. This company was to form a joint venture with Namgomar Pesca SA (Angola).

[34] The witness testified that the allocation of quotas was agreed reciprocally. However, investigations reveal that only Namibia allocated quotas to Namgomar Pesca

SA (Angola). Investigations revealed that Namgomar Pesca SA was a non-existing company in Angola.

[35] According to Mr. Kanyangela, Namibia allocated fishing quotas to Namgomar Pesca SA (Angola) from July 2014 to 2019 amounting to 50 000 Mt worth about N\$ 150 million.

[36] Mr. Kanyangela testified that the letters of allocation of fishing quotas were addressed to Mr. Ricardo Gustavo who was the sole director of Namgomar Pesca Namibia (Pty) Ltd. Upon receipt of the quota allocations, Namgomar Pesca Namibia entered into usage agreements with ESJA Holdings a subsidiary of Samherji. Although the MOU was meant to benefit the people of Namibia and Angola, only the applicant and his co-accused benefited.

[37] Mr. Kanyangela testified that under the chairmanship of Mr. James Hatuikulipi, the applicant and his co-accused benefited from the proceeds of the fishing quotas meant for governmental objectives. Amounts of money were diverted to DHC Incorporated, a law firm of which Mr. Maren De Klerk was a director and shareholder. Some of the money diverted to DHC was paid to the applicant's entities.

[38] According to Mr. Kanyangela, the applicant benefited more than N\$ 75 million from fishing quotas in general, through both Namgomar and Fishcor.

Discussion

[39] Where an applicant relies on new facts which have come to the fore since the previous bail application, the court must be satisfied firstly, that such facts are indeed new and secondly that they are relevant for purposes of the new bail application.¹ The new facts must be such that they are related to and change the basis on which bail was initially refused.²

¹ See *Sheelongo v S* (CC 16/2018) [2020] NAHCNLD 51 (18 May 2020) at para [10]; *Kakurarume v S* (CC 6/2014) [2020] NAHCMD 532 (19 November 2020).

² See *S v De Villiers* 1996 (2) SACR 122 (T).

[40] I am satisfied that the facts set out by the applicant as new facts did not exist at the time of his initial bail application. Those facts are thus new facts entitling him to launch another bid to be released on bail. What I am required to do is to consider all the facts which the applicant has placed before the court, new and old, and decide on the totality of those facts.³

Investigations complete

[41] At the time of the applicant's initial bail application, the matter was still under investigation. Mr. Kanyangela testified that investigations are now complete and the matter is ready for trial. In light thereof, the applicant testified that there exists no threat of interference with investigations or witnesses.

[42] In his initial bail application, the court *a quo* ruled as follows:

'The State argued that if one of the group of the co-accused interfere, it benefits all of them and therefore this is a valid ground. However, that is not the question, the question is whether these particular applicants interfered or tried to. There is no evidence that the two applicants tried to interfere with investigations and therefore it is not a valid ground.'

[43] It is clear from the above that the learned magistrate did not refuse bail on the basis of the likelihood of interference with investigations. On the contrary, the finding by the magistrate on this issue appears to be in favour of the applicant. Thus, the fact that investigation is now complete has no impact upon the old facts.

Protracted trial, considered together with pre-trial incarceration and effect thereof

[44] The applicant contends that the consolidation of the two criminal matters has resulted in a voluminous disclosure consisting of thousands of pages. This, according to him establishes a protracted trial that will infringe on his right to a fair and speedy trial.

³ See *Shanghala v S* (CC 06/2021) [2022] NAHCMD 164 (01 April 2022); *S v Gustavo* (SA 58/2022) [2022] NASC 45 (02 December 2022).

[45] The applicant further contends that he has been in detention for more than two years between the time of his initial failed bail application in July 2020 and this current bail application whilst the trial is yet to commence.

[46] A court considering a bail application must strike a balance i.e. weighing the necessity to protect the liberty of those who are presumed innocent until proven guilty against the interests of the proper administration of justice. The seriousness of the offence and the strength of the State's case are two pertinent factors in this latter regard.⁴

[47] *S v Du Plessis and another*,⁵ the court held that:

‘Where it is shown on the evidence in bail applications that there is a strong *prima facie* case against a particular applicant for bail on very serious charges for which, if found guilty, a heavy sentence can be imposed then, generally speaking, the risk of an injustice inflicted on the accused will be diminished if he or she is not released on bail prior to the trial and the risk of prejudice to the State will increase if he or she is released on bail prior to trial.’

[48] In *Tjombe v The State*⁶ the court found that the period of incarceration did not constitute a new fact. The court held that the period of incarceration is a natural consequence of bail being denied. In *Shanghala v S*⁷ the court held that the fact that the applicants have spent more than two years in custody does not automatically entitle them to be admitted to bail, they must discharge the onus resting upon them.

[49] It appears from the State’s evidence that the matter is ready for trial and that any delays, *in casu*, are not occasioned by the State, but by the applicant’s co-accused.

[50] In any event, the grounds relied upon, being pre-trial incarceration, protracted trial, and deterioration of the applicant’s personal circumstances, although new, they do not establish a new perspective that impacts on the old facts. This is considering the basis on which bail was refused.

⁴ See *S v Gustavo* supra.

⁵ *S v Du Plessis and another* 1992 NR 74 (HC) at page 82.

⁶ *Tjombe v The State* (HC-MD-CRI-APP-CAL-2021/00077) [2021] NAHCMD 539 (19 November 2021).

⁷ *Shanghala v S* supra: footnote 1.

[51] The applicant's concern about the inadequate facilities for consultation at the correctional facility is a genuine concern that the authorities should look into. Our Constitution makes provision for a right to a fair trial.⁸ The embodiment of this right entails, among others, that persons accused of committing crime must be afforded an opportunity to prepare for the trial, including the opportunity to engage a legal practitioner of their choice.

[52] The officer in charge of the Windhoek Correctional Facility, Deputy Commissioner Armas informed the court that, although his facility has limited consulting rooms, arrangements can be made on request. I am also mindful that the bail inquiry is not concerned with the actions and omissions of the prison authorities.⁹

Prima facie case against the applicant

[53] In *Khoaseb v The State*,¹⁰ this court held that:

'It is trite that a bail application is not a trial itself. The prosecution does not have to prove beyond reasonable doubt that the Applicant is guilty at this stage of the proceedings. The requirement at this stage is for the prosecution to show through credible evidence that there is a strong prima facie case against the applicant.'

[54] Mr. Kanyangela narrated to court how the applicant is linked to the Namgomar project. According to him, the communication shows that the applicant was involved in the establishment of Namgomar. He was kept abreast on all the happenings including the creation of the Namgomar letterhead.

[55] Namgomar Pesca Namibia paid Erongo Clearing and Forwarding CC, an entity owned by the applicant an amount of N\$ 400 000. This amount, according to the applicant was paid by Mr. Gustavo to him as a reward for a client list he had provided to Mr. Gustavo. During cross-examination, the applicant was unable to mention a single

⁸ Article 12 of the Constitution.

⁹ *Matheus v The State* (CA 35/2016) [2016] NAHCMD 167 (13 June 2016); *S v Van Wyk* 2005 (1) SACR 41 (SCA).

¹⁰ *Khoaseb v The State* (5/2011) [2012] NAHC 78 (09 March 2012).

client that he introduced to Mr. Gustavo. According to Mr. Kanyangela, the applicant's entities benefited from the N\$ 39 Million that was paid to Namgomar Pesca Namibia.

[56] Mr. Kanyangela testified that the applicant was paid more than N\$ 57 Million from funds diverted to DHC, either directly or through other entities. The applicant explained that some of the funds he received were loans he had advanced to Mr. James Hatuikulipi, however, the State argues that the transactions show that as soon as he received such funds, he paid some of the money to entities owned by Mr. James Hatuikulipi, which defies the reason that the funds were loans.

[57] According to the investigations, the applicant benefited more than N\$ 75 Million from both Namgomar and Fishcor.

[58] According to the information contained in Mr. Stefánsson's affidavit, the consultancy agreements between the applicant and Samherji were dummy agreements made to cover the bribes paid to the applicant and his co-accused.

[59] I find that the State made out a strong *prima facie* case against the applicant. Accordingly, the new fact that the disclosure reveals that the State has no *prima facie* case against the applicant has no impact on the old facts.

[60] The learned magistrate found that the nature of the offences, the public interest and the administration of justice made it impossible for the court to grant bail to the applicant. The alleged offences are serious and involve a huge amount of money. Section 61 of the Criminal Procedure Act essentially authorises the court to decline bail in instances where a court considers that the interests of the public or the administration of justice justify the refusal of bail.¹¹

[61] In *Nghipunya v S*¹², this court held as follows:

'The days of distinguishing between the seriousness of monetary crimes and violent crimes can no longer be seen to be different in bail applications. Whether the crimes involve

¹¹ *S v Gustavo* supra, footnote 3.

¹² *Nghipunya v S* (HC-MD-CRI-APP-CAL-2020/00077 [2020] NAHCMD 491(28 October 2020) para 44.

public funds or a physical attack on a member of society, if the circumstances permit, the seriousness thereof must be taken into account when considering bail. In this matter, the misappropriation of public funds affects every individual of the Namibian public and needs to be seen for the detestable crime that it is. This together with the factors outlined above are essentially enough to arouse a court to the view that the administration of justice does not merit the release on bail of an applicant under these circumstances.'

Conclusion

[62] Having taken into account all the facts placed before court, the new and old, I am satisfied that the new facts did not establish a new perspective that impacts on the old facts. It is therefore not open to me to admit the applicant to bail.

[63] In the result, it is ordered as follows:

1. The applicant's application for bail based on new facts is dismissed.
2. The applicant is remanded in custody pending trial.

D.C. MUNSU
ACTING JUDGE

APPEARANCES

FOR THE APPLICANT: R. Metcalfe, assisted by F. Beukes.
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FOR THE RESPONDENT: H. Iipinge, assisted by E. Marondedze.
Office of the Prosecutor-General, Windhoek