

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: CC 06/2021

In the matter between:

BERNHARDT ESAU

1ST APPLICANT

NIGEL VAN WYK

2ND APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Esau v S* (CC 06/2021) [2023] NAHCMD 819 (12 December 2023)

Coram: MUNSU J

Heard: 12 - 21 December 2022, 27 - 28 February 2023, 1 -3 March 2023, 11 - 13 April 2023, 2 - 3 May 2023, 22 - 26 May 2023, 23-31 August 2023, 1 September 2023, 9 October 2023, 24 November 2023

Delivered: 12 December 2023

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 applicants brought an application for bail on new facts. The application is opposed by the State. The applicants were arrested during November and December 2023. They are indicted on charges ranging from racketeering, money laundering, conspiracy to commit crime, corruptly giving gratification for reward, fraud and theft. The second applicant is also charged with assault on a member of the police in contravention of provisions of the Police Act 19 of 1990, unlawful possession of ammunition in contravention of provisions of the Arms and Ammunition Act 7 of 1996.

The applicant initially applied for bail in the Magistrates Court. Their applications were dismissed. They are now applying for bail on new facts. The new facts are that case no: CC6 and CC7 of 2021 have been joined which will result in a protracted trial considering the number of State witnesses; that they have been in detention for over two years and five months since their initial bail application failed whilst the trial is yet to commence; that the State does not have a strong case against them; that their personal circumstances have deteriorated exponentially over the past years since the last bail application. The first applicant further claims that, his name and credentials as Minister of Fisheries and Marine Resources have been falsely used by some of his co-accused; that his medical condition deteriorated while in custody and since his last bail application. The second applicant's further grounds are that, it is not in the interest of the public and the administration of justice to keep him in custody; that investigations are finalised, thus, there exist no fear of interference.

The State opposed the granting of bail on the grounds that: It will not be in the interest of the public and the administration of justice for the applicants' to be granted bail; that the applicants are facing serious charges; that the State has a strong case against the applicants; that there is a likelihood that the applicants will interfere with witnesses and the evidence; that there is a likelihood that the applicants will abscond. There is another ground of objection against the second applicant, being that he has a propensity to commit similar offences while on bail.

Held that, in applications for bail based on new facts, the court considers the facts which did not exist as at the time of hearing of the earlier bail application and then consider all

the facts which an accused has placed before the court, new and old, and decide on the totality of those facts.

Held that, the period of time of more than two years the applicants spent in custody awaiting trial after the refusal of their bail application amounts to a new fact entitling the court to consider the new fact together with all other evidence on record to determine if the applicants have discharged their onus of proof on a balance of probabilities to be granted bail.

Held that, the period of time spent in custody pending trial has to be considered together with other factors, such as the seriousness of the charges and strength of the case against the applicant, the reasons for any delay etc.

Held that, in respect of the first applicant, the new fact raised, considered together with all the evidence on record did not change the position on which bail was initially refused.

Held that, the evidence presented in the current bail proceedings coupled with the evidence led at the initial bail hearing, does not persuade the court to reach a different conclusion than that reached in the initial bail hearing.

Held that, it is has not been alleged that the second applicant was part of the Namgomar and or Fishcor scheme.

Held that, the magnitude of the offences and the severity of the sentence he may receive on conviction, is unlikely to be the same as for those of his co-accused.

Held that, regard being had to his extent of involvement in the matter, the period he has been in custody, the sentence he is likely to receive if convicted, the fact that investigations are complete, it is in the interest of the administration of justice that he be admitted to bail.

ORDER

1. The first applicant's application for bail based on new facts is dismissed.
2. The applicant is remanded in custody pending trial.
3. The second applicant is granted bail in the amount of N\$ 20 000 (Twenty Thousand Namibia Dollar) on the following conditions:
 - 3.1. He must hand in his passport to the investigating officer and should not obtain any travelling documents until the finalisation of this case;
 - 3.2. He must report himself three times a week, on Mondays, Wednesdays and Fridays between the hours of 08h00 and 18h00 to the Rehoboth Police Station;
 - 3.3. He must not visit any of his co-accused at the facility where they are detained.
 - 3.4. He is not allowed to leave the district and area of Rehoboth without written permission from the investigating officer;
 - 3.5. He must not interfere with witnesses in the matter;
 - 3.6. He must attend court on the date that his case is remanded to and every subsequent date of postponement thereafter.

JUDGMENT

MUNSU J:

Introduction

[1] This is an application for bail on new facts. The applicants are, Mr Bernhard Esau (first applicant) and Mr Nigel Van Wyk (second applicant). The application is opposed by the State.

Background

[2] The first applicant was arrested on 27 November 2019, while the second applicant was arrested on 14 December 2019. They face several charges under the Anti-Corruption Act 8 of 2003 and the Prevention of Organised Crime Act 29 of 2004, as well as theft, defeating or obstructing or attempting to defeat or obstruct the course of justice.

[3] The first applicant also faces charges of fraud, while the second applicant is further indicted on charges of assault on a member of the police in contravention of s 35(1) of the Police Act 19 of 1990, unlawful possession of ammunition in contravention of provisions of the Arms and Ammunition Act 7 of 1996 and a further charge of theft.

[4] The applicants were both denied bail in the Windhoek Magistrates Court. They have both applied to be released on bail on new facts.

The alleged new facts

[5] The new facts relied on by the applicants are as follows: Case no: CC6 and CC7 of 2021 have been joined which will result in a protracted trial considering the number of State witnesses (342); they have been in detention for over two years and five months since their initial bail application failed whilst the trial is yet to commence; that the State does not have a strong case against them; that their personal circumstances have deteriorated exponentially over the past years since the last bail application.

[6] The first applicant further claims that, his name and credentials as Minister of Fisheries and Marine Resources have been opportunistically and falsely optimised by some of his co-accused; that his medical condition deteriorated while in custody and since his last bail application. The second applicant's further grounds are that, it is not in the interest of the public and the administration of justice to keep him in custody. Lastly, he states that investigations are finalised, thus, there exist no fear of interference. Initially, the first applicant also relied on this ground, but abandoned it at the hearing of

the matter, together with the ground that the State added charges which were not canvassed in the initial bail application.

State's grounds of opposition

[7] The State is opposing the granting of bail on the grounds that: It will not be in the interest of the public and the administration of justice for the applicants' to be granted bail; that the applicants are facing serious charges; that the State has a strong case against the applicants; that there is a likelihood that the applicants will interfere with witnesses and the evidence; that there is a likelihood that the applicants will abscond. There is another ground of objection against the second applicant, being that he has a propensity to commit similar offences while on bail.

Evidence in support of the new facts

In respect of the first applicant

[8] The first applicant testified about his advanced age and the effect the detention has had on him and his family. He informed the court that he has not been able to see his wheelchair-bound daughter since his arrest as she cannot visit him due to the inadequate facilities such as ramps at the correctional facility.

[9] The first applicant further testified that there has been breakings, as well as theft of his livestock at the farm. He stated that his farm is no longer a productive unit since his incarceration. He also spoke about criminal activities at his parental home in Swakopmund. He claims that his absence is the reason these incidents happen. It was his further testimony that all his assets, fixed and current have been restrained. Furthermore, he informed the court that he has been unable to honour his financial obligations with his legal team, Agribank, short-term insurance policies and family support.

[10] As regards his medical condition, the first applicant testified that his medical team discovered that he has cardiac arthritis, hypertension, coronary artery disease, putting him at risk of a heart attack, shortness of breath, and chest discomfort. They also said that he has been diagnosed with these conditions and that his therapy will consist of

long-term medication, close cardiac follow-up, and lifestyle modification. On occasion, he experienced lack of concentration and attentiveness, and that he has been admitted to Lady Pohamba Hospital on several occasions.

[11] It was his testimony that the disclosure in the matter is bulk, and envisages a protracted trial that will infringe on his right to a fair and speedy trial. He added that the environment at the facility is not conducive for consultations considering the voluminous nature of the documents.

[12] Regarding the strength of the case, the first applicant pointed out that the disclosure reveals that Mr Olivier was dishonest in the initial bail application, as there was no meeting held at his farm to discuss how to gain access to the fishing industry. He recounted 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 Marine Resources Act, 2000 to enable fishing rights to be awarded to non-right holders and in particular Fishcor.

Second applicant

[13] He testified that he was formerly employed by the government as a Senior Legal Clerk at the Attorney General's office. There he got to know Mr Sakeus Shanghala who at the time got appointed as the Attorney General. He testified that prior to that, he never knew Mr Shanghala.

[14] The second applicant recounted further that he resigned from government on 31 October 2017, and on 01 November 2017, he started working for Olea Number Nine CC (Olea) as General Manager, earning a salary of N\$ 25 000. He stated that the members with interest in Olea are Mr James Hatuikulipi and Mr Sakeus Shanghala. His main duties were to run the affairs of farm Dixie.

[15] He narrated that the farm was bought during the year 2016, however, the buildings were dilapidated. So, the idea was to renovate the structures. From November 2017 to 2018, he received petty cash into his FNB bank account. According to him, he

raised a concern to his employer that such arrangement was going to lend him in trouble with Inland Revenue. He was then advised to open a bank account at Bank Windhoek where Olea held a bank account. Money for petty cash was paid into his bank account held with Bank Windhoek.

[16] According to the second applicant, he would receive payments and would use the funds as directed. He would then make a summary of how money would have been spent.

[17] In response to the allegation of obstruction, the second applicant explained that he had been told by Mr Shanghala and Mr Hatuikulipi that they would depart the farm early in the morning. Therefore, when he told ACC authorised officers that the two were not present on the farm, he believed that they had departed early. He denied resisting or assaulting the ACC officers. He pointed out that he could not have wrestled the ACC officials, who are significantly larger than him, because he was limping at the time and had a "metal plate" in his leg.

[18] He added that the impact of his incarceration is such that his wife and children are now dependent on friends and family for help and support in repaying the vehicle loan and mortgage bond.

[19] He stressed that, even at his initial bail application Mr Olivier was of the opinion that he is not a flight risk and was unlikely to interfere with investigations. He testified that it is clear from the indictment that he is not part of the syndicate. He concluded that he is being charged with individuals he never knew before.

Evidence in opposition

[20] The State led evidence of the lead investigating officer Mr Andreas Kanyangela. Mr Kanyangela testified that the first applicant acted with a common purpose together with his co-accused in order to enter into a memorandum of understanding (MOU) with his Angolan counterpart in order to benefit his co-accused and Samherji group of companies.

[21] He recounted that the whistleblower Mr Johannes Stefansson provided an affidavit in which he narrates the events that took place from December 2011 when the first applicant's son in law, Mr Tamson Hatuikulipi was introduced to him. Mr Stefansson later met the first applicant and the co-accused.

[22] Mr Kanyangela testified about the relationship between the co-accused and the interests they have in several entities they jointly own or are trustees. He related that, at the time, the first applicant, as Minister of Fisheries and Marine Resources did not have powers to allocate quotas to non-right holders. It was his testimony that the first applicant and his co-accused came up with the idea of a bilateral agreement with Angola through which quotas were allocated for the benefit of the members of the syndicate. According to Mr Kanyangela, it was established that the company through which the quotas were allocated (Namgomar Pesca SA) was a non-existent company in Angola. He further testified that the proceeds from the quotas were paid to Namgomar Pesca Namibia and further distributed to entities in which the co-accused had interest such as Grey Guard Investments, Erongo Clearing and Forwarding CC, Otuafika Logistics CC, and Otuafika Investment CC.

[23] Mr Kanyangela went on to say that the first applicant, in July 2013 requested for permission from the President to travel to Angola. Attached to the letter was a list of people who would accompany him, and one of them was Mr Sakeus Shanghala who at the time was the chairperson of the Law Reform and Development Commission. According to Mr Kanyangela, the technocrats of the Ministry of Fisheries and Marine Resources were left out in the Angola trip. Letters, emails and minutes in relation to the Angola bilateral agreement were produced in evidence.

[24] On the Fishcor matter, Mr Kanyangela testified that Mr Shanghala through a text message recommended Mr James Hatuikulipi as candidate for Fishcor chairmanship. This according to Mr Kanyangela was done contrary to the provisions of the Fishcor Act which provides for the appointment of the chairperson by members of the board of directors and not the Minister. Mr Kanyangela recounted that after his appointment, Mr James Hatuikulipi forwarded his appointment letter to his cousin Mr Tamson Hatuikulipi,

who is the son in law to the first applicant, as well as to Mr Shanghala, who is his business partner and one who recommended his appointment and to Mr Johannes Stefansson, a member of the Samherji group, which subsequently benefited from governmental objective quotas awarded to Fishcor.

[25] It was Mr Kanyangela's testimony that quotas for governmental objectives were allocated to Fishcor and the latter entered into usage agreements with the Samherji group of companies. He narrated that fees meant for governmental objectives were diverted to the law firms DHC and Sisa Namandje and Co and evidence shows that the funds were not utilised for governmental objectives, but were laundered to entities where the co-accused have interest for their personal benefit.

[26] Mr Kanyangela further testified that through DHC, the first applicant benefited from proceeds of governmental objective quotas. This is so because the first applicant and his wife are members of Otjiwarongo Plot 51 CC. The evidence show that Otjiwarongo plot 51 was purchased with funds emanating from Celax and DHC for N\$ 1, 218, 445.00.

[27] In respect of the second applicant, Mr Kanyangela testified that authorised officers from the ACC drove to farm Dixie in order to arrest Mr Shanghala and Mr Hatuikulipi. There they were met by the second applicant who informed them that Mr Shanghala and Mr James Hatuikulipi were not there as they left early in the morning. The officers could not agree. As Mr Cloete tried to open the door to the dwelling, the first applicant immediately entered the house and tried to close the door preventing them from entering. In the meantime, Mr Shanghala and Mr James Hatuikulipi were inside the house. This led to the arrest of the second applicant.

[28] Mr Kanyangela further testified that during December 2019, search warrants were obtained in respect of Mr Shanghala and Mr James Hatuikulipi's houses. However, they only managed to search Mr James Hatuikulipi's house. As for Mr Shanghala's house, the ACC officers, according to Mr Kanyangela were informed that the key to the house was with one lady in the north of the country. The ACC officers decided to observe movements to Mr Shanghala's house. On 14 December 2019, the

second applicant went to the house, and as he was reversing to drive out, the officers blocked him. It was found in his possession, bags containing documents, some of which relate to the case.

[29] Mr Kanyangela informed the court that there were funds paid into the second applicant's bank account from entities of interest in the matter. He further stated that the second applicant would withdraw the funds, and sometimes made purchases on behalf of Mr Shanghala and Mr James Hatuikulipi.

[30] Furthermore, Mr Kanyangela testified that the second applicant's employer Olea benefited from funds meant for governmental objectives. And according to him, the second applicant was well aware that Olea was not conducting any business to generate income, nonetheless, he still received the funds, even after the arrest of Mr Shanghala and Mr James Hatuikulipi.

Submissions on behalf of the applicants.

[31] Mr Beukes, on behalf of the first applicant submitted that the State failed to particularise on record the grounds on which bail is opposed in the interest of the public or administration of justice. He submitted that the court should consider that the first applicant is now over the age of 65, well beyond the country's life expectancy. It was further submitted that the first applicant will not be in a position to instruct a legal practitioner of his choice should he remain in custody. Mr Beukes urged the court to consider the fact that the trial may take many years to complete. He emphasised the inadequacy of the facilities where the first applicant is being detained. Mr Beukes contended that the period the first applicant has been in detention is a new fact constituting sufficient ground for the granting of bail.

[32] In addition, Mr Beukes argued that Mr Olivier misled the magistrate who heard the initial bail application, when he testified that the first applicant was part of the discussions on the setting up of the Namgomar scheme. Furthermore, it was submitted that there was no shred of evidence that shows that the applicant was involved in the

illegal scheme that funds meant for governmental objectives be paid to DHC and or Celax.

[33] Moreover, Mr Beukes contended that the first applicant's ill health having deteriorated exponentially since his last bail application is a new fact that the court should consider.

[34] Mr Siyomunji submitted on behalf of the second applicant that the disclosure made by the State exonerate the second applicant in so far as any of the predicate offences are concerned. He submitted that there was nothing clandestine about the items (computer monitor, a power supply and various other documents) which were found in the possession of the second applicant. The monies he received which is N\$ 1.9 million include his salary. In any event, he gave an account of every cent, Mr Siyomunji submitted.

[35] Mr Siyomunji argued that the fact that the State offered the second applicant a plea bargain for him to plead guilty to common law obstruction and that they would drop all other charges, shows that the State does not have a strong case against him.

[36] The long and short of Mr Lutibezi's submissions on behalf of the State is that, it will not be in the interest of the public and the administration of justice to release the applicants on bail. He specifically pointed out aspect of the case that tend to show that the State has a *prima facie* case against the applicants.

Discussion

[37] In applications for bail based on new facts, the court is required to consider the facts which did not exist as at the time of hearing of the earlier bail application and then consider all the facts which an accused has placed before the court, new and old, and decide on the totality of those facts.¹ The new facts must be such that they are related to and change the basis on which bail was initially refused.²

¹ *Shanghala v S* (CC 06/2021) [2022] NAHCMD 164 (1 April 2022); *S v Gustavo* (SA 58/2022) [2022] NASC 45 (02 December 2022); *Noble v The State* (CA 02/2014) [2014] NAHCMD 117 (20 March 2014).

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

[38] In *S v Gustavo*³, the court held that, in dealing with applications for bail, a court engages in a balancing exercise, by balancing the need to preserve the liberty of individuals presumed innocent until proven guilty and the interest of the due administration of justice on the other hand.

[39] The facts, especially as they relate to the applicants' personal circumstances were already placed before and considered by the magistrate. However, at the time, investigations were not yet completed and the State had not yet disclosed. The proceedings in the court *a quo* show that the State had listed the grounds on which bail was opposed. The fairly recent decision in *Nghipunya v Minister of Justice*⁴ has made the position clearer. It cannot be said that the applicants were in the dark as to the reasons that bail was opposed.

[40] In *Ali Moussa v The State*⁵ found that the period of two years and nine months that the applicant spent in custody pending trial after his third unsuccessful bail application, was a new fact in the subsequent bail application.

[41] It follows that the period of time of more than two years the applicants spent in custody awaiting trial after the refusal of their bail application amounts to a new fact. This entitles this court to consider the new fact together with all other evidence on record to determine if the applicants have discharged their onus of proof on a balance of probabilities to be granted bail.

[42] Bail was refused on the basis that it was not in the interest of the public and the administration of justice to admit the applicants to bail. In this application for bail on new facts, the first applicant raised as a new fact, his medical condition.

³ *S v Gustavo* (SA 58/2022) [2022] NASC 45 (02 December 2022).

⁴ *Nghipunya v Minister of Justice* (HC-MD-CIV-MOT-GEN-2021/00343) [2022] NAHCMD 510 (14 October 2022).

⁵ *Ali Moussa v The State* (CA 105/2014) [2015] NAHCMD 21 (11 February 2015).

[43] I can do no better than to refer to the decision of *Samahina v The State*⁶ wherein Hoff J agreed with what was said in *S v Mpozana*⁷, thus:

'one whose detention has been pronounced lawful and in the interests of justice cannot simply resort to a further bail application merely because he has been detained under inhumane and degrading conditions or on the ground that his right to consult with a doctor of his own choice has been infringed. It is, however, available to such person firstly to apply to the prison authorities concerned and call upon them to remedy whatever complaints he/she has with regard to the conditions of his/her detention. Should the prison authorities fail to remedy such complaints, it is available to the detainee concerned either to challenge the detention before a court of law as being unconstitutional or obtain a court interdict to force the prison authorities to comply with the law.'⁸

[44] The applicants further raised as a new fact the length of time that they have been in custody while the trial is yet to commence. The State submitted that this ground has become inconsequential given the fact that trial dates have been set. I agree. The State added that, it is appalling for the first applicant to allege that there is no evidence to suggest that he is the reason for the delay in commencement of the trial, when he is the same person who states in the heads of argument that his lawyers have withdrawn and he needs funds to retain them.

[45] In addition, the period of time spent in custody pending trial has to be considered together with other factors, such as the seriousness of the charges and strength of the case against the applicant, the reasons for any delay etc. For instance, it was stated in *Holland v S*⁹:

'The length of time that a person is in custody awaiting trial and the reason for the delay are factors to be taken into account in the overall assessment as to whether it is in the interests of justice that the accused person be released on bail...In this instance the fact of the detention and the fact that the trial has been subject to various delays... fall to be considered in the light of the broader attack upon strength of the state case...In the event that it is found that the state case is established to be exceptionally weak and that there is a balance of probability which

⁶ *Samahina v The State* (CA 77/2014) [2014] NAHCMD 291 (07 October 2014).

⁷ *S v Mpozana* 1998(1) SACR 40 (Tk) at 45f-g.

⁸ At 45F-G.

⁹ *Holland v S* (CC 11/2016) [2016] ZAECPE HC 49 (2 September 2016).

favours a finding that the applicant is likely to be acquitted, then in that event the length of detention will weigh heavily in favour of an order releasing the applicant on bail. The converse is equally true. In the event that it is found that the applicant has not discharged the onus which rests upon her to establish that the balance of probabilities favours a finding that she is likely to be acquitted at trial, then period of detention will weigh less heavily in favour of admitting the applicant to bail.'

[46] In *Helena Botha v State*¹⁰, the court held that our case law is abundantly clear that the nature of the crime charged and the strength of the state's case are extremely relevant at the stage when bail is considered.

[47] It is trite that the requirement in bail applications is for the prosecution to show through credible evidence that there is a strong prima facie case against the applicant.¹¹

[48] Although the first applicant contended that the State does not have a strong case against him, the evidence presented show otherwise. Disclosure having been availed, the applicant became aware of the allegations about the meetings which were held in Angola, the documents prepared in respect of the Angola MOU etc. Him being the line Minister at the time, he does not deny that an illegal operation took place, but that his name had been used by his co-accused.

[49] Exhibit Q is a letter prepared by Mr Shanghala and Mr Antonio Santos of Angola, addressed to the two Ministers of Fisheries for Namibia and Angola on letter heads of the two countries. Mr Shanghala and his counterpart were presenting to the two Ministers the setting up of Namgomar Pesca SA in Angola. The Ministers were also requested to designate the entity under the laws of the two countries and issue it with access to the marine resources. The first applicant stated during the proceedings, that the nomination of Namgomar Pesca SA was based on the recommendation contained in the letter.

[50] Despite the first applicant stating that he never had any interaction with Mr Shangala, and that he never delegated him to perform any functions of the Ministry, as

¹⁰ Charlotte Helena Botha v The State CA 70/95, unreported judgment delivered on 20 October 1995 at page 29.

¹¹ See *Khoaseb v The State* (5/2011) [2012] NAHC 78 (09 March 2012).

well as him agreeing with the then Attorney-General's statement that it was '*highly irregular for Mr Sakeus Shangala, by then as Chairperson of the Law Reform and Development Commission to write such document purporting to represent the position of the Namibian Government*, he nonetheless referred the said letter to the Permanent Secretary, with the knowledge that such letter contained falsehoods. He subsequently nominated Namgomar Pesca SA, which was subsequently issued with quotas based on the false information contained in Mr Shanghala's letter.

[51] The first applicant testified that the allocation of quotas are made to Namibian registered entities, however, he went ahead and approved allocation of quotas to Namgomar Pesca SA with an address in Angola. In addition, the first applicant testified that to his knowledge, there was no Namibian shareholder Namgomar Pesca Namibia, yet in a letter dated 7 July 2014 to employees of the Ministry, he stated that quotas were allocated to a joint venture. The evidence revealed that Namgomar Pesca SA was a non-existent company, while Namgomar Pesca Namibia was owned by an Angolan company Namgomar Pesca Limitada.

[52] On the Fishcor matter, the same individuals still feature. Mr Shanghala recommended to him the appointment of Mr James Hatuikulipi as Board chairperson. Upon being appointed, Mr James Hatuikulipi forwarded his appointment letter to the same individuals as pointed out earlier.

[53] The first applicant is also linked to the Fishcor matter through Otjiwarongo plot 51, which was purchased for 1, 2 million, using funds from Celax and DHC. Accordingly, I find that the State has established a *prima facie* case against the first applicant on what appears to be serious charges.

[54] The legislature did not define what constitutes public interest or administration of justice. It has been left to the courts to interpret what constitutes public interest or interest of administration of justice. The court in *Shaduka v State*¹² emphasised that since the enquiry is now wider a court will be entitled to refuse bail in certain circumstances even where there may be a remote possibility that an accused will

¹² *Shaduka v State* Case No. CA 119/2008, Unreported judgment of the High Court of Namibia, delivered on 24 October 2008.

abscond or interfere with the police investigations. The crucial criterion is thus the opinion of the presiding officer as to whether or not it would be in the interest of the public or the administration of justice to refuse bail.

[55] In *Boois v S*¹³ the court reasoned that if an accused is charged with a serious case and if convicted, a substantial period of imprisonment is likely to be imposed; such factor alone entitles the court to refuse bail based on public interest or administration of justice.

[56] In respect of the first applicant, I find that the new fact raised, considered together with all the evidence on record did not change the position on which bail was initially refused. The evidence presented in the current bail proceedings coupled with the evidence led at the initial bail hearing, does not persuade me to reach a different conclusion than that reached in the initial bail hearing.

[57] As for the second applicant, it has not been alleged that he was part of the Namgomar and or Fishcor scheme. It seems to me that his involvement was as a result of his employment with Olea. According to him, he never knew that Mr Shangala and Mr James Hatuikulipi may have been involved in illegal activities. He placed on record that his relationship with them is only on the basis of employer-and-employee relationship. He presented into evidence his contract of employment. He further informed the court that the payments he received were for the benefit of his employer as he took the court through documents in quest to demonstrate just that.

[58] Thus, the magnitude of the offences and the severity of the sentence he may receive on conviction, is unlikely to be the same as for those of his co-accused. Although he has a case to answer at trial, regard being had to the extent of his involvement in the matter, the period he has been in custody, the sentence he is likely to receive if convicted, the fact that investigations are complete, it is my considered view that it is in the interest of the administration of justice that he be admitted to bail.

The order:

¹³ *Boois v S* (CC 08/2016) [2017] NAHCMD 85 (16 March 2017)

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

1. The first applicant's application for bail based on new facts is dismissed.
2. The first applicant is remanded in custody pending trial.
3. The second applicant is granted bail in the amount of N\$20 000 (Twenty Thousand Namibia Dollar) on the following conditions:
 - 3.1 He must hand in his passport to the investigating officer and should not obtain any travelling documents until the finalisation of this case;
 - 3.2 He must report himself three times a week, on Mondays, Wednesdays and Fridays between the hours of 08h00 and 18h00 to the Rehoboth Police Station;
 - 3.3 He must not visit any of his co-accused at the facility where they are detained.
 - 3.4 He is not allowed to leave the district and area of Rehoboth without written permission from the investigating officer;
 - 3.5 He must not interfere with witnesses in the matter;
 - 3.6 He must attend court on the date that his case is remanded to and every subsequent date of postponement thereafter.

D C MUNSU
Judge

APPEARANCES

FOR THE FIRST APPLICANT: F Beukes.
Of Metcalfe Beukes Attorneys, Windhoek

FOR THE SECOND APPLICANT: M Siyomunji
Of Siyomunji Law Chambers, Windhoek

FOR THE STATE: C Lutibezi, assisted by H. lipinge
Of the Office of the Prosecutor-General.