CASE NO.: CA 30/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JACOBUS ADRIAAN PIENAAR **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **MULLER, J**

Heard on: 22 September 2010

Delivered on: 05 October 2010

BAIL APPEAL JUDGMENT

MULLER, J.: [1] This is an appeal against the refusal of bail for the Appellant on 2 occasions, namely on 14 December 2009 and 29 April 2010, respectively. The Appellant gave notice of appeal against both such refusals on 10 May 2010 in which he included his grounds of appeal. Earlier the Appellant had filed a notice of appeal which was apparently against the December 2009 refusal of bail. Some grounds or reasons for appeal were contained in that notice, but the Appellant's main complaints at that stage seem to be the unavailability of the

record of that bail hearing in the notice of appeal dated 10 May 2010. Both the appeals seem to be incorporated in one Notice and the grounds set out therein are consequently the grounds of appeal against both decisions by the same Magistrate, who heard both bail applications. I shall refer to those grounds later herein.

[2] Before I deal with the appeal set down for hearing on 22 September 2010, it is necessary to say something about the manner in which the State has handled this appeal. A date for the hearing of this appeal was specially arranged during the Court recess on 11 August 2010, but on that date Mr Kuutondokwa, who appeared for the State, informed the Court that he was given the appeal only minutes before it was due to commence. Consequently, he was unable to argue the appeal. It must be mentioned that the appeal documents comprise of 2 volumes. Understandably the Appellant was not amused to say the least. He is in custody since December 2009 and was fully prepared to argue his appeal. In the circumstances, however prejudicial to the Appellant, the Court had no choice than to postpone the appeal to a later day. These circumstances were compounded by the fact that it was in the Court recess and an effort was made to set the appeal down for hearing at the soonest date that I would be available. Reluctantly, I postponed the appeal to the 22nd September 2010 and ordered the State to file its heads of argument and serve it on the Appellant not later than 31 August 2010. The Court expressed its dissatisfaction with the conduct of the State to Mr

Kuutondokwa, who is not to blame, and made it clear that if the State does not file its heads of argument in time and/or is not ready to argue the appeal on 22 September 2010, the appeal shall still be heard. The Appellant confirmed that the document in his handwriting with the heading "Appellants Heads of Argument", dated 22 June 2010, is indeed his heads of argument.

[3] On 22 September 2010 the Mr Heathcote, assisted by Ms Van Der Merwe, appeared on behalf of the Appellant and Mr Small represented the State. The State's heads of arguments had been filed in time as stated above and Mr Heathcote filed additional heads. Both Mr Heathcote SC and Mr Small amplified their respective heads with oral submissions.

[4] It is appropriate to set out the law applicable to bail appeals at this juncture. The Appellant's appeal is brought in terms of S65 of the Criminal Procedure Act, no. 51 of 1977 (CPA), as amended and applicable to Namibia. S 65(4) of the CPA states the following:

> *"The court or judge hearing the appeal shall 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 or his opinion the*

lower court should have given."

[5] The *locus classicus* in respect of bail appeals is the case of *S v Barber* 1979(4) SA 218 (D & CLD) where Hefer J, as he then was, formulated the powers of an appeal court in respect of bail as follows at 220E-F:

> *"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's exercise of his direction. 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."*

(Also S v De Abreu 1980 (4) 94 (W) at 96H – 97A). In *S v Du Plessis* 1992 NR 74 (HC) at 78A-E O'Linn J (with Frank J concurring) approved what Hefer J has said in the *Barber* case *supra*, and further quoted with approval Hefer J's reasons for that decision. Similarly, this court in a bail appeal in *S v Timotheus*_1995 NR 109 (HC) on 112J -113C repeated with approval the enunciation of Hefer J in the *Barber* case *supra*. With regard to the likelihood of an accused absconding if bail is granted, O'Linn J referred to a list of considerations as formulated by Mahomed J in *S v Acheson* 1991(2) SA 805 (Nm), 1991 NR1 (HC) at 19E-20F. (*S v Du*

Plessis, *supra* at 86 E-87C).

[6] Mohamed J also dealt in the *Acheson* case with the primary importance of the Namibian Constitution and the rights enshrined therein when the granting of bail is considered. He's formulation in this regard had often been followed:

> *The law requires me to exercise a proper discretion having regard, not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990.*
>
> *The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside over and permeate the processes of judicial interpretation and judicial discretion.*
>
> *Crucial to that tenor and that spirit is its insistence upon the protection of personal liberty in art 7, the respect for human dignity in art 8, the right of an accused to be brought to trial within a reasonable time in art 12(1)(b) and the presumption of innocence in art 12(1)(d).*
>
> *I think Mr Grobbelaar was correct in submitting that I should have regard to these provisions in exercising my discretion. They constitute part of the*

constitutional culture which should influence my discretion. No judicial officer should ignore that culture, where it is relevant, in the interpretation or application of the law or in the exercise of a discretion.
(*S v Acheson, supra*, 9J – 10C)

[7] In the application of the relevant section of the CPA, it should be kept in mind that the CPA, as applicable in Namibia, has been amended since Namibia's independence, including several sections concerning bail. The Criminal Procedure Amendment Act, no 5 of 1991 amended several sections regarding bail, namely sections 59(1)(a), 60(1), 61, 68(3), 72(1)(a), 307(2)(a), as well as Schedule 2, Part III of the Principal Act. Also in South Africa the CPA was amended materially in regard to bail. The old South African S 60(1), which is basically the same as our S 60(1), has been substantially altered by several amendments to it since 1995. The new amended S 60 of the CPA in South Africa now contains 14 subsections with very important provisions regarding bail. The constitutionality of some of these subsections, eg. subsections (11) and (11B) have been tested in the South African Constitutional Court but found not to be unconstitutional. (*S v Dlamini and others* cases 1999(4) SA 623 (CC), 1999(2) SACR 51 (CC).) In Namibia courts should consequently be cautious when applying the relevant sections of the CPA regarding bail and not rely on South African Court decisions which may be based on those sections which are not applicable to Namibia.

[8] S 60(1) is applicable to an application by an accused person for bail and reads as follows:

> *"An accused who is in custody in respect of any offence may at his or her first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in the High Court, to that court, to be released on bail in respect of such offence, and any such court may release the accused on bail in respect of such offence on condition that the accused deposits with the clerk of the court or, as the case may be, the registrar of the court, or with a member of the prisons service at the prison where the accused is in custody, or, in the case of a periodical court, if no clerk of the court is available, with a police official at the place where the accused is in custody, the sum of money determined by the court in question."*

[9] In respect of S 61 of the CPA there were important changes effected by subsequent amendments. In South Africa S 61 has been repealed in its entirety by S 4 of Act 75 of 1995, most probably because most of its substance was incorporated in the comprehensive S 60(1) referred to *supra*. In Namibia, however, a new S61 was inserted in the CPA by Act 5 of 1991. S 61 now reads:

> *"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 trial".

[10] S 61 of our CPA has been the subject of several decisions of our Courts. After referring to the new S 61, O'Linn J (with Frank J concurring) stated in *S v Du Plessis and Another* 1992 NR 74 (HC) at 85C – 86A:

I have already indicated supra that one possible form of interest of the public is the second ground on which the Attorney-General could rely under the repealed S 61, namely that the release on bail is likely to constitute a threat to the safety of the public or the maintenance of the public order.

Other examples of the possible application of the new grounds are: the accused satisfies the Court on a balance of probabilities that it is unlikely, ie improbable, that he or she will abscond or will interfere with State witnesses or with the investigations of the case. The Court is, however, convinced that there remains a reasonable possibility that the accused will abscond or will interfere with State witnesses or will interfere with the investigation.

In such a case, in my view, where it has in addition been prima facie shown that the accused is guilty of one or more of the serious crimes or offences listed in the aforesaid part IV of the second schedule or where at least the witnesses for the State testify that there is a strong case against the accused or the accused admits that he or she is guilty of such a crime or offence, then the Court, after considering all the relevant circumstances, will be entitled to refuse bail, even if there is a reasonable possibility that the accused will abscond or interfere with State witnesses or with the investigation.

It may be that when the investigation is not complete and/or where stolen goods or other exhibits have not yet been recovered in cases of the aforesaid gravity and/or where a large number of accused are involved and charged as co-accused in the same case, that the State's case against all or several accused will be severely prejudiced if one or more of the co-accused abscond.

In such case there may even be a real danger that the accused persons, other than the particular applicant, or persons not yet detained may interfere with the applicant if released, because the applicant's evidence should he testify in the trial, may be potentially very damaging to such other accused or person.

In such a case it may very well be that it will be in the interest of the administration of justice not to take the risk to allow such applicant out on bail even where it is not likely or probable that applicant will abscond or

himself interfere with State witnesses or with the prosecution.

In further support of this approach is the fact that the application of the traditional approach in this respect has not been effective in the circumstances presently prevailing in Namibia, to prevent the dramatic and grave escalation of crime and of instances where persons accused of serious crime have absconded. For this very reason wider powers and responsibilities have been vested in courts to deal more effectively with the problem."

(Also *Albert Ronnie Du Plessis v S*, and unreported judgment by O'Linn J, delivered on 15 May 1992; *Timoteus Joseph v S*, an unreported judgment by Strydom JP, delivered on 22 August 1995; *S v Acheson*, *supra*, at 823E; *S v Pineiro and Others* 1992(1) SARC (Nm) at 580b-d; *Charlotte Helena Botha v S,* an unreported judgment delivered by O'Linn J on 20 October 1995; *Benita Groenewald* v S, an unreported judgment delivered by Mtambanengwe J on 16 August 1995; and *Julius Dausab v S*, an unreported judgment delivered by Namandje AJ on 20 September 2010.)

[11] Generally, in respect of the approach by a court in a democratic society where specific rights of an individual are entrenched in a constitution (such as the Namibian Constitution) to grant or refuse bail, the following, as stated by Cachalia AJ (as he the was) in *S v Branco 2002* (1) SACR 531 (WLD) at 532h – 533c, with reliance on the Namibian decision by Mohamed J in *S v Acheson*, *supra,* should be kept in mind:

The fact that the Appellant bears the onus does not mean that the State can adopt a passive role by not adducing any or sufficient rebutting evidence in the hope that the Appellant might not discharge the onus. (See S v Jonas 1998 (2) SACR 677 (SE); S v Mauk (supra).) It must however be borne in mind that any court seised with the problem of whether or not to release a detainee on bail must approach the matter from the perspective that freedom is a precious right protected by the Constitution. Such freedom should only be lawfully curtailed if the interests of justice so require….

The fundamental objective of the institution of bail in a democratic society based on freedom is to maximize personal liberty. The proper approach to a decision in a bail application is that:

> *'The court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby.'*

Per Harcourt J in S v Smith and Another 1969 (4) SA 175 (N) at 177E-F.

In S v Acheson 1991 (2) SA 805 (Nm), Mahomed AJ (as he then was) emphasized that-

'An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused unless this is likely to prejudice the ends of justice."

[12] It is apposite to briefly refer to the history of this matter without going into detail:

- The Appellant, a South African citizen, was arrested in Windhoek on about 20 November 2009. Two other persons were also arrested for apparently the same offences.

- 9 charges of fraud were brought against the Appellant in a total amount of N$340 000;

- On 14 December 2009 the Appellant applied for bail and a formal bail hearing was conducted. At that stage the Appellant denied that it was in the interest of justice to refuse him bail. He also submitted that he would not abscond; that although he has previous convictions in South Africa, he is a first offender in Namibia; that his wife is ill; that he suffers from 3 chronic diseases, namely diabetes, asthma and claustrophobia. He also relied on sections of the Constitution of Namibia warranting his constitutional rights;

- His bail application was refused;

- Subsequently, he brought an application to the High Court of Namibia and on 30 December 2009 an order was made to the effect that the Appellant be taken to hospital and be medically

examined;

- Following that medical examination, a certain Dr Ockie Jooste stated in a report that the Appellant suffers from a phobic anxiety disorder and recommended that he should stay under supervision in hospital. Furthermore, after x-rays were taken, it was discovered that the Appellant has an enlargement of the heart and an echo cardiograph was recommended;

- Further applications by the Appellant to the High Court followed, but further tests were apparently not done, because State funding was not available;

- The Appellant brought a further bail application on **new grounds**, in which he i.a. relied on the alleged findings of the doctors. That application for bail was also refused; and

- After the Appellant's notice of appeal against the refusal of both bail applications was filed, the Magistrate furnished additional reasons for his decisions.

[13] As mentioned before, it appears that the Appellant combined his objections to the two bail application judgments in a single set of grounds contained in his notice of appeal dated 10 May 2010. The fact that he did not indicate which of the grounds are relevant to which judgment makes it

difficult to properly evaluate those grounds. It should also be remembered that the second bail application was in fact brought because the Appellant believed that there were new grounds in addition to the grounds which had already been considered in the first bail application and which new grounds would entitle him to be granted bail. These new grounds comprised of two grounds that had to do with the condition of his health and another regarding the alleged changed attitude of the investigating officer, namely not to oppose bail anymore.

[14] The Appellant's grounds of appeal in his notice of appeal are the following (unedited):

> *The learned Magistrate made numerous mistakes in his approach to law, and the facts, they are:*
>
> 1. *The Magistrate ignored section 10(i) when he ruled that applicant can not get bail because the applicant have got no assets or family in Namibia.*
>
> *1.a) In the very same case accused no. 2, also a South African, also with no assets or family, was granted N$5 000.00 bail.*
>
> *1.b) The Namibian Constitution in Section 10(i) is very clear all persons shall be equal before the law.*
>
> 2. *The learned magistrate also misdirect himself to rule that*

applicant is the "main brain" when the learned magistrate ask the state if they want to go into the merit of the case, the State replied: No;

3. *The learned magistrate also misdirect himself or ignored the following facts:*

   3.1 *The investigating officer, inspector Louw testified that he has got no evidence that applicant previously did abscond.*

   3.2 *The investigating office testified that applicant was previously in a Pre-Independent Namibia released on a very serious charges of fraud on bail and applicant did stand trial and was found not guilty.*

   3.3 *The so-called crimes were apparently committed over the phone and the investigating officer did not conduct an identification parade.*

   3.4 *The learned magistrate ruled that applicant was the "main brain" but lost sight of the trite law that the Namibian constitution in section 12(i)d ruled that all persons shall be presumed innocent until proven guilty. In the second bail application, the applicant testified that the statements prove the innocence of the applicant and the State did not*

respond to that fact.

3.5 The learned magistrate also misdirect himself to the law in section 60 because the law is very clear that the mere possibility that applicant will abscond is not enough, there has to be a likelihood.

4. The learned magistrate also on numerous occasions failed to consider bail conditions.

5. The learned magistrate misdirects himself to the applicant medical condition. The applicant testified that he has got or was diagnosed with a Phobic anxiety disorder and an enlargement of the heart and did hand in exhibits to that facts.

The ruling of the magistrate from the bench that the applicant do not look so serious sick, amount totally to speculation as the State did not respond to the applicant's medical facts.

6. The learned magistrate also ignored the fact that applicant, when left unguarded for a long period, did not try to abscond. The fact was uncontested by the state.

7. The learned Magistrate also misdirected himself to the law when in the second bail application the applicant do want to go into the so called strength of the state case (merits), the learned magistrate refused, even if going in to the strength of the state's case could reveal new facts.

8. *The learned Magistrate also misdirected himself to the law when he ruled that in the 2nd bail application he only want to consider that new facts. The law is very dear that the magistrate must consider the old and new facts together.*

In weighting up all the facts in totality the learned magistrate completely misdirect himself to the facts because except for three facts which is highly disputable all the other facts are in the favor of applicant (article 60(4) f,b,c).”

[15] In this Court Mr Heathcote made certain submissions in respect of serious misdirections by the Magistrate in both judgments when bail were refused. The Court will of course only entertain any submission where it is based on a ground of appeal, unless it entails a point of law. Any such submission that is not based on one or more of the Applicant’s grounds of appeal cannot be entertained because the grounds of appeal had not been amended and had not been submitted to the magistrate for her consideration. It also do not regard it necessary to deal with each and every submissions.

[16] Much has been made of the Appellant’s previous convictions in South Africa. After the amendment of S 60 (11B) of the CPA in South Africa, an accused in a bail application is compelled to inform the Court of his previous convictions. That section is not applicable in Namibia. However, it has often been said in applicable decisions that “*previous convictions*” may be relied on

to show the tendency of an Applicant for bail to commit certain crimes. It has been used to indicate his character. In *S v Patel* 1970 (3) SA 565 (WLD) Cillie JP said the following in this regard at 568C:

> *"It seems to me that an applicant's past record, his actions immediately prior to the application for bail and particularly while he was out on bail in respect of another charge, may be relevant factors, particularly when they* ***indicate a propensity to commit a particular type of crime."***
>
> (My emphasis)

Such previous convictions must of course relate to the particular applicant or be admitted by him. The Appellant admitted that he had previous convictions. Mr Heathcote showed that no record of previous convictions were handed in, although the investigating officer, inspector Louw, testified about 21 previous convictions. What was handed in as an exhibit were 4 warrants of arrest issued in South Africa and obtained by Louw from Interpol. The Magistrate only referred to the Appellant's previous convictions in passing in his judgment in the first bail application when dealing with the issue of possible punishment that may be imposed if he is eventually convicted. He did not take the "*previous convictions*" into consideration in respect of his decision to refuse bail. This whole issue is rather here or there and because it is not a ground of appeal, probably as a result of the Magistrate's non-reliance on it. It warrants no further attention.

[17] The submission was advanced on behalf of the Appellant that with regard to the new evidence in the second bail application, it should be considered together with the facts placed before the Court in the previous bail application. Mr Heathcote understood the State's argument in this regard to be that these decisions should be kept separate. In one of his grounds of appeal, if I understand it correctly, the Appellant complained that he was not allowed to refer to facts considered in the first bail application when the again applied for bail on new facts. Mr Small made it clear that his submission in this regard is not understood and it appears to me that there is in fact no dissent on this issue. Mr Heathcote relied on what was said by Van Zyl J in this regard in *S v Petersen* 2008 (8) SACR 355 at 371G-H:

> *"Where evidence was available to the Applicant at the time of the previous application but, for whatever reason, was not revealed, it cannot be relied on in the later application as new evidence. See S v Le Roux en Andere 1995 (2) SACR 613 (W) at 622a-b. If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the Court in previous applications, and not separately. See S v Vermaas 1996 (1) SACR 528 (T) at 531e-g; S v Mpofana 1998 (1) SACR 40 (TK) at 448g-45a; S v Mohammed 1999 (2) SACR 507 (C) [1999] 4 All SA 533) at 511a-d.*

I am in agreement with what has been stated above by Van Zyl J, but it does not seem that the Magistrate shared the same view. The Appellant did not only make submissions on the new facts, but in his submissions also referred in

detail to what had been placed before the Magistrate in the first bail application. Despite this, the Magistrate only concentrated on the 3 new facts in his judgment. The Magistrate commenced his judgment with the following words:

> *"Now in giving judgment in respect of this application based on new facts, the Court will only focus on what are the main new facts despite everything mentioned by both parties the Applicant as well the Respondent. The Court will only focus on the new facts which were brought to Court."*
>
> (Record: Vol 2, p239).

The Magistrate then proceeded to analyse each of the three new facts and rejected each new fact. At the end of his judgment the Magistrate said:

"So in conclusion the bail application on new facts, the bail is denied."

In his reasons for refusal to grant bail, the Magistrate only dealt with the same new grounds mentioned in the second bail application and merely confirmed what he said in his judgment referred to above. This approach is wrong. Although a magistrate is *functus officio* in respect of his/her judgment and cannot change, or alter it himself/herself, it is evident from what has been stated in the authorities referred to in the *Peterson* case, *supra*, that new facts should not have to be considered in isolation, but in conjunction with the facts placed before the Court in a previous bail application.

[18] It is apparent from the evidence submitted at the first bail application and the Magistrate's judgment, that the paramount consideration was whether the

appellant would stand his trial, or put otherwise, whether there is a likelihood that he will abscond, if bail is granted. In his judgment the Magistrate discussed what he considered to be the 5 grounds on which the State opposed bail. He called it the first to fifth objections and discussed each against the evidence. These were:

a) It is not in the interest of justice to release the Appellant on bail;

b) Whether he will abscond or not;

c) The simonies of the case;

d) Public interest; and

e) That the investigation was not finalized at that stage.

The court then commenced with the second objection namely whether he will abscond if bail is granted and found that he will abscond. (Record: Vol 1,p136-138.)

[19] Mr Heathcote submitted that the Magistrate committed a serious misdirection in this regard against the evidence presented during the first bail application. I shall deal with the evidence on this aspect hereinafter. On behalf of the State, Mr Small, supported the Magistrate's finding in respect of absconding and submitted it is apparent from the evidence that the Appellant is a past master in avoiding real issues and hides under a cloud of irrelevant issues created by himself. According to him the Magistrate saw through this

and the generalizations of the Appellant when he refused bail. Mr Small also supported the opinion of the investigating officer, namely that the Appellant will abscond if granted bail.

[20] A court has to base its decisions on evidence. It is necessary to analyse the evidence put before the Magistrate in respect of whether it is likely that the accused will abscond and his judgment in that regard. This decision of the Magistrate is a ground of appeal.

[21] The Appellant categorically denied that he will abscond and also expressed his willingness to comply with strict bail conditions which may be imposed by the Magistrate in order to negate the incentive to abscond. Much has been made of the facts that the Appellant is not a Namibian citizen, but a South African and that he has no address or assets in Namibia. In the Magistrate's judgment he has obviously considered the list of factors referred to in *S v Acheson*, *supra*. Those are only some of the factors to be considered. There are also other factors that favours the Applicant. The investigating officer has possession of the Appellant's passport, which has expired and there is evidence is that there is an extradition treaty between South Africa and Namibia. The following are extracts form the record during the cross-examination of the investigating officer, inspector Louw, in respect of this issue:

"So if this Court decides to grant me bail and they decide that for,

say for instance I must report several times during the day, do you think that will force me to stay in Namibia? I must sign three times a day (Intervention) …I personally believe that you will not stay here. But where is the facts your Honour?... That is my opinion.

Your opinion… It is my opinion that you will not stay, because there is too many cases pending at this stage.

I am still a suspect. I am innocent until proven guilty…

That is right.

As the other three Accused. On my record that you, that so-called record that you handed in, is there any evidence, hard evidence that I am a guy that abscond trials? Is there any evidence?... No, not. (intervention)…

No…On that I could not see, no, no.

No. There you are quite right. That is South Africa and here in Namibia am I a first offender?... In Namibia yes (intervention)

A first offender… Yes."

(Record: Vol 1, p107 l26-108 l17)

The Appellant thereafter questioned the investigating officer whether based on his past record it can be said that there is a possibility that he may interfere with State witnesses and the investigating officer could not provide any evidence that the Appellant had done so. That line of questioning concluded with the following:

"Thank you. So you can give no hard evidence that I will abscond,

that will tamper with State witnesses, that I will commit another crime. You give no hard evidence. That is just your opinion. Is that correct?... That is correct your worship."

(Record: Vol 1, p109 l 28-32).

After dealing with other issues and before concluding his cross-examination, the Appellant again asked the inspector about his view regarding absconding:

"So will you agree now that your reason for absconding is your personal opinion?... No your worship.

You did not hand in evidence of any kind that I will abscond, no evidence, no exhibits that we have got reason to believe this guy is going to abscond. That is your opinion, you mentioned, you said my opinion, when you finished your testimony is that this guy will abscond. It is your personal opinion, is that correct, yes or no?... I think with the evidence which I handed in at Court it makes it clear that you are definitely not a first offender and that the (intervention). I asked you yes or no?... Possibilities that it could happen is very good.

I am asking you yes or no?--- I think the Court will, must take that in consideration.

Is, and I asked you again, there is no evidence, there in that papers that you hand in that I have previously absconded. Is there any evidence on that previous convictions that you hand in that I am an absconder, I am a guy who runs away easy?--- I did not have

something here who say that, that is true.

Ja, so do not let us waste time, the Court's time again. So you have got no evidence?--- I think I make it clear to the Court what, what is the, why I say that.

Did you have, did you give the Court any hard evidence yes or no?--- I did not hand in (intervention). You did not.--- Hard evidence about that, that is true.

Yes, thank you. Thank you.--- I said it many times already."

(Record: Vol 1, p118 l3 – p119 l3).

[20] When the Magistrate dealt with the issue of absconding in her judgment she stated the following on p 138 l4-7; Vol 1:

"In respect of the objection of abscondment the Court is of the view that the accused, the Applicant, there is a ***high possibility*** *hat he might abscond."*

(My emphasis)

Later when dealing with the objection of the interest of justice, she says at the same page of the judgment in l19-22:

"Now when we look at, when the Court looked at those there elements the issue of absconding has already been dealt with, the Court is of the view that the accused person ***will*** *abscond."*

(My emphasis)

[21] In *S v Du Plessis*, *supra*, O'Linn J dealt with opinions of the investigating

officer in bail applications, as well as that of the Prosecutor-General. At 83G-I:

> *"The opinion of the investigating officer on questions such as whether or not it is likely that the accused will abscond or interfere with State witnesses or with the investigation, as distinguished from facts placed before Court, should also carry some weight. When the Court has an opinion of the investigating officer which is in conflict with that of the Prosecutor-General on those points, the Court should bear in mind that even if the investigating office plays the dominant role in the actual investigation, the Prosecutor-General is entrusted with the final decision as to the planning of the prosecution's case against the accused. However, it is obvious that the Court is the final arbiter on the question of whether bail is to be granted or not and may not allow the mere ipse dixit of either the Prosecutor-General or the instigating officer or both, to be substituted for the Court's discretion. See: S v Lulane 1976 (2) SA 204 (N) at 211F-G; S v Bennet 1976 (3) SA 652 (C) at 654H-655A; S v Mataboge and Others 1991 (1) SACR 539 (B) at 548."*

[22] The investigating officer might have an opinion, but he was severely cross-examined on the basis for his opinion. He could do no better than to repeat that is his personal opinion and that he has no "hard facts" to base it on. The prosecutor produced no other evidence. As pointed out earlier the alleged previous convictions had not even been handed in, but were apparently still in possession of the investigating officer who was pertinently asked

whether anything in his possession supports his personal opinion, but even that did not help. In respect of the so called 4 warrants of arrest that were handed in, the Appellant cross-examined inspector Louw to the effect that he would not have been granted bail in South Africa if he had outstanding warrants because South African operate a computerized system. Again Inspector Louw could not provide an proof to counter the statements of the Appellant. There was no evidence form anyone from South Africa in this regard. The evidence of inspector Louw is hearsay. Although hearsay is allowed in bail applications to some extend, it carries little weight when it is disputed. (See *Charlotte Helena Botha v S*, *supra*, at p8). As was succinctly stated by O'Linn J in the quoted passage in *S v Du Plessis, supra*, the Court is the final arbiter and the opinions of the investigating officer or the Prosecutor-General can never substitute the Court's discretion. The question is then:

What did Court do with the evidence in respect of the issue of absconding? As pointed out the Magistrate considered that there is a **high possibility** of the Appellant absconding. That was never the evidence and this finding is certainly not based on evidence by the investigating officer. Later the Magistrate elevated the **high possibility** even above the required criteria of likelihood by holding that the Appellant **will** abscond if granted bail. The Magistrate's findings are clearly not based on any evidence, neither can it be said that he exercised his discretion judicially. The Magistrate's finding that the Appellant will abscond and that bail is therefore refused constituted a material misdirection. It is wrong and this Court of appeal should interfere.

[23] There are also other misdirections that might be so material that it lead to wrong decisions by the Magistrate during both bail applications. Mr Heathcote pointed out some of these misdirections. However I do not regard it necessary to analyse the Magistrate's judgments in respect of any of these. The ones that I have dealt with will suffice. The Magistrate's decisions in those respects were wrong.

[24] Finally, the Magistrate applied section 61 of the CPA, despite his finding that the Appellant will abscond if granted bail. He used his decision as a factor in his enquiry whether it is in the interest of the administration of justice to grant bail. In the *Du Plessis* case, *supra*, O'Linn J made it clear that the court may still refuse bail if it is in the public interest or in the interest of the administration of justice, even if it is unlikely that the accused may abscond or interfere with witnesses or the police investigation. If the Magistrate's decision that the Appellant will abscond was justified, he could refuse bail without involving S 61. It is his decision that the Appellant will abscond that was wrong.

[25] S 65 (4) of the CPA provides a Court of Appeal with the power, if it finds that any of the Magistrate's decisions was wrong, to give the decision which it believes the Magistrate should have given.

[26] Mr Heathcote suggested that bail should be granted to the Appellant with strict bail conditions. In respect of the amount of bail money, he suggested N$10 000, because that is what the Appellant can apparently afford. However, he indicated that the Appellant might be able to raise more. I am alive thereto that to impose an amount which is beyond the Appellant's means would effectively mean that no bail is possible and has been considered to be a misdirection. (*Hiemstra's Criminal Procedure,* 9-17). However, the amount of the bail money does reduce the risk that an accused may abscond and the Court has to determine an amount that will compel the accused to arrive at his trial, rather than loose his bail money. (*R v Du Plessis* 1957 (4) SA 463 (W); *R v Vermeulen* 1958 (2) SA 326 (T) at 327H; and *S v Budlender* 1973 (1) SA 264 (C) at 266H). The total amount involved in the alleged 9 counts of fraud is N$340 000.00. That should also be a consideration when the amount for bail money to comply with the abovementioned objectives is considered. In *S v Du Plessis, supra*, the court considered in 1957 that an amount of N$4000 (£2000) for bail money, where the alleged fraud involved N$360 000 (£180 000), would be a fair deterrence for the accused to stand his trial. In my opinion, an amount of N$10 000 for bail where N$340 000 is involved, is in today's momentary terms quite inadequate. Without imposing an amount which is beyond the means of the Appellant, but will still serve the purpose of having the Appellant stand his trial and not loosing his money, I believe that an amount of N$50 000 is appropriate. Apart from the bail money, further and strict bail conditions will be imposed.

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

1. The Appellant's appeal against the judgments in his first and second bail applications is upheld.

2. Bail is granted to the Appellant on the following conditions:

    a) The Appellant shall only be released on bail if an amount of N$50 000.00 is deposited;

    b) After release on bail:

        i) The Appellant's passport shall be retained by the investigating officer and the Appellant is prohibited from renewing his passport or obtaining any temporary or emergency travel documents in Namibia, or from the South African Internal Affairs in Windhoek, or elsewhere.

        ii) A photocopy of the passport of the Appellant with his photo and description, as well as a copy of this order has to be provided immediately by the investigating officer to all border posts of Namibia, as well as the Hosea Kutako airport;

        iii) The Appellant shall not leave the area of the Magistrate's Court Windhoek and is ordered to report

three times daily, between 07h00 and 09h00, between 13h00 and 14h00 and between 18h00 and 20h00 at the Windhoek Police Station; and

iv) The Appellant shall not approach or discuss the case that he is involved in with any State witness or any of his co-accused and shall not interfere with the prosecution of his case in any way.

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MULLER, J

On behalf of the Appellant:	**Adv Heathcote**
Instructed By:	**Lorentz Angula**
On behalf of the Respondent:	**Mr Small**
Instructed By:	**Office of the Prosecutor-General**