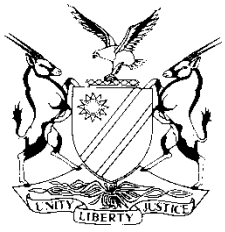

REPUBLIC OF NAMIBIA

CASE NO. CA 57/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ESMERELDA MARTINA MAJIEDT **Appellant**

and

THE STATE **Respondent**

CORAM: **VAN NIEKERK, J**

Heard: 9 December 2011

Delivered: 16 December 2011

REASONS FOR JUDGMENT: BAIL APPEAL

VAN NIEKERK, J:

Introduction

[1] This is an appeal against a decision by the magistrate of Windhoek on 15 July 2011 refusing to grant the appellant bail after a formal bail application. Except in a minor respect I dismissed the appeal on 16 December 2011, and indicated that reasons would be provided during the course of the following week. Unfortunately other work commitments made this impossible until now, for which I extend my apologies to the parties.

[2] The appellant is a 46 year old Namibian citizen who is married and has 4 children. She was arrested on 4 April 2011 on a charge of contravening section 35(3)(b) of the Anti-Corruption Act, 2003 (Act 8 of 2003).

[3] At the commencement of the proceedings in the court *a quo* on 7 June 2011 the State indicated that it was opposing the granting of bail on the following grounds:

(i) That there is a likelihood that the appellant may interfere or will continue to interfere with witnesses and the investigations as she has done so already.

(ii) That it is not in the public interest and/or in the interest of the administration of justice for the appellant to be released on bail.

(iii) That there is a possibility that the appellant may not stand trial as she will possibly abscond.

(iv) The allegations against the appellant are quite serious as it involves the amount of N$70 million.

(v) Investigations are not finalised and more arrests are anticipated.

(vi) The appellant may commit other offences once released on bail.

(vii) Any other factor which the magistrate may consider necessary to refuse bail.

[4] After hearing the appellant and several witnesses for the State, the magistrate reserved judgment until 15 July 2011 when she gave a reasoned judgment in which she *inter alia* found that the evidence does not justify the conclusion that the appellant is likely to abscond if released on bail. The judgment concluded with the following orders:

> "(1) That bail is denied due to the likelihood that exists that the Accused if released on bail might interfere with Witnesses of the State or tamper [with] or obstruct Police investigations;
>
> (2) That it will not be in the interest of the public or the administration of justice if the accused person is released on bail.
>
> (3) That the Accused person be transferred to the Hosea Kutako Police station due to better facilities for female trial-awaiting prisoners at that station. The station commander at the Hosea Kutako Police Station is hereby ordered to make sure the Accused is taken to doctor should she be requested to do so."

Summary of relevant evidence

[5] The appellant was employed by the complainant's predecessor, Namibia Portland Cement, since 1997. The company later became known as Afrisam Namibia. Its head office is in Johannesburg, South Africa. She gradually made her way up the employment ladder from credit controller to sales team leader. She then had three subordinates and was mainly tasked with the fulfilment of orders for cement, generation of cement sales and customer services. In about October 2010 the appellant was informed that an intended merger between Africam and Ohorongo Cement would not be going ahead and that Afrisam would be closing its operations in Namibia. The appellant's employment at Afrisam ended at the end of January 2011 whereafter she commenced employment at Ohongoro.

[6] She received written notification from Afrisam early in February 2011 that her performance bonus would be withheld pending an investigation into stock discrepancies. It is common cause that an internal audit was done and that the appellant was called in by Ms Ollen, the financial controller of the cement business unit of Afrisam's head office to explain certain transactions captured in the computerized accounting system. The investigation was prompted by a N$9 million loss at Afrisam Namibia. The investigations led to the discovery of a stock write off in the freight clearing account of N$13 million. It is common cause that the appellant was involved in this transaction, but there is a dispute as to whether this action was properly authorised. Ms Ollen indicated that the write off was not properly reflected in the system as it was disguised as a different transaction

and therefore it was not initially apparent. As I understand it, the appellant's explanations were not satisfactory, leading to a criminal charge being laid against her in relation to the write-off. The Anti-Corruption Commission's staff then became involved in the investigations. As a result of these events, the appellant's employment at Ohorongo Cement came to an end. On 4 April 2011 the appellant was arrested.

[7] Further investigation revealed that the appellant allegedly, by means of manipulation of the accounting system, disguised a multitude of irregular transactions which were designed to conceal the fact that vast amounts of cement was delivered to certain customers without payment to Afrisam. Instead, it would seem, payments were made to the appellant in her personal capacity. In respect of two specific customers alone, namely Discount Hardware and Cool Properties, unauthorised deliveries were made to the total value of about N$56 million. At the time the bail application was heard, the total amount allegedly involved in relation to suspect deliveries was in excess of N$71 million. The complainant's accounting system records the date, time and identity of the person whose password was used to effect every single transaction on the system. Virtually all relevant transactions reflected the appellants as the person who entered the transactions. The appellant's case at this stage is that other employees had knowledge of her password and that the transactions therefore do not necessarily point to her involvement, despite the fact that, for security reasons, passwords were required to be changed every 45 days and that it was a dismissible offence to disclose one's password to another person.

The evidence concerning Zabby van Zyl

[8] One of the grounds on which the State opposed the bail application is that that there is a likelihood that the appellant may interfere or will continue to interfere with witnesses and the investigations as she has done so already. It was common cause that this ground was based on what transpired between the appellant and the State witness Mr Zabby van Zyl on 31 March to 1 April 2011. The evidence about these events plays an important role in the appeal and should be considered carefully.

[9] During the bail proceedings the State presented evidence by Mr Zabby van Zyl, a former colleague and subordinate of the appellant at Afrisam and employed in its sales department as a stock controller. On 31 March 2011 he was still employed at Afrisam. The investigators had taken a statement from him the previous day. During the morning he received a telephone call from one Basson, a friend of the appellant who often used to visit the appellant at work while she was still employed there. Basson relayed a message from the appellant requesting Mr van Zyl to meet with her. Mr Van Zyl reported this to his team leader, who in turn reported this to Ms Ollen, the investigating officer and two other investigators of the Anti-Corruption Commission who were busy with investigations at Afrisam's premises at the time. Mr van Zyl was instructed to make contact with Basson again and to arrange a meeting with the appellant near the Ministry of Finance later that morning.

[10] A recording device was placed on Mr van Zyl's body to record the conversation with the appellant. As a result of some objections by the defence about the admissibility of the transcript of the recording and also about parts of the evidence of Mr van Zyl, the transcript and some of the oral testimony offered were excluded. Be that as it may, Mr van Zyl testified that the appellant met him outside and suggested that they move to her car to talk. She asked him to walk in front of her, because she did not want to be seen with him. In her car she told him to relax and informed him that she heard that the Anti-Corruption Commission's investigators were at the premises of two of the transporters who used to transport cement for Afrisam. She asked him to obtain for her what appear to be paper sheets bearing Afrisam's letterhead which are kept next to the printer. Later she retracted and said he should "rather leave the papers". She also asked him to take an Afrisam stamp which is kept in the sales office at the sales department. She said she would come to pick up the stamp from him at his home during the afternoon and indicated that she needed the stamp because she wanted to "get the people away from her or off from her." She did not mention names, but I think it is reasonable to assume that she was referring to the investigation.

[11] During the meeting she further asked "what are the people saying?", but this aspect was not taken any further in evidence. The question is open to several interpretations, all of which suggest that she was fishing for information. She also mentioned that Gerald Bezuidenhoudt (of Cool

Properties) has said that he gave her money, but that it was not the whole amount and she did not care about that.

[12] Mr van Zyl testified that the appellant called him after 18h00 that day. There is no evidence about the contents of this conversation, but it is safe to assume that it concerned the matter of the company stamp. The appellant did not come to collect the stamp. The next morning Mr van Zyl phoned her on the instructions of the investigators and asked if she is still coming to collect the stamp. He did not testify about her alleged answer. He agreed that this was the last conversation that he had with the appellant and that she never collected the stamp.

[13] The prosecutor incorrectly put to the appellant during cross-examination that she asked van Zyl for "invoices" of the company and for a "date stamp". The appellant readily admitted during cross-examination by the prosecutor that she did meet with Mr van Zyl and that she asked him to obtain the "company stamp", but she vehemently denied that she asked for "invoices" or the "date stamp". In this respect she is corroborated by Mr van Zyl. She denied the suggestion that she wanted the "invoices" and "date stamp" to, as the prosecutor put it, "issue new proof to the clients to show them that they have made payments". On what appears to be prior advice from her lawyers, she declined to answer questions about the further content of their conversation, stating that those questions would be answered at the trial.

[14] Counsel for the appellant stressed that the evidence shows that the appellant never contacted Mr van Zyl to collect the stamp as arranged, but

that it was Mr van Zyl who, on the instructions of the Anti-Corruption Commission's investigators, repeatedly called the appellant in an attempt to get her to collect the stamp. Yet she never did so. These alleged facts were emphasized in argument to indicate that the magistrate erred when she concluded that there is a likelihood that further interference may occur.

[15] However, having considered the record carefully, it seems to me that in fact there is uncertainty whether it was only Mr van Zyl who called the appellant about the stamp or whether the appellant also called him, and how many telephone calls were made about this matter. The appellant did not allude to these events during examination in chief. Under cross examination she was asked whether she had any contact with Mr van Zyl after the meeting near the Ministry of Finance. To this she replied:

> "I phoned Zabby a lot of times but I cannot remember thereafter, I cannot remember exactly but what I can recall is that Zabby phoned me that specific day until round about 19:00 after 18:00 to tell me I must please come collect the stamp at his house which I never did.
>
> You never did? --- I never did. I just switched off my phone at a certain stage because he phoned me from various phone numbers.
>
> But in fact you never did collect any stamp or invoices from Zabby? --- No.
>
> Although he indicated that he had it available or the stamp (intervention). --- He indicated that he had the stamp available which I asked from him, yes."

[16] Firstly, I think that, read in context, the first answer recorded above indicates that in the past before the day the meeting took place she used to phone Mr van Zyl a lot of times, but not in connection with the stamp. (Mr

van Zyl in any event never testified that she called him about the stamp before the meeting and only testified about one call after the meeting that she made enquiring about the stamp.)

[17] The second aspect is that it is unclear whether Mr van Zyl called her several times between 18:00 and 19:00 or only once. In my view both interpretations are reasonable. The fact that she does not clearly state in the second paragraph of the quotation when she switched off her phone or when he called her from the various numbers leaves one with a doubt whether Mr van Zyl made various calls between 18:00 and 19:00 on 31 March or whether he made various calls over a period.

[18] The third aspect is that the appellant's evidence that Mr van Zyl called her several times about the stamp was not denied in cross examination by the prosecutor. However, when it was the State's turn to present evidence, Mr van Zyl's evidence that he only phoned her once on the morning of 1 April and that she in fact phoned him after 18:00 on 31 March was not denied in cross examination, nor was the appellant's version put to him.

[19] There are therefore, contradicting versions by the appellant and Mr van Zyl which were not contested by either side under cross-examination. In view of the fact that the onus is in bail applications on the appellant, the conclusion must be that she has not shown on a balance of probabilities that her version should be accepted. There is nothing inherently improbable about Mr van Zyl's version and I think it more probable than not that the appellant would have followed up on her request of earlier that day to contact Mr van Zyl. However, when she did not collect the stamp, he called

her the next day. On the available evidence, bearing in mind the lack of cross-examination on the issue and the onus resting on the appellant, it seems to me the matter must be approached on the basis of Mr van Zyl's evidence. With this in mind I now turn to consider the appeal grounds raised against the magistrate's judgment on this issue.

The likelihood of interference with State witnesses or interference with or obstruction of police investigations

[20] In my view the learned magistrate rightly commended Mr van Zyl for reporting the approach made by the appellant. She emphasised that the appellant incited an innocent employee, who used to be her subordinate, to commit a crime in an attempt to defeat the course of justice. I can find no fault with this. Mr *Botes*, who (assisted by Mr *Basson*) appeared both in the court *a quo* and on appeal submitted that the magistrate misdirected herself by finding that the appellant had asked Mr van Zyl to steal the stamp. It is so that there is no evidence that her intention was to steal the stamp, but rather that it should be taken for her to use in some illegal manner. In my view the misdirection is not material. The point is that the removal and use of the stamp would have amounted to at least one crime, in this case a contravention of section 8 of the General Amendment Ordinance, 1956 (Ordinance 12 of 1956) and be punishable by the same penalties as for theft.

[21] One of the objections on appeal is that the magistrate's conclusion about the likelihood of interference by the appellant was reached after

applying the incorrect test. Counsel referred to the matter of *Engelhardt Motjari Agauire v The State* (High Court Case No. CA 7/2001 – unreported judgment by HOFF, J and MANYARARA, AJ delivered on 11/5/2001), in which the Court stated that the proper approach to be followed is that which was laid down in *S v Bennet* 1976 (3) SA 652 (CPD) at 655G. When HOFF, J quoted the relevant passage he left out the introductory words, which I shall include and italicize to indicate them clearly:

> "*It appears to me that, as applicant has thus far not interfered with the investigation,* the proper approach should be that, unless the State can say that there is a real risk that he <u>will</u>, not merely <u>may</u>, interfere, there does not appear to me to be a reasonable possibility of such interference." [the underlining added by HOFF, J]

[22] The submission on behalf of the appellant is that the magistrate, by concluding that there is a *"likelihood"* that the appellant, if released, *"might"* interfere with witnesses of the State or tamper with or obstruct police investigations, erred by not applying the more onerous test of determining whether there is a *"real risk"* that the appellant *"<u>will</u>, not merely <u>may</u>, interfere"* and therefore whether there is a *"reasonable possibility"* of such interference. Earlier in her judgment the learned magistrate states that she *"is not convinced that the accused if released on bail would refrain from any interference with witnesses or possible state witnesses of the State (sic) or not try to conceal any evidence, the likelihood of possible interference exists."*

[23] Counsel relies on the partial quote from *Bennet* without the underlined words. In my view the introductory words are important to bear in mind as they would appear to qualify the words following thereon. It

should also be noted that in both the *Bennet* case and the *Agauire* case there was no evidence of any prior interference or attempts thereto. In the *Agauire* case the Court found that there was no evidence that there was any risk that the appellant would interfere with the investigation (at p.3). These two cases are therefore not only distinguishable from the instant case on the facts, but the Courts in those cases were concerned with the approach to be followed in circumstances where there is no evidence of any prior interference. In my view it is quite understandable that in such cases a court should require sufficient evidence to at least show a real risk or a reasonable likelihood of interference. As the question was not argued before me, I do not wish to express a firm view on whether something less than that would be sufficient in a case where there has already been such interference in the past and the court must decide whether there is a likelihood of further or continued interference or whether it would merely require less evidence to convince a court that there is a real risk of continued interference.

[24] Mr *Marondedze* on behalf of the respondent contended that the submissions of appellant's counsel related to mere semantics and not to matters of substance. I do not agree that the matter is quite that simple. Firstly, from various authorities it is clear that questions regarding bail must be decided on the <u>probabilities</u> and therefore findings on the <u>probabilities</u> must be made.

[25] In *S v Acheson* 1991 (1) NR 1 (HC) 19G-20A this Court has stated clearly that when considering whether to grant bail one of the questions to

be decided is whether "there [is] a reasonable likelihood that, if the accused were released on bail, he would tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted" [my underlining] (see also *S v C* 1998 (2) SACR 721 at 725D-E (approved in the *Agauire* case at p5-6); *S v Swanepoel* 1999 (1) SACR 311 (O) 313E-F (it should be noted, though, that *C's* case and *Swanepoel's* case are based on the wording of the applicable South African statute)). The manner in which the answer to the question is expressed is important in order to achieve and convey a clear understanding of the applicable onus and the manner in which it may be discharged. For instance, the onus is on an accused who applies for bail to satisfy a court that it is unlikely (i.e. improbable) that he will abscond or interfere with witnesses or the investigation. Depending on the finding of the court, an accused may have acquitted himself of this onus and yet be refused bail by virtue of the provisions of section 61 of the Criminal Procedure Act. As was stated in *S v du Plessis and another* 1992 NR 74 HC at 85E-G where the Court was discussing the application of section 61:

> "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 investigation 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 only a reasonable possibility that the accused will abscond or interfere with State witnesses or with the investigation."

[26] See also *S v Timotheus* 1995 NR 109 (HC) at 113H-114G where the following was said:

"*In casu*, the prosecutor-general and the investigating officer were *ad idem* that there existed the possibility that the appellant would interfere with the police investigation or State witnesses. Mindful of the type of facts placed before her, the learned magistrate relied on the wider powers provided by Act 5 of 1991, to refuse bail and the learned magistrate cannot be faulted for giving effect to the provisions of the amending legislation. See: *S v Aikela* 1992 NR 30 (HC).

The amending legislation was obviously enacted to combat the very serious escalation of crime and the escalation of accused persons absconding, or for that matter tampering with the police investigation, by giving the Court wider powers and additional grounds for refusing bail in the case of the serious crimes and offences listed in the new Part (IV) of the Second Schedule of the Criminal Procedure Act 51 of 1977.

> 'The Legislature has recently in Act 5 of 1991 included theft where the value involved exceeds R600, . . . in the list of serious crimes and offences where the Court would be entitled to refuse bail on the grounds of the interests of the public or the interests of the administration of justice, even where it has been proved to the satisfaction of the Court that it is unlikely that the accused will abscond, or interfere with any witnesses for the prosecution or with the police investigation.'
>
> See: *Du Plessis* (*supra* at 82D-G).

The Court [referring to what was said in the *du Plessis* case] was entitled to refuse bail, even if there was only a reasonable possibility

> that the accused will interfere with State witnesses or with the police investigation.
>
> *In casu*, the allegation against the appellant went further than this, namely that he indeed tried to interfere with State witnesses and police investigation."

[27] Even if it may be said that the trial magistrate followed an incorrect approach as evidenced by the manner in which she formulated her conclusion, it seems to me, also for reasons expanded upon later in this judgment, that there are sufficient grounds in this case for the magistrate to have concluded at the time that there was a reasonable likelihood that the appellant would interfere with witnesses or the evidence. In the alternative, there certainly was a reasonable possibility that the appellant would interfere and, following the approach in the *du Plessis* case, the magistrate would have been entitled to refuse bail in terms of section 61 of the CPA. In this case there is *prima facie* evidence that the case against the appellant is strong and the case falls under Part IV of Schedule 2. In fact, it is clear that the magistrate relied on the approach as set out in the *Timotheus* case (*supra*).

[28] Mr *Botes* submitted that the magistrate could not rely on the issue of the appellant's contact with Mr van Zyl as a ground for refusing bail under section 61 because the State did not oppose bail on this precise basis and the magistrate did not indicate that she was approaching the case on this basis. As such, it was submitted, the appellant did not have an opportunity to deal with such a ground during the bail application. In my view there is

no merit in this contention. The appellant was clearly alerted to the fact that the issue of what transpired between the appellant and Mr van Zyl would be raised as a distinct ground in itself for opposing bail and that the State would also be relying on section 61. Bearing in mind what was stated in the well known case of *du Plessis* (*supra*) and echoed in the *Timotheus* case (*supra*) it should have been self-evident at an early stage that the fact of what had transpired between the appellant and Mr van Zyl and its implications could contribute to providing a basis for refusing bail under section 61. There was no prejudice caused to the appellant. It is further clear that the magistrate did not only rely on this aspect for the ultimate conclusion. From her judgment is it clear that she also took into consideration the seriousness of the case and the huge amount involved, and, by clear implication, that it falls under Part IV of Schedule 2. She further took into consideration that there is a strong *prima facie* case against the appellant and that the investigation was not yet completed.

[29] Ultimately it must be remembered that "[i]n the final resort it is the court seized of the particular application, which must decide what is in the interest of the administration of justice or the public in the particular circumstances." (*S v du Plessis* (*supra*) at 84I). In my view the magistrate made a value judgment when she assessed it not to be in the interest of the administration of justice to grant bail to a person who had shortly before sought to persuade an innocent person to assist her in committing further crimes in what could only have been an attempt to defeat or obstruct the course of justice. I am not prepared to find that the magistrate was wrong

when she did this. In this regard I remind myself of the fact that it is trite that the Appeal Court may not set aside the magistrate's decision to refuse bail unless satisfied that it is wrong (see section 65(4) of the Criminal Procedure Act).

[30] It was submitted on behalf of the appellant that erred in concluding that there is a likelihood of tampering in the light of the fact (i) that it was common cause that all the relevant records of Afrisam were in the custody of the Anti-Corruption Commission's investigators and could not be accessed by the appellant; (ii) that most of the material witnesses had already made statements and that it was improbable that the appellant would attempt to influence witnesses to change their statements; (iii) that there was no evidence on record that the appellant had attempted to influence any witness, including Mr van Zyl, to depose to any untruth; (iv) that there were no specific indications given during the hearing of the bail application of how the appellant would be able to interfere or tamper in future; (v) that the appellant did not continue to obtain delivery of the company stamp despite it being offered to her; and (vi) that the incident with Mr van Zyl was an isolated one.

[31] As to (i) and (ii), I agree with Mr *Marondedze* that these are not valid objections. It is clear from the evidence presented that the investigations had not been concluded, that there were still many irregular transactions to follow up, that investigation had to be done in Angola, that further arrests were considered possible and that many delivery documents were missing, some of which used to be hand generated.

[32] As to (iii), the approach of Mr van Zyl contemplated dishonest action on his part. It is not farfetched to assume that by natural implication the execution of the intended plan might include the telling of lies. For example, if Mr van Zyl had been noticed removing the stamp, I think it unlikely that the appellant expected him to make a clean breast of everything, but rather that she foresaw and took it into the bargain that he may very well have to lie to cover himself.

[33] As to (iv), although specific allegations were not made in evidence I think this is not material in the circumstances where the appellant had already convinced Mr van Zyl to obtain the stamp and also initially requested the letter heads. It should not be forgotten that the appellant did not give any explanation for these actions. It is therefore unmeritorious to submit, as was done, in an application where the onus is on the appellant, that the State did not show that she wanted to defeat or obstruct the course of justice.

[34] As to (v), the appellant has not provided any explanation why she did not collect the stamp. The fact that she did not collect it does not necessarily indicate that she suddenly decided to walk the straight and narrow, especially when one bears in mind that she had started new employment on 1 April and was arrested four days later.

[35] As to (vi), this may be so, but in my view it is not material. The question may be asked, how many such incidents must there be before one should take notice?

[36] In conclusion, where the onus is on the appellant to satisfy the court that bail should be granted, the appellant may be expected to have given an adequate explanation for her conduct in relation to Mr van Zyl. She did not offer any evidence in this regard. In any event, the topic first had to be raised in cross-examination. Apart from general statements that she would not interfere with any witnesses or evidence there was not any real effort to assuage any fears in this regard and to persuade the court *a quo* that she should be trusted in the future. In the light of what had transpired between her and Mr van Zyl, this omission may be considered to be fatal to her application.

[36] Mr *Botes* made certain submissions with reference to the following extract from *S v Pineiro and others* 1999 NR 18 (HC) at 21E-H (the underlining is mine):

> "The overriding principles guiding an application of this kind are succinctly set out by Du Toit *et al* in *Commentary on the Criminal Procedure Act* and, in his notes to s 60 thereof at 9-8B, the following is stated:
>
> > 'In the exercise of its discretion to grant or refuse bail, the court does in principle address only one all-embracing issue: Will the interests of justice be prejudiced if the accused is granted bail? <u>And in this context it must be borne in mind that, if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced.</u>
> >
> > Four subsidiary questions arise. If released on bail, will the accused stand his trial? Will he interfere with State witnesses or the police investigation? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and order and the security of the State? <u>At the same time the court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions</u>

> pertaining to release on bail. (See generally *S v Bennett* 1976 (3) SA 652 H (C).)'"

[37] Counsel submitted that the magistrate, although finding that the appellant is not a flight risk, did not give any consideration to the fact that in such circumstances the interest of justice is also prejudiced as stated in the first underlined part of the above quotation. Whilst it is so that the magistrate did not expressly indicate that she did consider the matter in these terms, I am not persuaded that the mere failure to mention it in itself conveys that she was not generally aware of the principle.

The imposition of bail conditions

[38] A stronger argument on behalf of the appellant was raised in relation to issue of fixing suitable bail conditions. Counsel referred to the second underlined portion quoted above and submitted that the magistrate did not properly apply her mind by considering whether suitable conditions should be imposed upon the appellant in circumstances where she was not a flight risk. In this regard counsel emphasized what was stated in the *Agauire* case at p.5:

> "I confirm that the correct approach in considering whether bail should be granted or not is as stated in the headnote of the Bennet case viz:
>
> > 'In striking a balance between the liberty of the subject and the proper administration of justice, the imposition of conditions in an application for bail can be decisive. Where bail can be granted subject to safeguarding conditions, the Court should, if possible, lean in favour of doing so, and even though the Court is of opinion that there is a reasonable possibility of interference with the investigation, nonetheless, to the extent

> that there is a risk, this can be met by suitable conditions. Further, if the police experience any interference they may forthwith apply for re-arrest and estreatment of bail.'"

[39] The magistrate merely stated that she "further considered the impositioning (*sic)* of bail conditions as pointed out by the defence that the accused will be able to afford an amount of N$75 000-00 payable as bail money, with stringent reporting conditions to prevent the accused from interfering with any of the State witnesses." The magistrate further considered the amount of bail offered with reference to the case of *Sydney Claude Schnugh v The State* (unreported judgment of this court in Case No. CA7/2009 delivered on 14 April 2009) where the amount of bail offered was considered quite inadequate in the light of the huge amount allegedly involved in the offences charged. She similarly was of the view that the amount offered in the instant case was quite inadequate.

[40] As far as the amount is concerned Mr *Botes* stated that the appellant at some stage also mentioned an amount of N$100 000 that could be paid in bail, but that the magistrate did not even mention this. However, it must be pointed out that the final offer that was made after the evidence had been heard and submissions concluded was in the sum of N$75 000. I do not think the magistrate can be faulted for accepting this as the actual offer. While the amount is not insubstantial, I can also not fault the magistrate for considering the amount to be inadequate in the light of the huge amount allegedly involved in the commission of the

offences under investigation. This is an issue on which reasonable persons may differ.

[41] It is so that the magistrate did not expressly discuss the pros and cons of imposition of other conditions relating to contact with State witnesses and so forth. It may be that the fact that the amount offered was considered inadequate cut short the magistrate's further contemplation of the matter. Even if the magistrate erred by not properly considering the imposition of bail conditions, this Court is of the view that it would have been difficult at the time to impose conditions with any real confidence that they were likely capable to be effectively monitored. The investigation was not complete at the time the magistrate considered the bail application. The indications were that it would still require at least three months to complete and would entail cross-border investigations to be conducted in Angola, which could in itself be problematic. While an accused cannot be kept indefinitely in jail for the investigation to be concluded, it does seem to me that the investigation was not unduly being dragged out by incompetence or tardiness. While the investigation was being conducted it would have been easier to make contact with witnesses or take other action to manipulate evidence than when the investigation is complete. It is in the nature of such conduct that it is not openly done. It seems to me that the appellant has a keen appreciation that this is so. The appellant was clearly very careful in her initial approach to Mr van Zyl, whom she regarded as a very close friend. She worked through another friend and third party. She met Mr van Zyl

in a public place where the meeting could be construed as a coincidence and she was concerned not to be seen with him. She did not follow through on her initial request for the letter heads and company stamp, again a possible sign of being cautious. Furthermore, the indications are that the appellant, who *prima facie* is involved in the alleged offence being investigated, was successful over a long period of time at deceiving her co-employees, manipulating the accounting system, disguising a multitude of transactions and giving plausible explanations in the past which set the minds of her superiors at rest. Based on this conduct the appellant comes across as highly intelligent and adept at concealment. The manner in which she testified and at times engaged the prosecutor re-inforces the impression of a keen intelligence and a forceful personality not easily intimidated. Any further attempts to interfere with witnesses or evidence would likely not have been done openly or by using brute force. In my view all these considerations would have impacted adversely on the fixing of meaningful conditions.

[42] Mr *Marondedze* submitted that the magistrate did not err by refusing bail at that stage of the investigation. He invited the appellant to apply for bail again when the investigation is complete. It may be that at that stage when some further time has lapsed between a second bail application and the approach made to Mr van Zyl, the appellant has had the opportunity to realize the consequences of the attempt to involve Mr van Zyl in what could only have been the commission of a crime in order to tamper with or fabricate evidence.

Conclusion

[43] The result is that I reached the conclusion which I placed on record on 16 December 2011, namely that I was not persuaded that the ultimate decision by the magistrate to refuse bail is wrong. To this extent the appeal failed.

[44] There is a further aspect with which should deal and that is the magistrate's order that the appellant be transferred to the Hosea Kutako police station for detention there. Mr *Botes* submitted that the magistrate made this order without being requested to do so and without receiving any evidence that the conditions in the holding cells there are better for female awaiting trial prisoners as the magistrate stated in her order. He mentioned this as an example of one of the many irregularities she allegedly committed and added that it causes hardship as it is too far for the appellant's family to regularly travel there to visit her. In the light hereof I upheld the appeal against this order by setting it aside.

[45] After I made the order, State counsel and Mr Basson for the appellant approached me in Chambers. Mr Basson indicated that there had been a misunderstanding and that there were no instructions to ask for this part of the magistrate's order to be set aside. In fact, he stated, the appellant prefers to be kept at Hosea Kutako as the facilities are indeed better. I indicated that I would not change the order without a formal application, but that the intention and effect of my order was never to prohibit the police to detain the appellant at Hosea Kutako, but only that they would no longer be compelled by a court order to detain

the appellant there. It was arranged that the Registrar should address the warrant of detention to the commanding officer at Hosea Kutako, which officer was in principle willing to accommodate the appellant there. By this means the desired effect was in any event obtained.

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VAN NIEKERK, J

Appearance for the parties

For the appellant: Mr L C Botes,
assisted by Mr B D Basson,
Instr. by B D Basson Incorporated

For the respondent:
Mr E Marondedze
Office of the Prosecutor-General