



NOT REPORTABLE

CASE NO: SA 62/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

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| SAKEUS EDWARD TWELITYAAMENA SHANGHALA | First Appellant |
| JAMES NEPENDA HATUIKULIPI | Second Appellant |
| PIUS NATANGWE MWATELULO | Third Appellant |
| MIKE NGHIPUNYA | Fourth Appellant |
| OTNEEL NANDETONGA SHUUDIFONYA | Fifth Appellant |
| PHILLIPUS MWAPOPI | Sixth Appellant |

and

| | |
|-------------------|---------------------------------------|
| STATE | Respondent |
| Coram: | FRANK AJA, SHONGWE AJA and MOSITO AJA |
| Heard: | 24 January 2023 |
| Delivered: | 6 March 2023 |

Summary: The appellants together with three other individuals are accused persons in a trial that is yet to commence in the High Court (arraigned alongside the nine individuals are a number of corporations and trusts in which one or more of these individuals have an interest). The accused persons face charges of racketeering and money laundering pursuant to the provisions of the Prevention of Organised Crime Act 29 of 2004 (POCA), corruption pursuant to the provisions of the Anti-Corruption Act 8 of 2003 (the ACA), fraud in the form of tax evasion, conspiring to commit crimes, theft and obstructing or attempting to defeat or obstruct the course of justice – involving a total amount in excess of N\$317 million siphoned from an unlawful scheme to personally benefit them from fishing quotas allocated by the State. The appellants have all been incarcerated since their arrest: the first to third appellants were arrested on 27 November 2019; the fourth appellant on 17 February 2020 and the fifth and sixth appellants on 21 December 2020. Fourth appellant applied for bail during June 2020, but it was refused by the magistrate. He appealed to the High Court, but his appeal was unsuccessful. Fourth appellant however then joined forces with the other appellants to bring the bail application which is the subject matter of this Supreme Court appeal.

The court *a quo* found that it would not be in the interest of justice to grant the appellants bail - this was on the back of findings that the court *a quo* could not ‘make a finding whether the applicants will or will not abscond’, that the appellants did not satisfy the court that if they are released on bail they will not distort or suppress evidence and thus ‘the likelihood that they would interfere with the evidence is reasonably real’ and that their ‘personal circumstances, (their health, their family relations, employment and business environments)’ which the appellants placed before the court *a quo*, were ‘neither unusual nor do they singly or together warrant release of the applicants in the interest of justice’.

On appeal, the appellants took issue with the signed judgment released on 11 April 2022. Appellants further contended that several factors had not been considered by the court *a quo* at the bail hearing, ie that the court *a quo* did not properly consider the impact on the appellants’ constitutional rights to liberty (Art 7) and to a fair trial (Art 12); that the State does not have a strong case against them – by attacking the

manner in which the investigation was conducted; raising an issue of credibility of the State's

key witness and whether he will come to testify and that charges based on POCA are fatally flawed and evidence in relation to these charges cannot be admissible at trial.

It was contended on behalf of the appellants that the signed judgment differs from the transcribed judgment which the judge *a quo* read into the record via the recording system from a pre prepared document on 1 April 2022 (the transcribed judgment). Appellants submitted that as the judge was *functus officio* in that after he delivered the transcribed judgment, the signed judgment must be declared a nullity or alternatively those portions of the signed judgment that do not coincide with the transcribed judgment must be deleted and treated as a nullity (*pro non scripto*).

The primary question for consideration on appeal is not what the appeal court would have decided had it heard the bail application, but whether it is satisfied that the decision of the court *a quo* was wrong in which case the appeal court can give a decision it considers should have been given.

Held that, the general principle in *Cargo Dynamics Pharmaceuticals v Minister of Health* 2013 (2) NR 552 (SC) applies. This general rule is only strictly adhered to when it comes to signed judgments. Some leeway is however allowed when it comes to *ex tempore* judgments and it seems also to situations where the delivery of a judgment cannot, strictly speaking be said to be *ex tempore*, but is pronounced orally and not by the way of the handing down of a signed judgment. Further, s 176 of the Criminal Procedure Act 51 of 1977 (the CPA) makes provision for mistakes in pronounced judgments to be corrected.

Held that, the relevant paragraphs in the signed judgment supplements the transcribed judgment in line with the correct factual position and clears up a possibly obscure and ambiguous statement from the point of view of fourth to sixth appellants. Furthermore, even if the finding on this issue is not correct and that it was simply a mistake and not an ambiguity or obscurity then the court *a quo* was entitled to correct this mistake in terms of s 176 of the CPA as the judgment was signed by

the judge in circumstances where it could not possibly prejudice the appellants in respect of appeal procedures that followed subsequent to its release.

Held that, paragraph 81 in the signed judgment did not form part of the transcribed judgment. This court does not agree with the State's submission that this paragraph is in line with the tenor of the transcribed judgment. This is a different matter relating to the impracticality of addressing an issue with the appropriate conditions when considering bail to neutralise the likelihood of the appellants interfering with evidence. Whether conditions could be imposed to prevent appellants from interfering with evidence if granted bail was not a subject matter at all in the transcribed judgment. This additional justification to deny bail was not alluded to nor does it necessarily follow from the tenor of the transcribed record. In the result this paragraph in the signed judgment must be treated as *pro non scripto*.

It is thus held that, the signed judgment of 11 April 2022 sans para 81 thereof will be regarded as the judgment of the court *a quo* for the purposes of this appeal. For the purpose of the record it is ordered that para 81 of the signed judgment dated 11 April 2022 be struck from that judgment and regarded as *pro non scripto* as it was added to the judgment when the judge was *functus officio* having delivered an oral judgment to which the contents contained in para 81 could not be added to it subsequently.

Held that, the legal position on bail applications and appeals in Namibia has been restated recently by this court in *State v Gustavo* (SA 58/2022) [2022] NASC (2 December 2022) endorsing the full bench decision in *Nghipunya v State* (HC-MD-CRI-APP-CAL-2020/00077) [2020] NAHCMD 491 (28 October 2020) and this position is therefore applied in this appeal. With respect to the legal framework relating to bail applications and appeals, this court finds it necessary to express caution in respect of the use of South African case law as precedents. This is so because the South African underlying premise and legislation differs totally from that in Namibia. The South African Constitution contains a right to bail which is not

present in the Namibian Constitution and furthermore the section in the South African CPA dealing with bail differs materially from s 61 of the Namibian CPA.

Held that, the reliance on Art 7 and Art 12 of the Constitution by the appellants is misdirected. The constitutional rights contained in these articles can and must be enforced independently from any bail application. If their liberty was interfered with in terms of a valid warrant of arrest in respect of a criminal charge then the release can only flow from a successful bail application or from an acquittal in respect of the criminal charges.

Appellants further submitted that all the charges based on POCA are fatally flawed as officials of the ACC investigated these charges (ie money laundering and racketeering) and that the evidence in relation to these charges cannot be admissible.

Held that, when the ACC refers matters to the Prosecutor-General, the referral need not only be in respect of the ACA offences, but can also be in respect of any other offences discovered during the investigation. The sections in the ACA fortify the position that where lawful investigations established facts that would sustain convictions or prosecutions in respect of more than one offence, it would be nonsensical to exclude it in respect of certain crimes but allow it in respect of others.

Held that, the objections raised on this basis are not likely to substantially affect the admissibility of the evidence in respect of the POCA charges.

Consequently, and once it is accepted *prima facie*, that the State has established a strong case to make against the appellants, then the appellants' attack on the judgment of the court *a quo* falters at the starting block as the onus resting on the appellants to make out a case for their release on bail was not discharged. Further, considering the nature and magnitude of the allegations; the allegations relating to alleged attempts to interfere with the evidence and the likelihood of this continuing should they be released on bail and the role players involved (whose conduct struck

at the very basis of our society) - the risk that any one of them will not stand trial or continue to interfere with evidence simply cannot be excluded and the court a quo cannot be faulted to not allow anyone of them bail.

All six appeals are dismissed.

APPEAL JUDGMENT

FRANK AJA (SHONGWE AJA and MOSITO AJA concurring):

Introduction

[1] The appellants together with three other individuals are accused persons in a trial that is yet to commence in the High Court. Also arraigned with the above mentioned nine individuals are a number of corporations and trusts in which one or more of the individuals accused allegedly have an interest. The accused persons face charges of racketeering and money laundering pursuant to the provisions of the Prevention of Organised Crime Act 29 of 2004 (POCA), corruption pursuant to the provisions of the Anti-Corruption Act 8 of 2003 (the ACA), fraud in the form of tax evasion, conspiring to commit crimes, theft and obstructing or attempting to defeat or obstruct the course of justice.

[2] It needs to be mentioned that not all the accused persons are implicated in all the charges pressed. What is clear, however, is that they were all involved, according to the indictment, in an unlawful scheme to personally benefit from fishing quotas allocated by the State. Vast sums of monies are alleged to be involved in this regard. Thus, a total amount in excess of N\$317 million was mentioned at the bail hearing a quo. The extent to which each appellant or accused benefitted varies, but they all allegedly benefitted to the tune of millions of Namibian dollars.

[3] What is alleged, amounts to the largest corruption scandal since independence in this country, if not its history. Furthermore, it involves a syndicate operating over a number of years consisting of high profile officials and government ministers acting in cahoots with others to enrich the members of the syndicate. The allegations paint a picture of corrupt and criminal conduct on a massive scale in one of the biggest economic sectors of the economy of this country, namely the fishing sector. This syndicate also involves high profile international personalities.

[4] The first to third appellants were arrested on 27 November 2019. Fourth appellant on 17 February 2020 and the fifth and sixth appellants on 21 December 2020. They have all been incarcerated since their arrest. Fourth appellant applied for bail during June 2020, but this was refused by the magistrate. An appeal by him to the High Court was unsuccessful. Fourth appellant however then joined forces with the other appellants to bring the bail application which is the subject matter of this appeal.

[5] The judge *a quo* was not persuaded to grant bail to the appellants and hence this appeal to this court with leave of the court *a quo*. In essence, the court *a quo* found that it would not be in the interest of justice to grant the appellants bail. This was notwithstanding the findings that the court *a quo* could not ‘make a finding whether the applicants will or will not abscond’, that the appellants did not satisfy the court that if they are released on bail they will not distort or suppress evidence and thus ‘the likelihood that they would interfere with evidence is reasonably real’ and that their ‘personal circumstances, (their health, their family relations, employment

and business environments)' which the appellants placed before the court *a quo*, were 'neither unusual nor do they singly or together warrant release of the applicants in the interest of justice'.

Two judgments

[6] The evidence led at the court *a quo* and the submissions made on behalf of the appellants in that court were finalised on 11 March 2022 whereafter judgment was reserved. On 1 April 2022 the judge *a quo* commenced to pronounce himself in respect of the bail applications. This he did by reading his findings into the record via the recording system from a pre-prepared document (the transcribed judgment). From the transcription of these proceedings it is evident that he stated at the outset that 'this matter is up for judgment' and then commenced to read his reasoning and findings into the record culminating in the dismissal of the bail applications and concluded 'that is the judgment'. On 11 April 2022 a signed judgment was forwarded to the parties and presumably uploaded on the High Court's website.

[7] Issue is taken on behalf of the appellants with the signed judgment as they contend that the signed judgment differs from the transcribed judgment and that as the judge was *functus officio* after he delivered the transcribed judgment, the signed judgment must be declared a nullity or alternatively those portions of the signed judgment that do not coincide with the transcribed judgment must be deleted and treated as a nullity (*pro non scripto*).

[8] The general principle, when it comes to judgments was stated as follows by this court in *Cargo Dynamics Pharmaceuticals v Minister of Health*¹:

'The general principle is that once a court has duly pronounced a final judgment or order, it may not correct, alter or supplement it, as it is *functus officio*. There are four main exceptions to this rule: the judgment may be supplemented in respect of ancillary matters such as costs which the court overlooked; it may be clarified if its meaning is obscure or ambiguous provided the clarification does not vary the "sense and substance" of the order; a court may correct a clerical, arithmetic or other error to give effect to its true intention; and the court may amend its costs order in specific circumstances.'

[9] The general rule is strictly adhered to when it comes to signed judgments. Some leeway is however allowed when it comes to *ex tempore* judgments and it seems also to situations where the delivery of a judgment cannot, strictly speaking be said to be *ex tempore*, but is pronounced orally and not by the way of the handing down of a signed judgment. In cases where judgments are delivered orally, ie by pronouncing it by speaking directly into the recording equipment or by reading it into the recording equipment from notes which are not handed down and signed as a formal written judgment, a less stringent rule relating to the finality of such judgments applies. As will become apparent from what is stated below, such judgments are treated as *ex tempore* judgments provided that the signed judgment is delivered prior to any prejudice being caused to any of the parties to such judgment relating to the result or the re-wording thereof.

[10] In *Cargo Dynamics*, it was accepted that the South African approach set out in *S v Wells*² is to apply to judgments given orally. The following statement from

¹ *Cargo Dynamics Pharmaceuticals v Minister of Health* 2013 (2) NR 552 (SC) at 556.

² *S v Wells* 1990 (1) SA 816 (A).

Wells is cited with approval: ‘. . . permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby. . .’³.

[11] What thus needs to be done is to compare that transcribed judgment (unrevised) with the signed (revised) judgment ‘to determine whether the revised judgment dealt with basically the same *rationes decidendii* as the unrevised judgment “without changing or violating the tenor of the unrevised judgment”’⁴.

[12] When it comes to judgments pronounced pursuant to matters arising from the Criminal Procedure Act 51 of 1977 (CPA) there is a further qualification to the *functus officio* rule contained in s 176 of the CPA. This section makes provision for mistakes in pronounced judgments to be corrected. The relevant portion of s 176 for the purpose of this matter reads as follows:

‘When by mistake a wrong judgment is delivered, the court may, immediately after it is recorded, amend the judgment.’

[13] With the aforesaid principles in mind I now turn to the complaints raised against the signed (revised) judgment. On behalf of the first to third appellants, issue was taken with paras 50, 81, 84, 85 and 86 of the signed judgment. On behalf of the other appellants, issue was taken with the removal of a paragraph in the transcribed judgment relating to a finding that there is a clear possibility that the applicants (appellants) will ‘if released on bail, suppress or distort evidence relating to that sum

³ *Wells* at 820C (as quoted in *Cargo Dynamics* at 557A-B).

⁴ *Cargo Dynamics* para 14.

of money is' and replacing this with four new paragraphs which 'made further amendments to the previous line of reasoning. . . '.

[14] When it comes to para 50 of the signed judgment it does not change the substance of what was contained in the ruling at all. It in essence repeats what is stated in the transcribed judgment and the fact that the phrase 'backed up' was moved does not change the meaning of the transcribed judgment at all.

[15] Paragraph 81 does not form part of the transcribed judgment. It is submitted on behalf of the State that this paragraph is in line with the tenor of the transcribed judgment as it simply embroiders the finding in the transcribed judgment that there is a likelihood that the appellants will interfere with evidence if granted bail. I do not agree. This is a different matter relating to the impracticality of addressing this issue with the appropriate conditions when considering bail to neutralise the likelihood of the appellants interfering with evidence. Whether conditions could be imposed to prevent the appellants from interfering with evidence if granted bail was not a subject matter at all in the transcribed judgment. This is an additional justification to deny bail which was neither alluded to nor necessarily follows from the tenor of the transcribed record. In the result this paragraph in the signed judgment must be treated as *pro non scripto*.

[16] When it comes to para 84 the transcribed judgment is the same as the first two sentences in the signed judgment. What is added is the reference to the case of *Abraham v State*⁵ and the quotation from this case. This addition is simply supplementary to the transcribed judgment which already found that the personal

⁵ *Abraham Brown v State* CA158/2003 delivered on 31 March 2004.

circumstances of the applicants did not warrant a release on bail and hence does not detract from the sense or substance of the transcribed judgment. The same comments apply to paras 85 and 86. It needs to be pointed out that para 86 in essence is a repeat of what is stated in the transcribed judgment, namely that the personal circumstances of the appellants before the court *a quo* were not of such a nature to justify their release on bail.

[17] The objection on behalf of the fourth to sixth appellants against the replacement of the extract in the transcribed judgment which erroneously, according to them, implicated them in the concealment of the money kept in a bank account in Dubai whereas the correct facts are stated in the signed judgment from which it is clear that they are not implicated in respect of that money. These appellants want the wrong factual position to prevail so that they can point it out as a misdirection by the court *a quo* so as to justify interference with the decision by this court. The problem however with this approach is that the transcribed judgment read in context, does not implicate them at all in respect of the money in the bank account in Dubai. In context it is clear that this account was opened by the second appellant. The signed judgment does supplement the transcribed judgment in line with the correct factual position and clears up a possibly obscure and ambiguous statement from the point of view of fourth to sixth appellants. Furthermore, even if my finding above is not correct and that it was simply a mistake and not an ambiguity or obscurity then the court *a quo* was entitled to correct this mistake in terms of s 176 of the CPA as this was the first transcribed judgment signed by the judge in circumstances where it could not possibly prejudice the appellants in respect of appeal procedures that followed subsequent to its release.

[18] The upshot of the above is that the signed judgment of 11 April 2022 sans para 81 thereof will be regarded as the judgment of the court *a quo* for the purposes of this appeal. For the purpose of the record it is ordered that para 81 of the signed judgment dated 11 April 2022 be struck from that judgment and regarded as *pro non scripto* as it was added to the judgment when the judge was *functus officio* having delivered a transcribed judgment to which the contents contained in para 81 could not be added to it subsequently for the reasons set out above.

Legal framework

[19] When it comes to bail appeals, the legal position has been restated recently by this court⁶ which also endorsed a full bench decision by the High Court⁷ which comprehensively dealt with this topic. It will serve no purpose to rehash the principles contained in these decisions, but it is apposite that I mention some of the aspects raised in the two mentioned cases for the purposes of this appeal. It should also be noted that both the decisions dealt with bail appeals of accused persons in respect of the very charges that the appellants face. Thus in *State v Gustavo* the court dealt with the bail appeal of Mr Gustavo who is a co-accused of the appellants and is accused no. 1 at the trial. In *Nghipunya v State*, the appellant was the fourth appellant who will be accused no. 7 at the trial.

[20] Chapter 9 of the CPA contains the framework within which bail applications are to be dealt with. In essence it requires the court to engage in a balancing exercise between the need to preserve the liberty of the accused persons who are

⁶ *State v Gustavo* (SA 58/2022) [2022] NASC (2 December 2022) (*Gustavo*).

⁷ *Nghipunya v State* (HC-MD-CRI-APP-CAL-2020/00077) [2020] NAHCMD 491 (28 October 2020) (*Nghipunya*).

deemed to be innocent until proven guilty and the interest of the administration of justice to ensure that guilty persons are convicted and dealt with accordingly.

[21] When a person is lawfully arrested and detained there is no question of the person's constitutional rights as stipulated in Art 7 being infringed. This is so because Art 7 expressly provides for the right to personal liberty to be deprived 'according to procedures established by law'. 'The rule of law, a foundational principle of our constitution and the principle of accountability inherent in our constitutional values require the State to prosecute those who transgress the law without fear or favour in order to uphold and protect the Constitution itself. The interest of the public is served by the State addressing serious crime and the scourge of corruption within the operation of the rule of law'⁸.

[22] An accused person who is being detained can apply for bail. In such case such accused person must show that he or she is a worthy candidate for bail. In other words, the accused person bears the onus to establish that he or she is a worthy candidate for release on bail (with or without conditions)⁹.

[23] Whereas the traditional considerations, as set out in *State v Acheson*¹⁰ are still of relevance and important in the determination of bail applications, s 61 of the CPA which, in its current form, was added to the CPA post *Acheson* applies to serious cases such as the case under consideration. Section 61 vests the court with the discretionary power to decline bail 'in the interest of the public or the administration of justice'. The relevant part of s 61 in this regard reads as follows:

⁸ *Gustavo* para 76.

⁹ *Gustavo* para 47.

¹⁰ *S v Acheson* 1991 NR 1 (HC) (*Acheson*).

' . . . 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 the police investigation, refuse 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 administration of justice that the accused be retained in custody pending his or her trial.'

[24] The traditional considerations set out in *Acheson* are the following:

First, was it more likely that an accused would stand his or her trial or was it more likely that such accused would abscond? Second, was there a reasonable likelihood that the accused, if released on bail, would tamper with the evidence and witnesses and cause evidence to be distorted or suppressed? Third, what is the prejudice to an accused being kept in custody pending his or her trial? In weighing up these considerations various other factors, depending on the circumstance, may come into play. A number of these factors are set out in *Acheson* but it would serve no purpose to reiterate them all in this judgment. As some of the factors relating to the prejudice caused to an accused if kept in custody pending his or her trial were raised on behalf of the appellants, it is apposite that I mention them. On behalf of the appellants it is submitted that that prejudice to them was not properly considered with reference to the lengthy period they have been already incarcerated which would be exacerbated by them being kept in custody pending, what would be, a lengthy trial. This would have an effect on their ability to earn an income and comply with their obligations. Further, it would have an impact on their ability to prepare for the trial as well as have an impact on their respective health. I deal with these aspects herein below.

[25] Section 61 does not require that a court hearing the bail application must first determine the traditional considerations as set out in *Acheson* and once it determined that, on those requirements, there would be no obstacle to bail it may then only apply s 61. The full bench of the High Court in *Nghipunya* considered this aspect and concluded as follows:

'The word 'notwithstanding' do not in our view equate to restricting the applicability of section 61 only in instances where a court finds that an applicant is *not* likely to abscond or interfere . . . Having perused decisions by this court shortly after the amendment, we find that the approach to be taken is a holistic one rather than restricted. A court should therefore, when exercising such wider powers, look at the evidence holistically when asking itself whether the applicant has discharged its onus on a balance of probabilities.'¹¹

[26] It was submitted on behalf of fourth to sixth appellants that s 61 only applies to situations where public violence had to be prevented and to address a threat of violence where it amounts to 'a menace, a danger, a scourge to public stability'. This approach was rejected in *Gustavo* by this court by reference to the following extract from *Nghipunya*:

'The days of distinguishing between the seriousness of monetary crimes and violent crimes can no longer be seen to be different in bail applications. Whether the crimes involve public funds or a physical attack on a member of society, if the circumstances permit, the seriousness therefore must be taken into account when considering bail. In this matter, the misappropriation of public funds affects every individual of the Namibian public and needs to be seen for the detestable crime that it is. This together with the factors outlined above are essentially enough to arouse a court to the view that the administration of justice does not merit the release on bail of an applicant under these circumstances.'¹²

¹¹ *Nghipunya* para 30.

¹² *Gustavo* para 53 quoted from *Nghipunya* para 44.

[27] I interpose here to mention that the two considerations set out immediately above dispose of submissions made on behalf of fourth to sixth appellants. The reference to the interest of the public does not, as submitted, only relate to protection against violent crimes and matters of public safety¹³, nor was the court a quo compelled to first deal with the traditional grounds relating to bail applications before it could invoke s 61.

[28] When it comes to the appeal before us the primary question is not what we would have decided had we heard the bail application. It is only if we are satisfied that the decision of the court a quo was wrong that we can give a decision we consider should have been given.¹⁴ The test adopted from South Africa is quoted in *Gustavo* and is as follows:

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

In the context of the present appeal the word 'magistrate' in the quotation should be substituted with the word 'judge'.

¹³ *Gustavo* paras 52 and 54.

¹⁴ Section 65 (4) of the CPA.

¹⁵ *Gustavo* para 57. See also *S v Barber* 1979 (4) SA 218 (D) 220.

[29] Lastly, in respect of the legal framework relating to bail applications and appeals, a caution should be expressed in respect of the use of South African case law as precedents. This is so because the South African underlying premise and legislation differs totally from that in Namibia.¹⁶ The South African Constitution contains a right to bail which is not present in the Namibian Constitution and furthermore the section in the South African CPA dealing with bail differs materially from the Namibian CPA. The position in Namibia was summarised in *Nghipunya* as follows:¹⁷

‘. . . an applicant for bail does not *per se* enjoy a *right to bail* but a *right to apply for bail*. Moreover, an accused who applies for bail bears the specific onus to prove on a preponderance of probabilities that the interest of justice permit his release. This means that an applicant must specifically make out his own case and not necessarily rely on the perceived strength or weakness of the State’s case. In so doing, an applicant must place before a court reliable and credible evidence in discharging this onus.’

First to third appellants

[30] First to third appellants applied for bail by way of affidavit. The State in opposing the bail applications of all appellants presented oral evidence through two witnesses who were cross-examined on behalf of all the appellants. There is nothing awry with this hybrid approach in bail applications seeing the *sui generis* nature of such applications. It however does not mean that refusal of an applicant for bail to give evidence under oath and submit himself to cross-examination is necessarily of no consequence. Whereas an affidavit carries more weight than a mere unsworn

¹⁶ *S v Dausab* 2011 (1) NR 232 (HC) deals in some details with the different positions in South Africa and Namibia. See also *S v Bruinders* 2012 (1) SACR 25 (WCC) where the South African position is dealt with extensively.

¹⁷ *Nghipunya* para 18.

statement, it carries less weight than oral evidence which was subjected to the test of cross-examination.¹⁸

[31] The first line of attack on the judgment *a quo* is that it did not properly consider the impacts of appellants' constitutional rights to liberty and a fair trial. The focus in this attack is the fact that they have been in custody since their arrest and the length of their upcoming trial would be of such duration that it would inevitably lead to a further extended period of custody. On behalf of the appellants it was contended that whereas Art 7 of the Constitution, which contains the right of liberty and authorises detention must be seen subject to Art 12 (1)(b) which provides under the 'Fair Trial' provision that such 'trial . . . shall take place within a reasonable time, failing which the accused shall be released'. The submission thus proceeds along the line that the length of appellants' incarceration is such that a reasonable time has already expired and in such circumstances the onus moved to the State to prove the continuous detention of the appellants was in the interest of the public or the administration of justice.

[32] Article 12 of the Constitution encapsulates the adage that 'justice delayed is justice denied' and this court in *S v Myburgh*¹⁹ dealt with the requirements relating to 'release' pursuant to the provisions of this Article. Firstly, what is a reasonable time must be determined on a case by case basis. In this regard the length of the delay may be presumptively prejudicial and only when this is established, need one consider the reasons for such delay and the prejudice caused, if any, to an accused person so as to establish whether there was unreasonable delay²⁰. When it is

¹⁸ *Nghipunya* para 9.

¹⁹ *S v Myburgh* 2008 (2) NR 592 (SC).

²⁰ *Myburgh* at 601I - 603A.

determined that the delay justifies a ‘release’ of the accused, a court has three options. First, where the accused has not yet pleaded, this is similar to the withdrawal of the case against the accused by the prosecution. This does not have the effect of a permanent stay²¹ but will mean that the accused will be released from prison if incarcerated and or from any bail conditions. Second, where an accused has already pleaded to the charges, this release will be tantamount to an acquittal on the charges. (This release is akin to a withdrawal of the charges by the prosecutor subsequent to a plea on the merits by the accused). Third, a permanent release from prosecution or permanent stay of prosecution, which, because of its adverse effect on the interest of the victims of the alleged crimes, the public interest and the accused will only be apposite in ‘the exceptional and extreme cases of unreasonable delay’²².

[33] Counsel for first to third appellants expressly disavowed any intention to seek a permanent stay. Nor did he seek a release prior to pleading to the charges as envisaged in *Myburgh*. He sought bail coupled with conditions and in this quest submitted that the normal incidence of onus be reversed, namely, that as a result of the long delay to bring the matter to trial the onus shifted to the State to prove it would not be in the interest of justice to release the appellants on bail with appropriate conditions. I point out below that this delay complained of is taken into account when considering bail applications but this is not the same as when done in the process of determining whether an accused person’s Art 12(1)(b) right has been infringed.

²¹ *Myburg* at 623H – 624A.

²² *Myburgh* at 609H and 624E-F.

[34] The reliance on Art 7 and Art 12 of the Constitution is misdirected. The constitutional rights contained in these articles can and must be enforced independently from any bail application. Thus, if a person is deprived of his or her liberty not in terms of ‘procedures as established by law’ such person can compel his or her release and his or her liberty restored. If the liberty was interfered with in terms of a valid warrant of arrest in respect of a criminal charge then the release can only flow from a successful bail application or from an acquittal in respect of the criminal charge. Similarly, where a criminal trial is not commenced within a reasonable time an accused person can apply for his release pursuant to Art 12(1) (b) of the Constitution. The requirements to obtain such release are dealt with in *Myburgh* which requirements were not properly canvassed in the affidavit in support of the bail applications which is understandable seeing the basis of the bail applications.

[35] The release in terms of Art 12(1)(b) seems to be primarily concerned with a release from further prosecution for the offence for which an accused is charged. This does not mean that the period of incarceration or the likely period incarceration is not relevant as pointed out by Hannah J in the *S v Heidenreich*²³:

‘. . . it is implicit in terms of art 12 that a trial court has the power, authority and indeed the duty to ensure that fundamental rights entrenched in that article are observed in proceedings conducted before it. . .’

²³ *S v Heidenreich* 1998 NR 229 (HC) at 233 I-J.

Furthermore when it comes to the usual considerations that must be taken into account in considering bail applications namely the prejudice that accused will suffer if denied bail, such delay must be taken into account.

[36] It is not necessary to elaborate on this aspect any further as the appellants simply did not put up any facts, apart from the time lines involved, to establish an unreasonable delay and this delay was thus just a factor to be considered in the ordinary course of dealing with the bail application and not identified as a threat to the fundamental rights of any appellant. In view of the nature and complexity of the alleged offences coupled with its international reach it cannot be stated without more that the delay was or is presumptively prejudicial to the appellants.

[37] On behalf of the appellants, it is submitted that all the charges based on POCA are fatally flawed as officials of the ACC investigated these charges. This is so because the ACC officials were not authorised to investigate POCA offences. It is conceded by counsel for the appellants that it is not necessary for this court to decide the issue finally and nor was it for the court *a quo* necessary to do so. According to counsel it was however necessary to consider this aspect together with the 'basket' of factors when determining the bail application. The court *a quo* was of the view that if the appellants felt strongly about this issue they should have approached the High Court to quash all the charges relating to POCA and hence the court *a quo* dealt with the matter as per the existing indictment.

[38] In the heads of argument filed on behalf of the appellants an analysis is made comparing provisions in POCA with the ACA and pointing out that each Act

envisaged that officers in the employ of the Namibian Police (Nampol) or in the employ of the Anti-Corruption Commission (the ACC) have different mandates in respect of what they can investigate. A detailed analysis is then made in respect of how these officials are to be appointed and their mandates to conclude that ACC investigators cannot investigate POCA offences. It is then pointed out that Mr Kanyangela and his colleagues at the ACC conducted most of the investigations in this matter.

[39] With due respect to the diligence and theoretical knowledge exhibited by counsel for appellants in dealing with the matter when drafting the heads of arguments, I am of the view that the merits of the submission in the circumstances of the present matter is exaggerated and so are the effects even if correct in certain instances and that the failure of the court *a quo* to consider it was not of material nature and does not warrant the interference of this court.

[40] To illustrate the limited effect, if any, of the point raised by the appellants will have on the evidence I simply refer to the following example. Say, the ACC is tasked to investigate an alleged act of corruption. For this purpose one of the issues that needs to be investigated is whether a person used his or her position to unlawfully gain a personal benefit from someone else. Such investigation determines that person A exercised his discretion on numerous occasions to award person B certain rights which are of economic value to B. The choice of B in this context is a suspect for whatever reason. Investigation must now establish that A benefitted personally from the rights he granted to B. To do this investigation the bank statements of B are obtained and they reflect several large payments made more or less

contemporaneously with the receipt of the rights by B. These payments are made to a variety of entities, (ie corporations, companies and trusts). On further investigation it is found that A has an interest in some of these entities and in this manner payment was channelled to A. It is also found that false invoices were created by the entities to reflect the payments as due to such entities for consultancy services to B. Some payments take an even more circuitous route to A. Thus an entity in which A, on the face thereof holds no interest channels a large amount received from B in a piecemeal fashion to a further entity again by the use of false invoices in which A holds an interest. The investigator is now satisfied that the money trail established offences of corruption against A and B and provides the Prosecutor-General with this docket. After perusal of the docket the Prosecutor-General decides to charge A and B with corruption but also with money laundering because of the manner in which the payments were disguised. Does this mean that A and B cannot be charged with money laundering because it was uncovered by an official of the ACC who was not authorised to investigate money laundering offences? Simply stating the proposition demonstrates its absurdity. The evidence which was lawfully gathered pursuant to the ACC investigation can obviously be used to press any charges based on such evidence. This is so because such evidence was not unlawfully obtained. In fact, as pointed out by counsel for the State, the ACA expressly provides that where an investigator from the ACC ‘reasonably suspects’ an offence other than the one that is being investigated was committed and is connected with or facilitated by the offence being investigated that such offender can be arrested by the mentioned investigator²⁴. When the ACC refers a matter to the Prosecutor-General it can refer it not only in respect of the ACA offences but also in respect of ‘any other offence

²⁴ Section 28 (2) of the ACA.

discovered during the investigation. . .'²⁵. These sections fortify their position that where lawful investigations established facts that would sustain convictions or prosecutions in respect of more than one offence it would be nonsensical to exclude it in respect of certain crimes but allow it in respect of others. The upshot of this is that objections raised on this basis are not likely to substantially affect the admissibility of the evidence in respect of the POCA charges if at all.

[41] Furthermore, on the record it is impossible to determine whether any evidence will be inadmissible on the basis suggested on behalf of the appellants. This is so because, as pointed out above, evidence lawfully gathered by the ACC officials can be used in respect of the alleged POCA offences and it is not possible at this juncture to determine in respect of which POCA offences and to what extent such offences will be effected. This issue is further complicated by the fact that at some stage, during the investigations, certain members of Nampol were authorised in terms of POCA and did become involved in some investigations. It is for the trial court to decide on the issues of admissibility of evidence in this regard, but for the reasons mentioned it is unlikely that evidence will be disallowed on the scale suggested on behalf of the appellants.

[42] Appellants also launched an attack on the manner in which Mr Kanyangela conducted the investigation, with aspersions that he was acting under direction of his wife and his predecessor; that he was hostile to the appellants and that the timing of the arrest of some of them was such so as to embarrass them as much as possible. These are simply last grasps at straws which are of no moment in the matter viewed against the documentary evidence relating to the money flows which ended up in

²⁵ Section 31 (1) of the ACA.

bank accounts of entities controlled by them or in which they had an interest. However hostile and flawed Mr Kanyangela's investigation may have been, (and the record does not support such conclusions in my view), it is not his evidence that will determine the matter but other evidence (including documentary evidence). The complaints against Mr Kanyangela seem to be for the sake of carping by the appellants as they could find no better complaints. The court *a quo* correctly held that these complaints were of no moment in the exercise of its discretion in the bail appeal. I should also mention in passing that to submit that Mr Kanyangela was hostile to the appellants because he said the purpose of his giving evidence in the bail application was to oppose the granting of bail to the appellants is an unwarranted inference. Criminal proceedings are adversarial in nature and it is a duty of the investigating officer to assist the court hearing the bail application with his views²⁶.

[43] Appellants raised an issue with Mr Kanyangela during his evidence relating to the witness Jóhannes Stefánsson who is identified as the whistle blower. It was questioned whether this witness will come to testify and his credibility was also impugned suggesting that he was a drug addict and in any event an accomplice. This was based on the application by some Icelandic applicants who made these allegations in an application where they explained, among others, that they would not come to Namibia voluntarily to be added as accused in the indictment and in which application they oppose the attachment of property belonging to fishing companies they operated in Namibia. Mr Kanyangela pointed out the State's case was not dependent on the evidence of this witness. Mr Kanyangela further indicated he had no information indicating that Mr Stefánsson would not come to Namibia to

²⁶ *Carmichele v Minister of Safety and Security* 2002 (1) SACR 79 (CC) paras 72 and 74.

testify. The suggestion that the court *a quo* should have paid more regard to this speculative approach as to whether Mr Stefánsson, will or will not testify, as though if he did not, the State's case would be substantially weakened is thus without merit.

[44] Lastly, with regard to attacks launched on the judgment *a quo* on behalf of the appellants. It is suggested that when considering the prejudice the appellants will suffer if they are not granted bail, the court did not properly consider the prejudice the appellants would suffer in respect of their fair trial rights (Art 12) relating to the environment in which they would need to consult. The problem with this submission is twofold. First, it was not raised as a ground of appeal. Second, it is in any event of no merit in view of the evidence of the Deputy Commissioner Armas that the complaints raised by appellants in this regard were addressed by him and since then no further complaints were forthcoming.

[45] As the attack on the judgment *a quo* by the appellants relates mainly to matters attacking the admissibility of evidence and the manner in which the investigation was conducted and these attacks are without merit as indicated above no basis was established to interfere with the discretion of the court *a quo*. As pointed out the further attack based on the submission that the onus has shifted to the State as a result of the time spent in incarceration by the appellants was also without merits. To reiterate the approach on appeal is set out in *Nghipunya* as follows:

' . . . the court of appeal is not called upon to sift through every detail of evidence afresh to determine whether it agrees or disagrees with the factual findings of the magistrate. The inquiry is limited to whether the court *a quo*'s discretion was

exercised wrongly. . . . A court of appeal's powers are only activated when the court a quo made a clear error *ex facie* the record. Moreover, where a misdirection is proven it must further be shown to be material, as not every misdirection will enable the court of appeal to disregard the findings of the court a quo.²⁷

[46] In respect of the strength of the State's case against the appellants it is apposite that I say something in passing only as this did not feature, save to the extent indicated above, in the attack on the judgment of the court a quo. None of the appellants gave evidence under oath and in respect of the money flow that was substantiated by documentary evidence. Mr Kanyangela's evidence was not disputed in any meaningful way. This meant, *prima facie*, the State established that it has a strong case against the appellants. I deal further with this aspect below when considering the applications of the fourth to sixth appellants.

Fourth to sixth appellants

[47] It is apposite before dealing with the bail applications of the above appellants that I provide a brief summary with regard to the alleged unlawful scheme put in place by and operated for the benefit of all the appellants. As will become apparent there were two legs to the operation namely - one that became to be referred to as the 'Fishrot' ('governmental objectives') component and one that became to be referred to as the 'Namgomar component'. In the public news media the matter has been referred to as the 'Fishrot' case without necessarily distinguishing between these two components.

[48] In terms of the Marine Resources Act 27 of 2000 (the MRA), the Minister of Fisheries and Marine Resources makes fishing quotas available to a statutory

²⁷ Para 17.

created state-owned company known as the National Fishing Corporation of Namibia Limited (Fishcor). Fishcor was designated to, *inter alia*, receive quotas so as to create funds for use in respect of ‘governmental objectives’. In the words of the MRA the purpose of the quotas is ‘to utilize or harvest marine resources to advance any social- economic, cultural or other governmental objectives in the public interest. . .’²⁸. Per Cabinet Directive two beneficiaries were identified namely the Namibia Fish Consumption Trust and Government Drought Relief Programmes. A Cabinet Committee was tasked to investigate a further four identified beneficiaries but nothing came of this that is of relevance in this matter.

[49] The Minister (accused No. 4) decided to make use of the provision relating to quotas for governmental purposes to allocate quotas for the benefit of the governing party (SWAPO) for use at its Congress where the new leadership of the party would be elected. The use of the quotas for these purposes was conveyed to fourth appellant by second appellant. Fourth appellant who was the Chief Executive Officer of Fishcor sold these quotas to fishing companies and arranged that the proceeds thereof be paid to the trust accounts of two legal practitioners from where they would be further distributed. An amount of N\$75 million was raised in this regard. What transpired when the money trail was followed in respect of the payments by the two legal practitioners is that less than ten per cent of the N\$75 million ended up with the SWAPO party and the balance of the amount was transferred to various entities in which the accused persons had an interest. This is the Fishrot component of the criminal case. The allegations against fourth to sixth appellants concerns this component of the criminal case. In other words, these appellants are not implicated in the ‘Namgomar component’.

²⁸ Section 3(3) of the MRA.

[50] In terms of s 35 of the MRA, Namibia may enter into agreements with countries in the Southern African Development Community to allow such countries to ‘harvest marine resources in the Namibian waters’. A memorandum of understanding in this regard was entered into with Angola. In terms of this memorandum of understanding a company would be set up in which Namibia and Angola would be joint stakeholders. This company would then be allocated quotas by the Minister of Fisheries and Marine Resources. A Namibian company Namgomar Pesca (Namibia) (Pty) Ltd was thus created. According to the company records the sole shareholder of this company is Namgomar Pesca Limitada, an Angolan company. Mr Gustavo (Accused No. 1) was appointed as the sole director of this Namibian company. It seems that the intended Angolan company was never created. Be that as it may, fishing quotas were granted by the Minister of Fisheries and Marine Resources to ‘Namgomar’. In fact 500 000 metric tons of ‘horse mackerel quota’ were allocated to Namgomar with an approximate value of N\$150 million. None of the money generated through these quotas flowed to either of these two States that were supposed to benefit but, again, it was syphoned off through various entities to the accused persons and, relevant to this appeal, mainly to the first to third appellants. This component is known as the ‘Namgomar component’ in the pending trial. The money trail in respect of the ‘Namgomar component’, as in the ‘governmental objectives’ component thus sets the tone of the State’s case against the appellants.

[51] I have set out the above brief background in respect of gist of the State’s case. I do this because of the submissions on behalf of fourth to sixth appellants that the State’s case against them is a very weak one and hence the refusal of bail to

them was likely to result in innocent persons languishing in prison while the trial proceeds. Whereas the 'Namgomar component' is not relevant to the fourth to sixth appellants, I mention it because it illustrates the manner in which the State has gone about in its investigations of the matter. The State thus followed the money trail collecting supporting documentation in respect of the quotas allocated, the payments that were made, the recipients thereof, the accounts into which these amounts were paid and the further distribution thereof. As already indicated in this manner it seeks to establish that large amounts ended up in the accounts of the accused persons (including the appellants), their business partners or entities in which they have interests. This approach was followed in respect of both the 'Namgomar component' and the 'governmental objectives' component of the criminal matter. The money trail is corroborated by documentary evidence obtained from the relevant bank accounts.

[52] Probably realising that should the State establish the money trail an explanation would have to be forthcoming from the accused persons, the fourth to sixth appellants gave evidence under oath so as to explain the monies that ended up in entities in which they have or had an interest in. The submission on their behalf is that their evidence in this regard is so compelling that it tends to show that the State has a very weak case against them. Without in any way attempting to prejudice the issue it must be pointed out that their explanations are not as compelling as suggested by their counsel. Their explanations will have to be assessed in due course in the light of all the evidence and I only refer to one aspect in which the explanations still leave the issue of the payments unresolved. This relates to instances where a fishing company, say A, made payments to an entity in which some of the appellants had an interest, say B. It was then stated in evidence that

such payment was owing in terms of an agreement between A and entity C (in which one or more of the accused and one or more of the appellants would also have an interest). When pointed out that the payment was not made to C but to B who had no agreement with A, it is explained that B had an agreement with C in terms of which C owed that amount to B and hence the payment due by A was ‘delegated’ by C to B. Needless to say this ‘delegation’ is not evident from the invoice presented by B. The invoice indicates an amount owing from A to B for certain services rendered. On the version of the appellants this was a false invoice and would thus mislead anyone who wanted to write up the books of any of the entities or the fishing companies involved as the documentary evidence would not reflect the reality based on the version of the appellants. These false invoices raises the question relating to money laundering as to why would a false invoice that would, from an accounting perspective, simply indicate the wrong parties as well as cause confusion be used if not to conceal the true state of affairs? The State is also in possession of statements of witnesses that indicate that the services billed for in the false invoices were never rendered making the invoices not only false but fictitious. The fourth to sixth appellants dispute this but this issue together with the whole *modus operandi* will have to be decided at the trial to see what the correct factual position is. The point however is that the mentioned appellants evidence in this regard does not satisfactorily address this issue so that one can make a determination that this issue will in all likelihood be determined in the appellants’ favour. This means that as the matter stands in this bail application, the State made out a *prima facie* case that the payments and the manner in which they were done were part of the corrupt scheme and that the method in the method of distribution of such monies amounts to money laundering (a POCA offence).

[53] The attempts by counsel for the fourth to sixth appellants to discredit a statement of the witness Jose Ramon in which this witness stated that he was approached by the fourth appellant to sign an agreement which was not yet signed and which was indicative of an intention to interfere with evidence is likewise not an issue that can be of much assistance to the fourth appellant. It is not disputed that he contacted Mr Ramon to seek his signature on behalf of a fishing company. The contract that he sent to Mr Ramon for signature in 2019 was backdated to 2017. Was this simply to finalise an agreement to which there was already verbal consent or an attempt to create a completely new backdated agreement in view of the pending investigation? Only once the evidence of Mr Ramon has been heard will the court be able to weigh up the situation against the full factual backdrop and decide this issue. It is however not cut and dry that the innocent version of the fourth appellant is bound to be accepted as submitted by his counsel. To cross-examine Mr Kanyangela uphill and down dale as to what Mr Ramon meant in his statement is not very helpful as Mr Ramon will come and explain himself what he meant. *Prima facie*, and in the context of the statement of Mr Ramon, it is evident that he thought the request from the fourth appellant in this regard was suspect and hence not as innocent as suggested by fourth appellant.

[54] It follows that if regard is had to the evidence relating to the money trail which is backed-up by the relevant bank statements and taking the false invoices created in respect of many payments into regard, the State has, *prima facie* established that it has a strong case against all the accused which includes fourth to sixth appellants. It is not necessary to sift in detail through all the evidence *a quo* to further elaborate

on this point and I decline to do so. The point is that, based on the evidence available to the State bolstered by documentary evidence, it is quite clear that the submissions made on behalf of fourth to sixth appellants that State's case against them on a *prima facie* basis is a weak one cannot be accepted.

[55] Once it is accepted that, *prima facie*, the State has established that it has a strong case to make against the appellants then the attack on a judgment of the court *a quo* falters at the starting block as the onus resting on the appellants to make out a case for the release on bail was not discharged by them. As found by the court *a quo* the appellants did not establish on a balance of probabilities that they would not abscond in view of the serious nature of the offences they face and the potentially severe sentences awaiting them. A number of potential further accused who left the country and are still abroad indicated they will oppose any extradition proceedings against them. Taking the closeness of the accused to each other through family ties, employment and business relationships and taking into account the incidents relating to alleged attempts to interfere with the evidence the likelihood of this continuing should they be released on bail cannot be discounted. I should mention at this junction that there is no evidence suggesting that the sixth appellant was in any way involved in any conduct suggesting that he would interfere and or tamper with evidence or witnesses. This however is not the key to his release on bail as suggested by his counsel. This is so because his co-accused are all linked to conduct that is indicative of the intention to interfere or tamper with witnesses or evidence and some face charges of attempting to defeat or obstruct the course of justice flowing from such conduct. In respect of fourth and fifth appellants, these allegations relate to communications with Mr Ramon related above. However taking

into account the close relationship between the accused mentioned above and the fact that they, *prima facie*, acted as a syndicate it cannot be said that the court *a quo* misdirected itself when it concluded that the risk of tampering or interfering with evidence could not be excluded in respect of all appellants.

[56] In addition, as pointed out in *Gustavo*, the nature, magnitude and the role players involved are such that, what is at play, is in fact allegations of persons whose conduct struck at the very basis of our society. In such circumstances the risk that any one of them will not stand trial or interfere with evidence simply cannot be excluded and the court *a quo* cannot be faulted to not allow anyone of them bail.

Conclusion

[57] In the result, and for the reasons set out above, I make the following order:

All six appeals are dismissed.

FRANK AJA

SHONGWE AJA

MOSITO AJA

APPEARANCES

FIRST TO THIRD APPELLANTS: V Soni, SC (with him R Kurtz)
Instructed by Murorua Kurtz Kasper Inc

FOURTH TO SIXTH APPELLANTS: T Phatela (with him M Engelbrecht)
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RESPONDENT: C K Lutibezi (with him E E Marondedze)
Of the Office of the Prosecutor-General