REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

BAIL RULING

Case No. CC 19/2017

In the matter between:

DAVID SHEKUNDJA **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Shekundja v S* (CC 19/2017) [2020] NAHCMD 339 (22 July 2020)

Coram: SIBEYA AJ
Delivered: **22 July 2020**
Reasons: **17 August 2020**

Flynote: Criminal Procedure – Bail – New facts – Accused not brought to court for hearing and accused's lawyer based at the epicentre area of COVID-19 in Namibia where movements are restricted – Parties opted to have the bail application heard and decided on affidavits – Application brought and opposed on affidavits – Face to face interactions during court sessions to be avoided where permissible in order to curb the spread of Covid-19 – There is

no prescribed procedure for bail applications – Bail applications based affidavits are allowed and is part of our law - New facts are facts which were non-existent during the initial hearing – Subsequent bail application on same facts prohibited – New facts which comes to the fore to be considered together with evidence already available on record – New facts raised considered in conjunction with the totality of evidence not satisfying the court to grant applicant bail – Application dismissed.

Summary: This is a bail application pending trial based on new facts brought on affidavits. The new facts are: that one year and six months has unreasonably lapsed from the date of refusal of the initial bail application without trial; that the state has no strong case against him and he is likely to be acquitted and it is not in the interests of justice to continue to keep him in custody pending trial. The application is opposed by the state. The application was heard on affidavits in order to curb the spread of the COVID-19 pandemic which may be asymptomatic and could easily spread.

Held, that, bail applications are neither civil nor criminal proceedings, are sui generis and unique in nature, procedure and purpose.

Held further, that, in view of the presence of the COVID-19 pandemic which may be asymptomatic but may infect others, courts should play their part to protect and preserve human lives and should avoid face to face interactions, where permissible.

Held further, that, the use of affidavits in bail applications was recognised before the enactment of the South African Criminal Procedure Second Amendment Act 85 of 1997 and even before promulgation of the Criminal Procedure Act 51 of 1977 (the CPA).

Held further, that, the finding in *Johan Pretorius v The State*, Case No. CC 91/2003, delivered on 29 April 2011 that, affidavits may only be used in bail proceedings for the evidence of the applicant (evidence in chief) after which

such applicant should be sworn in or take an affirmation and then subject himself to cross examination is contrary to our law and thus not followed.

Held further, that, the finding in *S v Visagie* 2013 (1) SACR 158 (GNP) that, the use of affidavits in applying for bail without *viva voce* evidence, is allowed as it is part of our law and is therefore endorsed.

Held further, that, the present matter is best suited to be heard and decided on the papers.

Held further, that, where there are factual disputes between the parties, such can be resolved by applying the principle set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-5.

Held further, that, amongst the alleged new facts, only the lengthy period of time lapsed without trial constituted a new fact and thus all evidence on record had to be considered in totality.

Held further, that, the new fact raised, considered together with all the evidence on record did not change the position on which bail was initially refused. The application therefor failed to establish that it was in the interests of justice for him to be granted bail. The bail application pending trial is dismissed.

ORDER

1. The applicant's application for bail based on new facts is dismissed.
2. The accused is remanded in custody pending trial.
3. The application for bail is removed from the roll and regarded as finalised.

RULING

SIBEYA, AJ:

Background

[1] An accused who is detained has the right to apply for bail, but this falls short of entitlement to bail. Bail can therefore not be claimed as of right, hence the need for its application and to establish that the applicant is a candidate worthy of being granted bail. Where the application for bail is refused, the applicant may subsequently apply for bail based on new facts, when such new facts are said to exist. To succeed, the said new facts should be such that when considered together with the evidence initially led, in totality tilts the scales in favour of granting bail.

[2] Serving before this court, is an opposed application for bail based on new facts following the applicant's initial unsuccessful attempt to get bail. The applicant is arraigned in this court together with four other accused persons on charges of murder; attempted murder; housebreaking with intent to rob and robbery; conspiracy to commit housebreaking with intent to rob and robbery with aggravating circumstances in contravention of s 18(2)(a) of the Riotous Assemblies Act 17 of 1956; possession of firearm without a licence in contravention of s 2 of Act 7 of 1996 and unlawful possession of ammunition in contravention of s 33 of Act 7 of 1996. Except for the offence of conspiracy to commit housebreaking with intent to rob and robbery with aggravating circumstances, which is alleged to have been committed in Ondangwa, the rest of the offences were allegedly committed in Walvis Bay.

[3] The applicant and his co-accused persons were arrested on diverse dates in June 2016. They have been detained in police custody ever since. After about two years and five months of his incarceration, the applicant

applied for bail in this court before Velikoshi AJ. He based the application on the following:

(i) That he was not in Walvis Bay during the commission of the offences and that his defence of an alibi to the charges is solid, therefor the state has no evidence that implicates him;
(ii) That if granted bail, he will not abscond nor commit similar offences;
(iii) That his minor children, businesses and livestock were affected by his pre-trial incarceration;

[4] Velikoshi AJ, in a resourced ruling, found that the possibility that the applicant could be found guilty of serious charges attracting severe sentences intensifies the inducement on the applicant to flee. The court further, found that, from the evidence, a prima facie case was established against the accused as the identification parade, cellular phone records and witness statements placed the applicant at the crime scene. The application for bail was thus dismissed on 22 November 2018.

[5] The applicant presently applies for bail pending trial based on new facts.

[6] Mr. Dube, who is based in Swakopmund in the Erongo Region represents the applicant while Mr. Olivier represents the respondent.

[7] On the scheduled date of hearing of the application for bail, 19 June 2020, the applicant, who is detained at the Windhoek correctional facility, was not in attendance at court. Mr. Dube was at a loss for words to explain the absence of the applicant. After the court took a break for a considerable amount of time, it resumed with the parties submitting that: in view of the unavailability of the applicant; the fact that Mr. Dube is based in Swakopmund, Erongo Region where he had to return and where COVID-19 restrictions are imposed on the movement of inhabitants outside the region; that the majority of COVID-19 cases by then emanated from Erongo Region,

and in order to curb the further spread of the corona virus, the application should be heard and decided on the affidavits to be filed of record.

[8] The court had to consider whether it was permissible to hear the application for bail based on affidavits. A search for authorities in our jurisdiction on this issue ran into a brick wall and provided no results.

[9] Section 60(1) of the Criminal Procedure Act[1] (the CPA) provides that:

'Any accused who is in custody in respect of any offence may at his or her first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in the High Court, to that court, to be released on bail in respect of such offence, and any such court may release the accused on bail in respect of such offence on condition that the accused deposits with the clerk of the court or the registrar of the court, as the case may be, or with the officer in charge of the correctional facility where the accused is in custody or with any police official at the place where the accused is in custody, the sum of money determined by the court in question.'

[10] The CPA does not prescribe the procedure to be followed in a bail application. Bail applications are neither civil nor criminal proceedings, they are *sui generis,* (in a class of their own). Bail is unique in nature, procedure and purpose. It is not aimed at ascertaining the guilt of an accused or determining the liability of a person for injuries caused to another.

[11] The Constitutional Court of South Africa in *S v Dlamini; S v Dladla; S v Joubert; S v Shietekat*[2] described bail applications in para 11 as follows:

'Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the

[1] 51 of 1977.
[2] 1999 (2) SACR 51 (CC).

presiding officer are greater. An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the inquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance.'

Procedure of bail application

[12] Courts have been at pains to set out the preferred procedure applicable to bail proceedings. An application may take any of the three processes, namely: *ex parte* statements from the Bar; applications heard on affidavits filed and lastly, *viva voce* evidence. Proponents of the process of making *ex parte* statements from the Bar ague that, considering that bail applications should be dealt with expeditiously, the process of locating witnesses for oral evidence or drafting affidavits may delay if not derail the bail application. This process usually contains very little material facts for consideration by the court.

[13] Diemont, J in *S v Nichas and Another*[3] remarked as follows regarding the process of making *ex parte* statements from the Bar in bail proceedings:

'It is a notorious fact that in the majority of cases *ex parte* statements are made both by the defence and by the public prosecutor who intimates what the police objections are. There are no formalities, no evidence is led, no affidavits are placed before court and the record is so meagre that there may be little or nothing to place before the Supreme Court if the matter is taken on appeal. This easy-going procedure has both advantages and drawbacks. …Accordingly, it does not seem to me that this court would be justified in declaring that there could be no appeal to a Superior Court … unless full information on oath had been placed before the magistrate.'

[3] 1977 (1) SA 257 (C) 260F-261A.

[14] The process of presenting *ex parte* statements from the Bar, though not prohibited, is further marred by shortcomings, particularly where the application is hotly contested. It is desirable that the applicant and the state should provide evidence to support their respective contentions. Notwithstanding the relaxation of the rules of admissibility of evidence in bail applications, *viva voce* evidence or evidence through affidavits should be considered. There is no question about the usefulness of *viva voce* evidence in these proceedings, but what if the parties opt, for convenience or force of circumstances, to have the bail application heard on affidavits. There is therefor, the need to determine whether a court is competent to hear a bail application based strictly on affidavits.

[15] It is common knowledge that presently, the world is battling to contain the spread of the pandemic coronavirus disease, referred to as COVID-19. COVID-19 has caused many deaths and the numbers escalate on a daily basis and unabated. Namibia is not spared from this scourge. To date no vaccine is available for this disease. COVID-19 may be asymptomatic, but may infect others and spread the disease with ease through droplets secreted from the mouth, nose or eyes of the infected person to another.

[16] By June 2020, Erongo Region was the epicentre of COVID-19 in Namibia and it is not surprising that, restrictions of movement of persons in and out of Erongo Region was restricted in attempt to contain COVID-19. Courts cannot close its eyes to factors, diseases included that threaten humankind. To the contrary, in this day and age, it is crucial for courts to play their part in the protection and preservation of human lives. Courts are therefore duty bound, like the other organs of State, to play their role in combating the spread of COVID-19. Face to face interactions during court sessions as Covid 19 cases mount, should where permissible, be avoided to help fight the COVID-19 pandemic.

[17] Considering the absence of the applicant on the date of set down of the hearing, the fact that Mr. Dube was to return to Erongo Region (the epicentre

of COVID-19) and the need subsequently for him to come back to court for hearing, could the bail application not be heard in any other manner than oral evidence? The gist of this ruling is therefore to determine what extent affidavits proposed by the parties can be utilised in bail proceedings.

[18] In *Moekazi and Others v Additional Magistrate, Welkom, and Another*[4], bail applications in terms of s 60(1) of the CPA were served on the prosecutor by the applicants. The applicants stated that they intended to file affidavits in support of their applications. The presiding magistrate reasoned that a bail application based on affidavits can only be utilised if there is no objection by the state to such process. Hattingh J sitting in a court of the provincial division, found that the magistrate had no jurisdiction to disallow the affidavits. He proceeded to state that, in the event that the state opposed the application, then it was entitled to file answering affidavits or alternatively provide *viva voce* evidence in opposition.

[19] Mabuse J in *Johan Pretorius v The State (*the *Pretorius case)*[5], discussed the manner in which bail proceedings should be conducted. He reiterated the long-established principle that evidence in bail proceedings may be tendered *viva voce* or by way of affidavit. Section 60 of the CPA, which regulates bail proceedings has since been amended in South Africa by the Criminal Procedure Second Amendment Act.[6] This Second Amendment Act is not applicable to Namibia. Mabuse J in the *Pretorius case* at para 22 referred to the effect of the Second Amendment Act on bail proceedings and stated that:

'It was indeed so that before the amendment of section 60 of the CPA, the accused who applied for bail took the witness box and gave viva-voce evidence whereafter he would be cross-examined by the prosecution. Adducing evidence by way of an affidavit developed from the interpretation of the word "adduce" in section 60(11)(a) and (b) of the CPA. The introduction of the word "adduce" was not intended to change the character of bail application proceedings but merely indicated that

[4] 1990 (2) SACR 212 (O).
[5] Case No. CC 91/2003, Unreported Judgment of North Gauteng High Court, delivered on 29 April 2011.
[6] No. 85 of 1997.

evidence could be put before court in bail application proceedings by way of an affidavit.'

[20] In order to appreciate the above passage, it is best to refer to the amended s 60(11)(a) and (b) of the CPA. It provides as follows:

'60(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) In Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;

(b) In Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.' (my underlining for emphasis).

[21] I point out that one searches Second Amendment Act in vain for an express provision of the manner in which evidence may be 'adduced' in bail applications. The only novel inclusion in the Second Amendment Act that comes close to the process of conducting bail application are the words "adducing evidence". Adducing evidence literally means presenting evidence. (Concise Oxford Dictionary, 11th ed). It is trite that evidence may be presented in court orally or through affidavits. The words "adducing evidence" in my view did not introduce the practice of bail applications through affidavits.

[22] Prior to the enactment of the Second Amendment Act in 1997, courts already recognised that bail applications may be brought on affidavit. Botha J in *S v Pienaar*,[7] a judgment delivered on 16 November 1990, said the following regarding the procedure to be employed in a bail application at p. 180G:

[7] 1992 (2) SACR 178 (W).

'It is inherent in the nature of applications that facts may be placed before the court by other means other than viva voce evidence.'

[23] At para 180 H, Botha J went further to state that:

'In my view therefore there is nothing in the Criminal Procedure Act that renders the use of affidavits in bail applications impermissible. Obviously an affidavit will have less probative value than oral evidence which is subject to the test of cross-examination. At the same time an affidavit will carry more weight than a mere statement from the Bar.'

[24] It follows that the use of affidavits in bail proceedings is not a novelty consequent upon the enactment of the Second Amendment Act in 1997. It is a process that pre-existed the said amendment and allowed by the Legislature at the promulgation of the CPA. This conclusion is supported by the fact that even before the enactment of the CPA, affidavits were utilised in bail proceedings instituted in terms of the legislation that preceded the promulgation of the CPA in 1977.[8]

[25] Mabuse J in the *Pretorius case (supra)*[9] further stated that launching a bail application on affidavit is permissible but such process does not exonerate the applicant from being cross-examined by the state. The learned Judge stated that the applicant may only use the affidavit in place of his evidence in chief, to save time and nothing more, As such, he reasoned that the applicant should still get into the witness box, take oath or affirmation and confirm the content of his affidavit, after which he is subjected to cross examination.

[26] I respectfully hold a different view and therefor do not agree with the interpretation accorded to the extent to which affidavits may be utilised in bail proceedings. The fact that no rigid procedure is prescribed for a bail application is indicative of the appreciation of the *sui generis* nature of such proceedings. It is the duty of the judicial officer to justly conduct the bail

[8] S v Nichas and Another (supra), delivered on 2 November 1976.
[9] Para 23.

hearing in a manner that will ensure that both parties are properly heard, without overlooking the inquisitorial nature of bail proceedings.

[27] I do not support the view that affidavits may be used in a half-baked manner by only being permitted for utilization in place of the evidence in chief only. If the rationale for allowing affidavits in bail proceedings was only to replace the evidence-in-chief, in order to save time, it begs the question, as to how much time will usually be saved by simply replacing the evidence in chief with an affidavit, when the applicant is still expected to read through his affidavit and then be subjected to cross examination. Cross examination, at times, take long to be completed. If insistence is placed on cross examination, it means that an applicant who is unable to attend court may not be afforded the opportunity to launch a bail application. Worsened by COVID-19, applicant's rights to be heard may be jeopardized by attempts to avoid face to face contacts. This would be a travesty of justice. A bail application can be heard and decided on affidavits, which process undoubtedly is cost effective and would also save the court's time and resources.

[28] In motion proceedings, affidavits are utilised throughout the litigation process. The Legislature was alive to this *status quo*, and if they intended to limit the usage of affidavits only to evidence in chief, then they should have expressly pronounced as such. Will it then offend the procedure if an applicant only files affidavits without subjecting himself to cross examination?

[29] Southwood J in *S v De Kock*[10] held that failure of an accused to present oral evidence in a bail application cannot be decisive against him.

[30] As alluded to above, the Legislature did not prescribe the procedure to be followed in bail applications, while being well aware of the existing practice of launching bail applications on affidavit and through oral evidence. Bail applications heard and decided entirely on affidavits are thus not prohibited.

[10] 1995 (1) SACR 299 (T) 302A-B.

[31] A year later after delivery of judgment in the *Pretorius case (supra),* Mabuse J in *S v Visagie (*the *Visagie case)*[11]was faced with a relatively similar bail application, based entirely on the affidavits filed by both the applicant and the state. At para 2, and in a change of reasoning compared to the decision in the *Pretorius* case, which reasoning I endorse with delight, Mabuse J stated that:

'It needs to be mentioned, though, that in applying to be released on bail, the applicant did not tender *viva voce* evidence and, in the process, subject himself to cross-examination but chose instead, and which is permissible, to tender his testimony by way of affidavit.' (My underlining for emphasis).

[32] As outlined *supra*, I differ with the decision in the *Pretorius* case that, an applicant can only bring an application for bail based on affidavit to cover his evidence in chief but must still take oath or make an affirmation and thereafter subject himself or herself to cross-examination. This is not in harmony with our law. To the contrary, the expression provided in the *Visagie* case *(supra)* is the correct exposition of our law regarding the utilisation of affidavits in bail applications.

[33] Affidavits contain evidence, the content of which is sworn to or affirmed by the deponent. Affidavits therefor, form the basis on which applications can be decided. The CPA does not prescribe what forms of affidavits may be filed, neither does it prohibit the traditional filing of affidavits in the form of a founding, answering and replying affidavit. In the *Visagie* case, Mabuse J in total contrast to his finding in the *Pretorius* case, that an applicant for bail should always be subjected to cross examination, proceeded to state that:

'[20] As submitted by the respondent in its counsel's heads of argument, the applicant did not testify orally. This contention is, in my view, not correct as the applicant's application is supported by his founding affidavit. The applicant placed evidence before court by way of an affidavit. The procedure or method of placing evidence before court in bail proceedings by way of affidavit is part of our law.'

[11] 2013 (1) SACR 158 (GNP).

[34] In the *Visagie* case, the applicant filed a founding affidavit and the respondent filed affidavits opposing the application for bail which stood in total contrast to the averments made by the applicant. The applicant did not file a replying affidavit and was content to have the bail application decided on the affidavits filed of record. Mabuse J remarked that nothing prevented the applicant from filing an affidavit in reply to the respondent's opposing affidavit.[12]

[35] In the analysis of mutually destructive versions of the applicant and the respondent, Mabuse J in the *Visagie* case stated the following:[13]

'It is important to remark that, as what is contained in the applicant's affidavit is evidence, equally so is what is contained in the respondent's affidavit or supporting affidavit. In his evidence the applicant made very serious allegations against the DCS (Department of Correctional Services) here in Pretoria. The said department was not party to the application. No attempt was made by the applicant to serve a copy of the application on the department so that it could be afforded an opportunity to respond to the allegations. It is only through the initiative of the respondent that this court had before it the necessary response from the department's personnel.

[25] The contents of the applicant's affidavit are now directly contradicted by the contents of the affidavits filed on behalf of the respondent. …

[27] As to the other points that the applicant raised, eg his conditions of detention and medical condition, I take the view that they have been ably and fully covered by the DCS. … What is dissatisfying about the applicant's affidavit is that, although he made such serious allegations against Pretoria Correctional Services, nowhere did he mention the efforts that he himself took to get the preferred treatment from them. Although it seems that he even consulted Dr Mahlalela, this he has not stated or acknowledged in his affidavit. He has not submitted any other evidence or expert evidence that the treatment he gets from the correctional services is not proper. I am satisfied that the applicant has, contrary to his averments, sufficient exercise facilities.'

[36] The analysis of the evidence on affidavit where there are clear factual disputes between the parties, can be assisted by the principle set out in the

[12] Para 23.
[13] Para 24-27.

often-cited case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[14] This case discussed and set out the widely accepted approach to factual disputes in application proceedings. It was stated that where factual disputes arise from the affidavits in application proceedings, a final order sought by the applicant can only be granted, if the facts averred by the applicant, and facts admitted by the respondent, justify the order sought. If, however, the respondent's version consists of bare denials, fictitious disputes of fact or is far-fetched, then the court may reject such version on the papers. The factual averments in dispute must strictly speaking be real, genuine or *bona fide*, emanating from established facts. The court still retains the discretion to refer real factual disputes which cannot be resolved on the papers to oral evidence, and the referral is only on such limited disputed facts.

[37] The analysis of the evidence must be carried out in consideration of the fact that the applicant bears the onus of proof in a bail application. He must prove on a balance of probabilities that he is worthy of being granted bail and that the interests of justice will not be prejudiced if bail is granted.[15]

[38] It is against the backdrop of the above-mentioned legal principles and the aforesaid facts regarding COVID-19, the unavailability of the applicant on the set down date and the preference of the parties, that this court acceded to the submissions of the parties to have the bail application decided on affidavits. That process, as I found herein above, is permissible in our law.

New facts

[39] The applicant then filed his founding affidavit, where after the respondent filed the affidavits of Detective Warrant Officer Cletius Kabuku, Detective Inspector Helena Ndeyapo Ashikoto and Detective Chief Inspector

[14] 1984 (3) SA 623 (A) 634-5.
[15] *S v Hlongwa* 1979 (4) SA 112 (D) 113; *S v Du Plessis and Another* 1992 NR 74 (HC) 81; *S v Dausab 2011* (1) NR 232 (HC) 235D.

Rafael Nsusi Litota in opposing the bail application. The applicant subsequently filed an affidavit in reply to the respondent's opposing affidavits.

[40] By agreement, the parties further jointly waived their right to present oral arguments in the matter in writing on 29 June 2020. In their waiver, they stated the following:

'TAKE NOTICE THAT the parties herein, having submitted written Heads of Arguments; now by consent, each party waives its right to present oral submissions before the Honourable Court in compliance with the Practice Regulations – COVID 19 Compliance.'

[41] In light of the above, the court then proceeded to decide this matter based on the affidavits filed by the parties and the heads of argument in the absence of the parties' representatives.

[42] It is noteworthy to state at the outset that the trial is geared to commence on 17 August and to proceed until 21 August 2020. And thereafter, it is to proceed on 28 September to 02 October 2020. On 07 May 2020, the applicant through Mr. Dube notified the Registrar of his intention to apply for bail on new facts.

[43] In an affidavit dated 22 June 2020, the applicant raised the following as new facts:

(i) That since the refusal of the initial bail application, the trial has not taken place within a reasonable time as a period of one year and six months has lapsed from the date of refusal of the initial bail application.
(ii) That the state does not have a strong case against him and that he has high prospects of acquittal at the trial.
(iii) That it is not in the interests of justice to continuously keep him in custody pending trial.

[44] Salionga J in *Hans Sheelongo v S*[16] at para 10 quoted with approval, a passage from *S v Petersen* 2008 (2) SACR 355 (C) 371 para 57, where the following appears:

'When as in the present case, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, firstly that such facts are indeed new and secondly they are relevant for purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it.'

[45] Similarly, Hoff J in *Samahina v The State*[17] at para 12 referred to the matter of *S v Vermaas*[18]*,* where the court's approach to a subsequent bail application was set out as follows:

'Obviously an accused cannot be allowed to repeat the same application for bail based on the same facts week after week. It would be an abuse of the proceedings. Should there be nothing new to be said the application should not be repeated and the court will not entertain it.'

[46] In applying the law to the facts, it is apparent that the applicant relies on his challenge to the identification parade to substantiate his claim that the state does not have a strong case against him and concludes that resultantly, his prospects of acquittal are high. The applicant further devotes a considerable period of time and energy to criticise the process that led to holding an identification parade where he was positively identified by witnesses. The applicant is hell bent on challenging the admissibility of the identification parade. I pause to observe that the question of the admissibility of the identification parade is an issue to be determined at the trial. It may or may not be ruled admissible during the trial, hence the veracity of the totality of the evidence would not ordinarily beg for consideration at this stage to determine the strength or weakness of the state case.

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[16] (CC 16/2018) [2020] NAHCNLD 51 (18 May 2020).
[17] (CA 77/2014) [2014] NAHCMD 291 (07 October 2014).
[18] 1996 (1) SACR 528(T) 528i-529a.

[47] Suffice to state that, although the applicant broadened the challenge to the identification parade, such challenge was available and raised during the initial bail hearing. It can therefore not be regarded as a new fact and I therefore find and hold that it is not a new fact. The same applies to the conclusion emanating from such challenge, that resultantly the state has a weak case against him and that he is more likely to be acquitted.

[48] To cement this finding, during the initial hearing, Velikoshi AJ found on 22 November 2018 that, the state has a *prima facie* case against the applicant in the form of an identification parade, cellular phone records and witness statements linking him to the offences. Nothing further requires mention here.

[49] The ground that it is not in the interests of justice to continue to keep the applicant in custody is too general. It is incumbent on the applicant to set out the ingredients for the conclusion reached, that justice dictates that he should be granted bail so to speak. Notwithstanding, the allegation of the general interests of justice dictating the granting of bail to the applicant was available and considered in the initial bail application, and it therefore does not amount to a new fact worthy of detaining this court any further.

[50] The only ground that that remains is that, the trial has not commenced and that a considerable period of time has lapsed since the refusal of the last bail application. To be exact, one year and six months has lapsed from the date of the refusal of bail on 22 November 2018. The fact that a considerable period of one year and six months from the date of the delivery of the bail ruling, would lapse without the trial in sight, was not in existence then. I hasten to add that, such fact could not even be foreseen during the initial bail hearing.

[51] Parker AJ in *Ali Moussa v The State*,[19] found that the period of two years and nine months that the applicant spent in custody pending trial after his third unsuccessful bail application, was a new fact in the subsequent bail application. The learned Judge further stated that:

[19] (CA 105/2014) [2015] NAHCMD 21 (11 February 2015) para 6-7.

'Since this fact did not exist as at the hearing of the third application in November 2011 it was a new fact that was presented to the learned magistrate at the hearing of the fourth application in August 2014. … It must be remembered that the term "new fact" is not esoteric. The term bears its ordinary grammatical meaning. "Fact" means "a thing that is indisputably the case" and "new" means "not existing before". (Concise Oxford English Dictionary, 11th ed.)'

[52] It follows that the period of time of one year and six months that the applicant spent in custody awaiting trial after the refusal of his bail hearing amounts to a new fact. This court therefore has jurisdiction to consider the new fact together with all other evidence on record to determine if the applicant has discharged his onus of proof on a balance of probabilities to be granted bail.

[53] Hoff J in *Noble v the State*,[20] in para 21 quoted with approval a passage from *S v Mpofana* 1998 (1) SACR 40 (T) regarding the approach of the court to considering new facts, when found to exist. The learned Judge remarked as follows:

'In considering an application allegedly brought on the strength of new facts, the court's approach is to consider whether there are, in the first instance, new facts and, if there are, reconsider the bail application on such new facts against the background of the old facts. In S v Vermaas at 531e-f Van Dijkhorst J set out the applicable approach in the following terms:

"… But it is a *non sequitur* to argue on the basis that where is some new matter the whole application is not open for reconsideration but only the new factors. I frankly cannot see how this can be done. Once the application is entertained the court should consider all the facts before it, new and old, and on the totality come to a conclusion. It follows that I will not myopically concentrate on the new facts alleged"

In my view, the above *dictum* should be interpreted to mean that, whilst the new application is not a mere extension of the initial one, the court which entertains the initial application should come to a conclusion after considering whether, viewed in

[20] (CA 02/2014) [2014] NAHCMD 117 (20 March 2014).

light of the facts that were placed before court in the initial application, there are new facts warranting the granting of the bail application.'

[54] Guided by the above authorities, I proceed to consider all the facts placed on record in the initial bail application and the present application.

[55] Whereas the applicant understandably has qualms about the long period of delay to commence with the trial, the respondent on the other hand apportions blame therefor to the applicant and his co-accused, as being the architects in chief for such delay. Mr. Olivier submitted that, notwithstanding the fact that none of the postponements were initiated by the applicant, he did not oppose or voice his dissatisfaction with the request of his co-accused for several postponements of the case. It appears that the state played no role in the delay of the commencement of the trial, from the date that the matter was set down for hearing. Unfortunate as this delay is, it is placed right at the feet of the applicant's co-accused.

[56] In the initial bail proceedings, the applicant admitted that the charges formulated against him are very serious in nature. The accused persons are alleged to have planned to break and enter the house of the deceased and rob the deceased and Carol-Ann Moller of their properties. They, in common purpose, conspired to plan and realised their plan by entering the house of the deceased and Carol-Ann Moller and robbed them of their properties using firearms, knives and other objects. In the process, so the allegations went, they assaulted Carol-Ann Moller and shot and killed the deceased.

[57] The seriousness of the charges formulated against the applicant are of such calibre that, if proved, it is a given, that the applicant will receive a lengthy custodial sentence. The acknowledgment by the applicant of the seriousness of the offences charged can be said to manifest the realisation of the likely severe sentence that may follow upon conviction. Where the state has a strong case against an applicant for bail, the possible severity of the sentence likely to be imposed, can be an enticement to the accused to flee and thus ending up frustrating the ends of the administration of justice.

[58] The respondent, backed by the aforesaid police officers, persisted in the assertion that the state has a strong case against the applicant, just as the respondent stated during the initial bail hearing.

Conclusion

[59] The evidence presented in the current bail proceedings coupled with the evidence led in the initial bail hearing, does not persuade me to reach a different conclusion than that reached in the initial bail hearing. I hold the view that an analysis of the evidence in totality reveals that the cellular phone records, the identification parade and witness statements place the applicant at the scene of crime. The *alibi* defence raised by the applicant is seriously challenged by the state's evidence led during the initial bail hearing.

[60] Taking all the evidence into consideration and weighing same against the applicant's personal circumstances, together with the submissions made on his behalf, I am satisfied that the applicant failed to prove that it will be in the interests of justice to grant him bail. To the contrary, I hold the view that the interests of justice and the public interest in this matter dictate that the bail application be refused.[21]In light of the foregoing, it follows that the applicant's application for bail falls to be dismissed.

Order

[61] In the result, it is ordered that:

1. The applicant's application for bail based on new facts is dismissed.
2. The accused is remanded in custody pending trial.
3. The application for bail is removed from the roll and regarded as finalised.

[21] S 61 of the CPA.

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ACTING JUDGE

APPEARANCES:

APPLICANT:	M Dube
	Directorate of Legal Aid

Windhoek

RESPONDENT: M Olivier
Office of the Prosecutor-General,
Windhoek.