

REPUBLIC OF NAMIBIA



REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2020/00076

In the matter between:

**NIGEL VAN WYK**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Van Wyk v S* (HC-MD-CRI-APP-CAL-2020/00076) [2020] NAHCMD 399 (7 September 2020)

**Coram:** LIEBENBERG J

**Heard:** 13 August 2020

**Delivered:** 7 September 2020

**Flynote:** Criminal Procedure – Bail – Appeal against refusal by magistrate to admit appellant to bail – Section 61 of the Criminal Procedure Act discussed - Court of appeal limited to the provisions of section 65 (4) of the Criminal Procedure Act – Interfering by appellate court only permissible when satisfied that magistrate was

clearly wrong – Criticisms immaterial – No misdirection proved – Trial court correctly exercised its discretion in favour of the evidence of the investigating officer – Such evidence reliable and credible when weighed against the evidence of the appellant.

**Summary:** The appellant was arrested on 27 November 2019, *inter alia* on a charge of obstructing the course of justice by means of frustrating the arrests of Mr *Sakeus Shangala* and Mr *James Hatuikilipi* in the Windhoek district court matter of *S v Bernard Esau and 5 others* (hereafter referred to as the Fishrot matter). While released on warning, the appellant was again arrested on 14 December 2019 on the same charge and two counts of contravening section 6 (a), (b) and (c) read with sections 1, 5 and 11 (1) of the Prevention of Organised Crime Act 29 of 2004, read with the provisions of section 94 of the Criminal Procedure Act 51 of 1977 (hereafter referred to as the CPA). Bail was refused by the Windhoek magistrate's court on 19 June 2020. He appeals that ruling.

*Held*, it matters not whether this court agrees or disagrees with the factual findings of the magistrate, the inquiry is limited to whether the court's discretion was exercised wrongly.

*Held further*, it is clearly observed *ex facie* the record of appeal, that the magistrate did not 'invoke' section 61 of the CPA, as alluded to by the appellant.

*Held further*, the magistrate's principal ground for refusing bail was as a result of having found that the applicant was not a truthful witness; was released some 14 days before on a similar offence before being arrested on a similar matter; and showing a clear propensity to attempt or defeat the ends of justice.

*Held further*, notwithstanding the provisions of section 61 of the CPA, the all-embracing question a court should ask itself when dealing with a bail enquiry is whether the interests of justice would be prejudiced if the accused is granted bail.

*Held further*, as a general rule, there is a distinction between the concepts of interest of justice and the concept of public interest.

*Held further*, there are instances where the interest of the public or that of society may be a factor taken into account when considering what is in the interest of the administration of justice, however, the requirements under section 61 of the CPA must have been met.

*Held further*, the court *a quo* may be criticized for making reference to the concept of public interest when it already made a finding that the applicant was not a candidate for bail on one of the traditional grounds.

*Held further*, the mere fact that the appellant finds himself culpable to similar conduct of which he was on warning, in itself, is reason enough to find that the appellant shows a propensity to commit such conduct.

*Held further*, the question of bail conditions becomes relevant once the court has found that the appellant is a candidate for bail.

*Held further*, other than criticisms immaterial to the factual findings made by the magistrate in this matter, there is no room for a finding that the magistrate exercised his discretion wrongly.

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### **ORDER**

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1. The appeal is dismissed.
  2. The matter is finalised and removed from the roll.
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### **APPEAL AGAINST REFUSAL OF BAIL**

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LIEBENBERG J

## Introduction

[1] Having failed to show he is a candidate for bail in the Windhoek magistrate's court on 19 June 2020, the appellant now appeals that ruling on grounds set out in his notice of appeal filed 8 July 2020.

[2] The appellant is represented by Mr. *Muchali* and Mr. *Ipinge* represents the state. The parties have agreed in writing, which agreement was filed on 13 August 2020, stipulating that this matter may be decided on the papers and in chambers. Both parties have duly filed their heads of argument.

[3] The appellant was arrested on 14 December 2019 and faces charges of obstructing and/or defeating the course of justice; two counts of contravening section 6 (a), (b) and (c) read with sections 1, 5 and 11 (1) of the Prevention of Organised Crime Act 29 of 2004 read with the provisions of section 94 of the CPA (Money Laundering - Acquisition, possession or use of proceeds of unlawful activities on diverse occasions).

## Objections to bail

[4] The state objected to bail on the following grounds: That it will not be in the interest of the administration of justice for the applicant to be granted bail; that it is not in the interest of the public for the applicant to be granted bail; interference with investigations into the matters of *S v Bernard Esau and 5 others* and *S v Mike Nghipunya and 5 others*; the accused having shown a propensity of committing offences; and, that the charges are serious of which the state has a strong *prima facie* case.

## Background

[5] On the evaluation of the evidence on record, the appellant was arrested on two occasions on charges of obstructing the course of justice. His first arrest on 27 November 2019 occurred on the same day as that of Mr *Sakeus Shangala* and Mr *James Hatuikilipi* (hereafter referred to as accused no.1 and accused no.2), the accused persons in *S v Bernard Esau and 5 others* (hereafter referred to as the Fishrot matter). The court accepted the evidence of the investigating officer, Mr Olivier, over that of the appellant, the latter clearly falling short of being satisfactory,

as it left a lot to be desired. The appellant, the only witness in his application, not only painted an incomplete picture before the magistrate, but only expanded on it in piecemeal under cross examination.<sup>1</sup> The evidence advanced by Mr Olivier was that the first arrest occurred as a result of the appellant lying to, and attempting to prevent the police officers from gaining access to the house where the aforementioned accused persons were. The appellant was charged and eventually released on warning by the Leonardville magistrate's court.

[6] The second arrest came about when a search warrant was obtained by the police for the search of the house of accused no.1. The police were informed by accused no.1 on 13 December 2019 that the keys to this house were with an employee in the Northern part of the country. They found this suspicious and kept surveillance over the property. Around 19:00 on 14 December, they found the appellant driving from the said house. The appellant was found with various documents and a laptop, directly relating to the bank accounts, mortgage bonds, deeds of sale and vehicle registrations linked to accused no.1. The magistrate found the presence of the appellant at the premises and his conduct suspicious, a day after accused no.1 become aware that the police obtained a search warrant to search his property. The appellant explained that he picked up these items in order to set up an office for accused no.1, he alleged to have been instructed to do so by his employer, accused no.1 already before their arrest. However this was done of his own volition the very day after accused no.1 told police that the house is locked. It is not disputed that the appellant visited accused no.1 on a daily basis after the latter's arrest. The magistrate essentially found that, based on the above, the applicant was out to protect his employer after his arrest. Moreover, the magistrate found that not even being arrested and released on warning had deterred him, as he found himself caught a little over two weeks after his initial arrest. To this end, it is clear that the principle ground for refusing bail was the repeated interference by the appellant with police investigations in the *Fishrot* matter, which not only shows a propensity to commit such offence, but equally interference with the administration of justice.

### The law relating to Bail Appeals

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<sup>1</sup> Record 393, 394.

[7] It is trite that the applicable section in the CPA in relation to appeals against the refusal of bail by a lower court provides in section 65(4) as follows:

'The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.'

In *S v Timotheus*,<sup>2</sup> the court referred with approval to *S v Barber*<sup>3</sup> at 220 E-H where Hefer J explained the implication and purport of subsection 4 as follows:

'It is well known that the powers of this Court are largely limited where that 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 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...'<sup>4</sup>

(My Emphasis)

[8] What should be emphasised is that it matters not whether this court agrees or disagrees with the factual findings of the magistrate, the inquiry is limited to whether the court's discretion was exercised wrongly. It is further trite law that an accused who applies for bail bears the onus to prove on a preponderance of probability that it is in the interest of justice that he should be granted bail.<sup>5</sup> This translates that an applicant must place before a court reliable and credible evidence in discharging this onus.

### Grounds of Appeal

<sup>2</sup> *S v Timotheus* 1995 NR 109 (HC) at 113 A-B.

<sup>3</sup> *S v Barber* 1979 (4) SA 218 (D).

<sup>4</sup> See also: *S v Miguel & others* 2016 (3) NR 732 (HC).

<sup>5</sup> *S v Pineiro* 1992 (1) SACR 577 (Nm) at 580; *S v Dausab*, 2011 (1) NR 232 (HC) at 235.

[9] In total there are 7 grounds of appeal. The grounds as set out in the notice of appeal appear as follows:

‘AD FIRST GROUND FOR REFUSAL

1. The Learned Magistrate erred in law by invoking section 61 of the Criminal Procedure Act 51 of 1997 when all offences against the Appellant are not listed in Part IV of Schedule 2 of the Criminal Procedure Act 51 of 1977 as amended.

AD SECOND GROUND FOR REFUSAL

2. The Learned Magistrate erred in law by failing to conduct an active and inquisitorial role of the bail enquiry.

AD THIRD GROUND FOR REFUSAL

3. The Learned Magistrate materially misdirected himself when he concluded and made a finding that the Appellant interfered and will continue to interfere with police investigations in other pending criminal cases in the absences of any credible evidence.

AD FOURTH GROUND FOR REFUSAL

4. The Learned Magistrate erred in law and/or fact in finding that the Appellant failed to prove on a balance of probability that he is a suitable candidate to be granted bail.

AD FIFTH GROUND FOR REFUSAL

5. The Learned Magistrate erred in law and/or fact in finding that the Appellant has a propensity of committing similar offences without credible evidence.

AD GENERAL

6. The Learned Magistrate materially misdirected herself in law and/or facts by failing to consider and imposing stringent bail conditions on the Appellant to alleviate any fears the State have from the Appellant.’

[10] I note with concern, the disenchanting manner in which most of the grounds of appeal are drafted in the notice. They overlap and are stated in such general terms that they do not pass muster with the established requirements. In particular grounds 2 and 4 fall victim thereto. These two grounds are mere conclusions by the drafter and fail to enthuse clarity and specificity. Hence, they will not be considered by this court.<sup>6</sup> Grounds 3 and 4 overlap with one another and will therefore be considered

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<sup>6</sup> *S v Gey Van Pittius and Another* 1990 NR 35 (HC) at 36H.

together. Grounds of appeal should set-out the parameters of the appeal and are not an opportunity for appellants to cast their net as wide as possible in hopes of drawing in a catch. This court therefore only recognises 3 grounds of appeal, namely grounds 1, 3 and 6, which will be dealt with *infra*.

[11] The first ground of appeal relates to the magistrate having erred in law or in fact by invoking section 61 of the CPA when all the offences against the appellant are not listed in Part IV of Schedule 2 of the CPA. In my view, and as can be clearly observed *ex facie* the record of appeal, the magistrate, in fact, did not 'invoke' section 61 of the CPA, as alluded to by the appellant. The magistrate reasoned as follows:

'...He [Mr Ipinge] therefore asked the Court to consider public interest without invoking Section 61 and I agree this case against the Applicant are not stand alone cases but are closely tied with the so called Fishrot and Fishcor cases which were cited in this ruling earlier...

..The section does not prohibit the Court to consider public interest *not* as a standalone ground but together with other factors where the Applicant is not charged with those schedule 2 offences and with Section 61. Ignoring public interest at all where there is a strong and overwhelming interest, public interest in the matter such as this will be a travesty of justice...'

(My emphasis)

[12] The magistrate thus reasoned that, although section 61 did not find application, the section itself does not preclude a court in circumstances of a case of this nature, to consider the *concept* of public interest during a bail enquiry.

[13] Although, the approach followed by the magistrate in respect of the concept of public interest does not go without criticism, these criticisms do not taint the evidence on record, rendering the ground raised argumentative. This is because even if the element of public interest is completely removed from the facts of this case, it can hardly be said to have affected the principle outcome of the ruling. The magistrate's principal ground for refusing bail was as a result of having found that the applicant, firstly, was not a truthful witness, secondly was released some 14 days before being arrested on a similar offence, showing a clear propensity to attempt or defeat the



ends of justice. The magistrate merely added *obiter dictum* that this case is latched to the Fishrot case, which aptly drew gargantuan public outcry. This much is clear from the following passage from the magistrate's judgment:

'..I found the Accused, the Applicant to be an untruthful witness, the Applicant was not [truthful], the Applicant was out to protect his former employers at whatever cost. After his first arrest at the farm, the Applicant was realised on warning. Within a little more than two weeks [the] Applicant was again caught and charged for the same thing defeating the cause of justice.....

The cases the Applicant [was] meddling in [are] serious and sensitive cases of national interest which drew a national outcry as testified to by Mr Olivier and even the Applicant himself admitted that it is common cause.<sup>7</sup>

(My emphasis)

[14] It is in fact trite law that, notwithstanding section 61 of the CPA, the all-embracing question a court should ask itself when dealing with a bail enquiry is whether the interests of justice would be prejudiced if the accused is granted bail.<sup>8</sup> As a general rule, there is a distinction between the concept of interest of justice and the concept of public interest. There are instances in a bail enquiry where the interest of the public or that of society may be a factor taken into account when considering what would be in the interest of justice, however, the requirements under section 61 of CPA must have been met. It having been common cause that the present offences do not fall under Part IV of the Schedule to the CPA, in my view, the magistrate may be criticized for making reference to the concept of public interest when he already made a finding that the applicant was not a candidate for bail on a traditional ground i.e. interference with investigations and propensity to commit further offences.

[15] It must be remembered that traditional grounds relevant during a bail enquiry include, inter alia, the seriousness of the offence, the strength of the state's case, whether the accused will stand his trial, will the accused interfere with witnesses and is the accused likely to commit similar offences if released on bail.<sup>9</sup> In my view, these

<sup>7</sup> Record 402-403.

<sup>8</sup> Du Toit *et al* in *Commentary on the Criminal Procedure Act* and, in his notes to s 60 at 9-8B; *S v Pineiro and others* 1999 NR 18 at 21E-G.

<sup>9</sup> *S v Acheson* 1991 NR 1 at p.5.

traditional grounds culminate to the ultimate question: will the interests of justice be prejudiced if the accused is granted bail? The concept of public interest was only introduced with the amendment and will only find application when the facts of the matter fall within its ambit. As alluded to above, notwithstanding the criticisms mentioned, there has been no material misdirection on the evidence and this ground of appeal must accordingly fail.

[16] The second ground of appeal, grounds 3 and 5 taken together, faults the court for finding that the appellant interfered and will continue to interfere with other pending cases and that the appellant has shown a propensity to commit similar offences as there was no credible evidence to that effect. These two grounds fall to be decided on the same evidence. After weighing the version of the appellant against the evidence by the investigating officer, Mr Olivier, about the first and second arrest, the court found that the appellant was not being truthful. The court occasioned this to his version being incomplete and haphazardly testified to.

[17] The magistrate was not wrong in making this finding as on this court's perusal of the record, there is nothing on record rendering the evidence given by the investigating officer unreliable or which negatively affected his credibility. I find the evidence upon which the magistrate relied sufficient to make such finding on credibility. In addition a strong *prima facie* case has been made out, particularly in respect of the offences of obstructing or attempting to obstruct the course of justice. The mere fact that the appellant finds himself culpable to similar conduct of which he was on warning, in itself, is reason enough to find that the appellant shows a propensity to commit such conduct. In *Kennedy v State*,<sup>10</sup> the court of appeal, in respect of an accused who was released on bail on a charge of rape and found himself arrested on the same offence stated the following:

'The Court a quo's use of the words 'propensity' to commit further offences' was prompted by the repeat of sexual assault allegations against the appellant while he was on bail on the same allegations. Bail is just what it is, whether with or without conditions. It was incumbent on the appellant to exercise some restraint in his further encounter with female persons.' (My emphasis)

<sup>10</sup> *Kennedy v State* (CA 23/2016) [2016] NAHCMD 163 (08 June 2016) at para 5.2.

[18] It was, as stated in the above quoted case, incumbent on the appellant to exercise restraint on himself, particularly in view of the fact that the second offence was committed when he very well knew that his employers were arrested and in custody on fraud and corruption charges. In the same vein, this finding vitiates any suggestion by the appellant that he did not interfere with police investigations. The evidence in this regard speaks of interference on more than one occasion. I can therefore safely conclude that the court *a quo* indeed carefully considered all the relevant facts when making these findings. Consequently grounds 3 and 5 fail.

[19] The final ground of appeal stands to fail as it presupposes that the court found that the appellant was a candidate for bail, which on the facts he is not. Having found that the appellant was untruthful in his application, showed a propensity to commit similar offences and that he interfered with pending cases, the question as regards conditions of bail becomes obsolete. It is further trite that the question of bail conditions becomes relevant once the court in its mind has found that the appellant is a candidate for bail. Nonetheless there can never be a perfect judgment or ruling, and in this regard I endorse what has been stated in *S v De Beer*<sup>11</sup> where the court stated:

‘No judgment can ever be “perfect and all-embracing”, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.’<sup>12</sup>

[20] When regard is had to the objections *ex facie* the record, the evidence shows the first, third and fourth grounds of objection to have been established on a preponderance of probabilities by the state. Therefore other than mere criticism immaterial to the factual findings made by the magistrate in this matter, I am not persuaded that a case has been made that the magistrate exercised his discretion wrongly. The appeal accordingly falls to be dismissed.

[21] In the result, it is ordered:

1. The appeal is dismissed.

<sup>11</sup> *S v De Beer*, 1990 NR 379 (HC) at 387I-J.

<sup>12</sup> (See *S v Pillay*, 1977 (4) SA 531 (A) at 534H-535G and *R v Dhlumayo and Others*, 1948 (2) SA 677 (A) at 706).

2. The matter is finalised and removed from the roll.

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JC LIEBENBERG

JUDGE

APPEARANCES:

APPELLANT            J Muchali  
                              Of Jermaine Muchali Attorneys,  
                              Windhoek

RESPONDENT        H Ipinge  
                              Of the Office of the Prosecutor-General,  
                              Windhoek