



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2020/00111

ELIFAS PAULUS

APPELLANT

Versus

THE STATE

RESPONDENT

Neutral citation: *Paulus v S* (HC-MD-CRI-APP-CAL-2020/00111) [2020] NAHCMD 79
(26 February 2021)

Coram: CLAASEN, J

Heard: 12 February 2021

Delivered: 26 February 2021

Flynote: Criminal procedure — Bail — Appeal against magistrate's refusal to grant bail - Section 65(4) Criminal Procedure Act 51 of 1977 - Appellate court must not set aside decision of lower court unless satisfied that decision is wrong - Trial court correctly exercised its discretion in favour of the evidence of the investigating officer - Question whether the magistrate who had discretion to grant bail exercised her discretion wrongly- Court not satisfied that magistrate's decision was wrong – Appeal dismissed.

Summary: The appellant was charged for fraud and money laundering in the district court of Swakopmund, during a time when Erongo region was placed under lockdown as

a result of the COVID-19 pandemic. The parties agreed to do the bail application on affidavits, though some of the papers that followed on behalf of the applicant were not commissioned. The state submitted an affidavit deposed to by the investigating officer. Upon consideration of the material placed before the magistrate refused to grant bail. Thereafter a new legal representative came on board for the accused and brought a new facts bail hearing, and after hearing the parties the magistrate refused bail.

Dissatisfied by the outcome, the appellant filed an appeal. The respondent opposed the appeal. The *court a quo* relied on a *prima facie* strong case of two serious offences as well 2 more pending cases, of similar nature, that the appellant has. The evidence under oath from the investigating officer depicts on a sophisticated operation wherein the bank accounts of the complainants are hacked remotely, and thereafter funds in question are transferred to a business account of which the appellant is the holder. The magistrate weighed this evidence against the unsworn information tendered on behalf of the applicant who inter alia says that he was a mere scape goat by business partners who may or may not have committed offences.

Held, the appeal is before court in terms of s 65(4),¹ which restricts this court insofar as it provides that it shall not to set aside the decision against which the appeal is brought, unless such Court or Judge is satisfied that the decision was wrong.

Held further, in our law the procedure for bail applications is not casted in stone. Against the flexible nature of bail proceedings the magistrate could not have refused to entertain the bail application, as contented by counsel for the appellant.

Held further, bail proceedings are not invalid simply because the information in support or against it is not under oath.

Held further, in the circumstances of the case, the respondent demonstrated a *prima facie* strong case, whereas the appellant's defence is contained in a capsule of little probative value.

¹ Criminal Procedure Act 51 of 1977 as amended

Held further, that the *court a quo* was entitled to consider the other pending matters together with the seriousness of the offences and the *prima facie* strong case and did not exercise her discretion wrongly.

ORDER

The appeal is dismissed.

APPEAL AGAINST THE REFUSAL OF BAIL

Introduction

[1] The appellant, a 29 year-old Namibian citizen was arrested and appeared in the District Court of Swakopmund on 26 May 2020. He faced a fraud charge and a charge of money laundering in contravention of s 6 of Act 29 of 2004. The gist of the allegations is that the accused defrauded one Ms Gunzel and or Nedbank by transferring N\$ 196 000.00 from the bank account of Ms Gunzel and withdrew the said amount, which act caused prejudice whilst the accused knew that he did not have the authority to do so. In count 2 the accused is charged for allegedly acquiring, using, or having in his possession cash of N\$ 196 000.00 whilst he knew or ought to reasonably have known that it is or forms part of the proceeds of unlawful activities.

[2] The appellant applied for bail during a stage when the Erongo region was placed under lockdown on account of the COVID-19 pandemic. At the time of the application the appellant was represented by a legal practitioner and the parties agreed in the presence of the presiding magistrate that the bail application will be done on affidavits. In that vein, 'papers' were filed by the parties respectively, which documents were placed before the

magistrate of the district. On 13 July 2020 she dismissed the application for bail and gave reasons for the decision.

[3] Subsequently on 21 October 2020 the appellant, this time represented by a different legal practitioner, formally addressed submissions from the bar for bail on the basis of new facts. A day later the court dismissed the new facts bail application.

[4] Dissatisfied by the outcome, the new legal practitioner filed an appeal against what appears to be both orders. The respondent opposed the appeal. Both the appellant and respondent filed heads of arguments.

[5] In looking at the grounds of appeal, there is an overlap between some of the grounds. In view of that I will summarize it. The nub of the first two grounds are that the court erred by finding 'the appellant is a 'dangerous' and 'repeat offender' which infringe against the presumption of innocence. Grounds 4 and ground 6 both pertain to the nature of the offences and the complaint is that the magistrate erred by relying on seriousness of the offences 'alone' to conclude that it is not in the interest of the administration of justice to grant bail and because of the seriousness, a lengthy of imprisonment is unavoidable. Ground 6 complains about the finding by the magistrate that the appellant did not proffer any defence, which finding is ostensibly not supported by the evidence led during the application. Finally grounds 5 and ground 7 can be dealt with together as it turns on the deficient procedure and consequences that ensued as a result of the 'erstwhile legal practitioner's mix up of facts.'

[6] I turn to the reasons of the *court a quo*. The central thread in the initial ruling is that the applicant did not make out a case on a balance of probabilities that he is entitled to be granted bail. The decisive issues for the court was that the state showed a *prima facie* strong case that comprised of two serious offences, that the appellant has, in addition to this matter, 2 more pending cases with the same *modus operandi* of hacking into bank accounts of persons and transferring money into the appellant's business

account, which led to the conclusion that it was not in the administration of justice and in the public interest to grant bail in such circumstances.

[7] The *court a quo* also commented on the disoriented manner in which the erstwhile counsel of the appellant placed the information in support of the application for bail before the court. The court expressed that it had to do the best it could with the information provided, in order not to deprive the appellant of his right to apply for bail during a time when physical appearances were not possible due to pre-cautionary measures against the spread of the COVID-19 virus.

[8] I gather from the *court a quo*'s ruling on the new facts bail application that the conclusion reached by the court was that the facts clothed as 'new facts' did not displace any of the findings in respect of the original ruling and thus did not warrant bail to be granted. Counsel for the appellant informed the court that he abandons the appeal against the ruling on new facts.

[9] I move to the issues on which the matter turns. As a point of departure, the appeal is before court in terms of s 65(4),² which restricts this court insofar as it provides that it shall not to set aside the decision against which the appeal is brought, unless such Court or Judge is satisfied that the decision was wrong. The test for the application of this provision was set out in *S v Timotheus*³ as follows:

'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 a discretion to grant bail exercised that discretion wrongly.'

Does the bail proceedings in the court a quo amount to no hearing?

[10] Counsel for the appellant strenuously argued that the *court a quo* should not have entertained the matter on account of the deficiencies in the 'affidavits' and the ineptitude of the erstwhile legal practitioner of the appellant. According to the counsel for the

² Criminal Procedure Act 51 of 1977 as amended

³ *S v Timotheus* 1995 NR 109 (HC) at 113 A-B

appellant the bail proceedings conducted was tantamount to his client having had ‘no hearing’ on bail. He urged this court not to punish the appellant for the sin of the erstwhile legal practitioner.

[11] The respondent on the other hand argued that the *court a quo* did not err in the outcome that it reached. He argued that the court should not be blamed for the manner in which the applicant’s erstwhile legal practitioner handled the matter.

[12] In perusal of the paper trail herein, initially I was tempted to accommodate the notion advanced by counsel for the appellant. The dilemma was that part of the information that was forwarded to the *court a quo* came in the form of affidavits, and part thereof comprised of written submissions ‘styled in the name of affidavits’ but not signed or commissioned by the appellant. That is with the exception of one of the affidavits by the appellant that was indeed commissioned.

[13] This court cannot support this proposition by counsel for the appellant because in our law the procedure for bail applications is not casted in stone. It is clear that we do not have rigid procedure for bail proceedings. The court in *Shekundja v S*⁴, after tracing through the history of the enabling legislation, confirmed that there is no prescribed procedure for bail applications and thus found that bail proceedings on the basis of affidavits are permissible. The headnote in *Shekundja* eloquently captures the position and nature of bail applications as follows:

‘... bail applications are neither civil nor criminal proceedings, are *sui generis* and unique in nature, procedure and purpose.’

[14] The Constitutional Court in South Africa pronounced itself on the position and formalities of bail in *S v Dlamini; S v Dlada; S v Joubert; S v Shietekat*⁵ at para 11:

‘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

⁴ *Shekundja v S* (CC 19/2017) [2020] NAHCMD 339 (22 July 2020)

⁵ *S v Dlamini; S v Dlada; S v Joubert; S v Shietekat* 1999 (2) SACR 51

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 presiding officer are greater...'

[15] Thus, bail proceedings are not invalid simply because the information in support or against it is not under oath. Police bail⁶ is an example of bail that is granted less formally. In addition, it is a frequent occurrence in Magistrates Courts that an accused or a legal practitioner make oral submissions from the bar, the prosecutor replies to that and the magistrate makes a ruling on bail there and then. Thus, *ex parte* submissions operate in a 'less formal' manner in court, without the formalities of evidence under oath. In this regard it was held in *S v Nichas and Another*⁷ at para 260F to 261A that:

' It is a notorious fact that in the majority of cases *ex-parte* statements are both by the defence and by the public prosecutor who intimates what the police objections are. There are no formalities, no evidence is lead, no affidavits placed before court and the record is so meagre that there may be little or nothing to be placed 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 be that this court would be justified in declaring that there would be no appeal to a Superior court... unless full information on oath has been placed before the magistrate.'

[16] Against this flexible nature of bail proceedings in our jurisdiction, it is my view that the Magistrate could not have refused to entertain the bail application, even though it was not quite in the format of orderly affidavits as contemplated. It must also be seen against the context of the challenges imposed on the parties as well as the court, which is situated in a district, which at the time was the epi-center of the Covid-19 pandemic in Namibia.

Did the court a quo erred in its refusal to grant bail?

⁶ Section 59 of the Criminal Procedure Act as amended

⁷ *S v Nichas and Another* 1977(1) SA 257 (C)

[17] It is trite that in a bail application a judicial officer has to balance the personal interests of the appellant against the interest of justice as it emanate from the evidential material that is placed before the court. Furthermore, the onus lies on the appellant, as an applicant for bail to persuade the court on a balance of probabilities that the interest of justice justifies his release on bail.

[18] It is prudent to commence with what has been placed before the court *a quo*. In an affidavit commissioned on 21 June 2020 the appellant deposed that he was arbitrarily deprived of his liberty, that he is in the dark as to why the State objects to bail, that his bail application was scheduled for 17 June 2020, but that the state is dragging its feet, that the state of emergency cannot be used as an excuse, that he was granted bail in both the fraud and money laundering cases in Windhoek and Walvisbay and that he petitions the court to take note of his bail application. That completes the information under oath in support of the appellant's bail application.

[19] The appellant also conveyed in his 'founding affidavit' that was not signed or commissioned, that he is a businessman, that he is a breadwinner for his children and their respective mothers and that he is the owner of MZET Investments CC. As for a defense, he disclosed that his business partners transferred the money into his business account, without his consent and asked him to withdraw it, which he did and he handed it to them in two instalments. He also submits that the state does not have a strong case against him, and that he was used by his business associates and partners, *'by whom actual criminal offences may or may not have been committed.'*

[20] The respondent countered the application with an affidavit deposed to by the investigating officer, Mr Primes Amwaama. It laid out what the state had at its disposal, which was a statement from the complainant and owner of the bank account that the said amount was transferred from her account to the account of one MZET Investments. The officer attached a copy of what he referred to as the bank statement that reflect the money transfer. According to Officer Amwaama, the appellant is the sole owner of the said business. He furthermore deposed that there is video footage that the appellant

withdrew the said monies and spent it a casino and that employees of the casino gave statements to that effect.

[21] In the 'replying affidavit', also not signed or commissioned, the appellant states that he is the sole owner of his business and that when he used the term 'business partners' he refers to persons that he contracts with on a regular basis. He denies that he transferred the money, he denies that he spent the money or that he spent it alone and he pleads that he will not commit any white collar offences when released on bail.

[22] I turn to the contention that the magistrate relied on the label of 'seriousness of the offences alone and that the state failed to meet the threshold of a strong *prima facie* case'. I disagree with both these arguments. The reasons left no doubt as to the combination of factors that brought the *court a quo* to the value judgment it made. It certainly was not an empty shell of a serious offense alone. The penalty clause for the money laundering charge in contravention of s 6 of Act 29 of 2004 is a fine of N\$ 100 million or 30 years imprisonment which underscores the seriousness nature of the offence.

[23] On the one side of the scale was the appellant who in his affidavit says nothing other than that his liberty was arbitrarily taken, as if it was not a lawful arrest and then mentions that he was granted bail in his pending matters. The court is not privy to whether it was a deliberate decision to not commission the purported affidavits wherein reference was made that he is a mere scapegoat for his business partners who may or may not have committed the offences. In the circumstances of the case, the respondent demonstrated a *prima facie* strong case, whereas the appellant's defence is contained in a capsule of little probative value. In *S v Dausab*⁸ it was held at para 33 that:

'While it may be correct that the accused is not compelled to address the merits during the bail application hearing, depending on the circumstances of a particular case and the evidence proffered on the merits by the State, a decision by the accused person not to address the merits may turn out to be fatal.'

⁸ *S v Dausab* (CC 38/2009) [2010] NAHC 90 (20 September 2010)

[24] Thus I fail to see how counsel for the appellant can complain that there was no evidential basis for the Magistrate's conclusion that no defense was proffered. The *court a quo* accepted the evidence of the investigating officer as more probable when weighed against the evidential material of the appellant.

[25] A question was posed in the appellant's heads of argument as to whether the *court a quo* was justified to invoke s 61.⁹ Indeed the *court a quo* was entitled to invoke the said provision as fraud is included in Part IV of Schedule 2 of the Criminal Procedure Act as amended.

[26] Guidance was given to judicial officers on the application of s 61 in *Charlotte Helena Botha v The State*¹⁰ that they will have to make a value judgment of what are the legal convictions of society and what is the impact of such convictions on the particular case. In the said matter J. O'Linn held that:

'The legal convictions of the community, in my view, will hold that an accused person should not be released on bail in the situations sketched herein, provided that there is prima facie proof against such person that he or she has committed a type of serious crime discussed and is therefore, in the opinion of the court, a potential threat to the victims or to other innocent members of society or is perceived by them on reasonable grounds to be such a threat.'

[27] Another pertinent consideration that featured in the magistrate's decision is that the appellant has two more pending cases of a similar nature. To that end counsel for the appellant criticized the *court a quo* for her reliance on *Shekundja v S*¹¹ as being 'unfounded and misguided.' With deference, it is counsel that misconstrued the context of the said citation. In reading the reasons of the *court a quo*, it is clear that the said citation was used in connotation to the accused's pending cases, which issue AJ Velikoshi indeed referred to at para 20 of the said case. In that particular matter, the court was not

⁹ Section 61 of the Criminal Procedure Act as amended

¹⁰ *Charlotte Helena Botha v The State* CA 70/95 delivered on 20.10.1995

¹¹ *Shekundja v S* (CC19/2017) [2018] NAHCMD 374 (22 November 2018)

swayed by that factor as that accused's cases had been withdrawn and were no longer pending. The position is different in the matter at hand.

[28] It is not in dispute that the accused has two more pending cases, one at the Windhoek District Court and one at the Walvisbay District Court. It is significant that the investigating officer deposed that these matters have in common a sophisticated scheme wherein the bank accounts of the complainants are hacked remotely, and thereafter funds in question are transferred to a business account of which the accused is the holder. The term hacking, in my understanding, is used in computer parlance to refer to the act of using a computer or other electronic device to gain unauthorized access to data on another electronic medium. In this particular case the complainant attested that she does not know the owner of the said business account to whom the money was transferred, nor does she know how the person became got hold of her internet banking details.

[29] Counsel for the appellant was at pains to paint the appellant as someone who is not a danger to society as his cases do not bear a trace of violence. The implication, is that because these are not violent offences, the appellant on bail is harmless and poses no threat to members of society. The question that arises is whether white collar crimes are to be discounted in bail hearings as 'not serious' and that victims of such offences are not at any risk? This question was answered in the negative in *Nghipunya v S*¹² where it was held that the days of distinguishing between the seriousness of monetary crimes and violent crimes can no longer be seen to be different in bail applications. In general, there is no doubt that fraud is considered a serious offence. The same can be said of the offense of money laundering. In the matter at hand, the consequences for this account holder, who is of senior age, are no less devastating as a substantial amount, that she thought was safely in the bank, was transferred remotely, through electronic means, and appears to have been squandered at a casino.

¹² *Nghipunya v S* (HC-MD-CRI-APP-CAL-2020/00077) [2020] NAHCMD 491 (28 October 2020)

[30] In fact the *court a quo* did not find that the accused is a repeat offender and a dangerous offender, but certainly had regard to his propensity to commit similar crimes, as she was entitled to. It is a relevant factor indeed that was weighed in with the seriousness of the offences and the *prima facie* strong case.

[31] On an analysis of the evidential material as a whole, the appellant did not succeed in demonstrating to this court that the *court a quo* exercised its discretion wrongly in the circumstances of this case.

[32] In the result:

The appeal is dismissed.

CM Claasen
Judge

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