REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 06/2021

In the bail application of:

SAKEUS EDWARD TWELITYAAMENA SHANGHALA	**FIRST APPLICANT**
JAMES NEPENDA HATUIKULIPI	**SECOND APPLICANT**
PIUS NATANGWE MWATELULO	**THIRD APPLICANT**
MIKE NGHIPUNYA	**FOURTH APPLICANT**
OTNEEL SHUUDIFONYA	**FIFTH APPLICANT**
PHILLIPUS MWAPOPI	**SIXTH APPLICANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Shanghala v S* (CC 06/2021) [2022] NAHCMD 164 (01 April 2022)

Coram:	UEITELE J
Heard:	**1-12 November 2021, 24 January 2022 - 04 February 2022, 22 - 28 February 2022 and 11 March 2022**
Delivered:	**01 April 2022**
Released:	**11 April 2022**

Flynote: **Criminal Procedure Act - Section 61** – vest in the court the discretion to refuse bail, if in the opinion of the court it is in the interest of the public or the administration of justice that the accused be retained in custody pending his trial; notwithstanding that the court is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation.

Common law – bail applications - an applicant for bail bears the specific onus to prove on a preponderance of probabilities that the interest of justice demands that he be permitted and be released on bail. 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.

Common law – bail applications – pre-detention procedure - a person whose detention has been pronounced lawful and in the interests of justice cannot simply resort to a bail application merely because the pre-detention procedures are flawed. It is, however, available to such person concerned to challenge the detention before a court of law as being unconstitutional or unlawful.

Summary: On 27 November 2019, Messrs, Shanghala, Hatuikulipi, and Mwatelulo were arrested on charges of corruption, money laundering and fraud. Mr. Nghipunya was arrested on 17 February 2020, also on charges of corruption, money laundering and fraud; while Messrs Shuudifonya and Mwapopi were arrested on 21 December 2020. The latter two were also arrested on charges of corruption, money laundering and fraud. All six applicants have since the time of their arrest been in detention.

During June 2020 Mr. Nghipunya unsuccessfully applied for bail in the Magistrates' Court for the District of Windhoek. He appealed to the High Court of Namibia against the decision of the Magistrates Court not to admit him to bail. On 28 October 2021 the High Court dismissed his appeal. He thus bring another application for the consideration bail, on alleged new facts.

The first to third applicants brought their application by notice of motion supported by affidavit, while the fourth to sixth applicants took to the stand to testify in support of their applications.

The applicants, and particularly the first, second, and third applicants alleged that the fact that they are denied bail infringes their constitutional rights, particularly the rights conferred on them by the Namibian Constitution.

The first to third applicants also based their application to be released on bail on the basis that the current criminal proceedings are the outcome of unlawful investigations by the Anti-Corruption Commission. The third basis on which the applicants relied on to be released on bail is the contention that having regard to the ordinary considerations that are taken into account when deciding whether or not to release an accused on bail, there is no cogent reason not to release them on bail.

Held that as to the first ground, the applicants had to place before the Court primary facts which must be used as a basis to infer the existence or non-existence of further facts namely that their constitutional rights are being violated or infringed. They did not do that. What they did is that they pleaded a legal result and parroted articles 7, 8, and 12, of the Constitution.

Held that upon a proper construction of section 60(1) of the Criminal Procedure Act, 1977, a person whose detention has been pronounced lawful and in the interests of justice cannot simply resort to a bail application merely because the pre-detention procedures are flawed. It is, however, available to such person concerned to challenge the detention before a court of law as being unconstitutional or unlawful.

Held further that the personal circumstance (their health, the family relations, employment, and business environments) which the applicants placed before court, are neither unusual nor do they singly or together warrant the release of the applicants in the interest of justice.

ORDER

The applicants' application for bail is dismissed.

JUDGMENT

UEITELE J:

Introduction.

'An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.'[1]

[1] The question that I am faced with in this matter is whether the applicants in this matter are being kept in detention as anticipatory punishment, calling for the Court to intervene and order their admission to bail or whether the ends of justice require that they be kept in detention pending the outcome of their criminal trial.

[2] There are six applicants in this matter, namely; Sakeus Edward Twelityaamena Shanghala, James Nependa Hatuikulipi, Pius Natangwe Mwatelulo, Mike Nghipunya, Otneel Shuudifonya, and Phillipus Mwapopi. The State is the respondent.

[3] On 27 November 2019, Messrs, Shanghala, Hatuikulipi, and Mwatelulo were arrested on charges of corruption, money laundering and fraud. Mr. Nghipunya was arrested on 17 February 2020, also on charges of corruption, money laundering and fraud; while Messrs Shuudifonya and Mwapopi were arrested on 21 December 2020.

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[1] Per Mahomed AJ (as he then was) in the matter of *S v Acheson* 1991 NR 1 (HC) at p19 para E.

The latter two were also arrested on charges of corruption, money laundering and fraud. All six applicants have since the time of their arrest been in detention.

[4] During June 2020 Mr. Nghipunya unsuccessfully applied for bail in the Magistrates' Court for the District of Windhoek. He appealed to the High Court of Namibia against the decision of the Magistrates Court not to admit him to bail. On 28 October 2021 the High Court dismissed his appeal[2].

[5] Mr. Nghipunya has again approached this Court with a fresh bail application, he says on new facts. The new facts according to him are that the investigations are now complete, which was not the case during June 2020 when he brought his initial bail application, that the State has disclosed the content of the docket and the disclosure runs into some 80 000 pages. Further, that considering and studying the disclosure – particularly the documents to be relied upon by the State – he is now better suited to comment on the strength of the State's case. Since his arrest on 17 February 2020 to date there is still no trial date in sight, which is almost two and half years after his arrest and that there are also 42 new counts which have been added incorporating and largely overlapping with the previous charges. I will later in this judgment, albeit briefly, deal with Mr. Nghipunya's application for bail on new facts.

[6] The remainder of the applicants (that is Shanghala, Hatuikulipi, Mwatelulo, Shuudifonya and Mwapopi) are all first time applicants for admission to bail. Before I consider the grounds on which the applicants rely for their admission to bail and the grounds on which the State opposes the admission of the applicants to bail, I find it appropriate to briefly restate some of the legal principles applicable to the question of whether or not the Court can grant bail.

Some legal principles relating to the granting or not of bail.

[7] The starting point is the Criminal Procedure Act, 1977[3]. Section 60(1) of that Act provides that:

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[2] See the unreported judgment of *Nghipunya v S* (HC-MD-CRI-APP-CAL-2020/00077) [2020] NAHCMD 491 (28 October 2020).

[3] Criminal Procedure Act, 1977 (Act No. 51 of 1977).

'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.'

[8] In the matter of *Shekundja v S*[4], Sibeya J opined that:

'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…'

[9] An applicant for bail bears the specific *onus* to prove on a preponderance of probabilities that the interest of justice permits his release.[5] 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.[6] In so doing, an applicant must place before a court reliable and credible evidence in discharging this *onus*[7].

[10] In the matter of *S v Acheson*[8] Justice Mahomed outlined considerations, which the Court must take into account in deciding the issue of whether or not to grant bail, in the following terms:

'1. Is it more likely that the accused will stand his trial or is it more likely that he will abscond and forfeit his bail? The determination of that issue involves a consideration of other sub-issues such as:

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

5 *S v Pineiro* 1992 (1) SACR 577 (Nm) at 580; *S v Dausab,* 2011 (1) NR 232 (HC) at 235, and also *Gustavo v The State* (CC 06/2021 and CC 07/2021) [2021] NAHCMD 591 (15 December 2021).

6 *Mathebula and the State* (431/09) [2009] ZASCA 91 (11 September 2019) at para 12.

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

8 *Supra* footnote 1 pp 19-20.

(a) how deep are his emotional, occupational and family roots within the country where he is to stand trial?
(b) what are his assets in that country?
(c) what are the means that he has to flee from the country?
(d) how much can he afford the forfeiture of the bail money?
(e) what travel documents he has to enable him to leave the country?
(f) what arrangements exist or may later exist to extradite him if he flees to another country?
(g) how inherently serious is the offence in respect of which he is charged?
(h) how strong is the case against him and how much inducement there would therefore be for him to avoid standing trial?
(i) how severe is the punishment likely to be if he is found guilty?
(j) how stringent are the conditions of his bail and how difficult would it be for him to evade effective policing of his movements?

2. The second question which needs to be considered is whether there is a reasonable likelihood that, if the accused is released on bail, he will tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted. This issue again involves an examination of other factors such as:

(a) whether or not he is aware of the identity of such witnesses or the nature of such evidence;
(b) whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject-matter of continuing investigations;
(c) what the accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimidated by him;
(d) whether or not any condition preventing communication between such witnesses and the accused can effectively be policed.

3. A third consideration to be taken into account is how prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail. This would involve again an examination of other issues such as, for example,

(a) the duration of the period for which he has already been incarcerated, if any;
(b) the duration of the period during which he will have to be in custody before his trial is completed;
(c) the cause of any delay in the completion of his trial and whether or not the accused is partially or wholly to be blamed for such a delay;

(d) the extent to which the accused needs to continue working in order to meet his financial obligations;

(e) the extent to which he might be prejudiced in engaging legal assistance for his defence and in effectively preparing for his defence if he remains in custody;

(f) the health of the accused.'

[11] Section 61 of the Criminal Procedure Act, 1977, as amended, vests the court with a discretion to refuse bail, if in the opinion of the court it is in the interest of the public or the administration of justice that the accused be retained in custody pending his trial; notwithstanding that the court is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation.

[12] Having set out the legal principles, I next turn to consider the grounds on which each applicants seek to be released on bail.

The grounds on which the applicants seek to be released on bail.

[13] I find it appropriate to point out that the first three applicants in this matter, that is Messrs Shanghala, Hatuikulipi, and Mwatelulo opted for motion proceedings to launch their application for bail; this is by Notice of Motion supported by affidavit. This Court has in the matters of *Shekundja v S*[9] *and Nghipunya v S*[10]*,* indicated that there is nothing irregular or improper with that approach.

Sakeus Edward Twelityaamena Shanghala.

[14] Mr. Shanghala in his affidavit in support of his application for bail contends that he anchors his application for bail on several 'weighty factors' which fall in three broad categories, namely:

(a) Given the circumstances in which he finds himself, denying him bail will constitute a violation of his fundamental rights.

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

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

(b) The current criminal proceedings are the outcome of unlawful investigations by the Anti-Corruption Commission, and

(c) Having regard to the ordinary considerations that are taken into account when deciding whether or not to release an accused on bail, there is no cogent reason not to release him on bail.

I will briefly set out these alleged weighty factors in the ensuing paragraphs of this judgment.

The alleged violation of Mr Shanghala's human rights.

[15] In his affidavit, Mr Shanghala contends that he was arrested on 27 November 2019. He continued and contended that by the time that he deposed to his affidavit in support of his application for bail, he has been in custody for some two years, more than 24 months. He further contends that there is, however, no indication as to when the trial itself will begin. Two sets of criminal proceedings have been joined, ensuring that this will be a lengthy trial that will not be finalized for some years. This fear (of a lengthy trial), he contends, is reinforced by the revelation that the State has lined up to 338 witnesses.

[16] Mr Shanghala thus continues and argues that denying him bail will constitute a violation of his rights under article 7 (the right not to be deprived of personal freedom except in accordance with procedures established by law), article 8 (the right not to be subjected to cruel, inhumane and degrading treatment), and article 12 (the right to a fair trial).

[17] Mr Soni, who appeared on behalf of Mr Shanghala argued that if he is denied bail, such denial of bail would be inconsistent with the other rights referred to by Justice Oosthuizen in *Gustavo v S*[11].The position now is that, so Mr Soni argued, unless Mr Shanghala is granted bail, the period of custody would be extended to several more years, without him having been found guilty of any offence. This would not accord with Article 12, which provides that a criminal trial shall take place within a

[11] *Gustavo v S* (CC 06/2021 and CC 07/2021) [2021] NAHCMD 591 (15 December 2021).

reasonable time, failing which the accused must be released and that all persons are presumed to be innocent until proven guilty.

The alleged unlawful investigations by the Anti-Corruption Commission.

[18] Mr Shanghala further contends that the more serious charges that he faces (namely racketeering and money laundering) are based on investigations by the Anti-Corruption Commission (the ACC) which it is not empowered to investigate, and whose investigations in respect of these offences and charges is accordingly unlawful; and that little reliance can be placed on the allegations and biased views of the main witness whom the State called to oppose the grant of bail.

[19] Mr Soni further argued that Mr Andreas Kanyangela, the main witness for the State in the opposition of the bail application, was nakedly hostile to the applicants, and especially to Mr. Shanghala. He argued that Mr Kanyangela did not take this Honourable Court into his confidence on several important issues, that he exercised powers that he did not have, and inexplicably refused to exercise powers granted to the ACC that could have assisted in uncovering facts and thereby presenting a more balanced picture and considerably shortening the length and cost of the investigation. Counsel further argued that Mr. Kanyangela failed to provide any proper explanation for his and the ACC's alleged 'clearly one-sided approach' to the entire investigation, and in particular why the ACC did not exercise the quite potent powers that the Anti-Corruption Act (ACA) grants to ACC investigators. He thus submitted that:

> '… the most reasonable inference is that the outcome of the investigation was to visit maximum prejudice on the Applicants on several fronts: violation of their rights starting with the ending of their freedom; depriving them of their assets; and undermining their dignity and in the case of the First Applicant his political reputation.'[12]

The ordinary considerations.

[20] Mr Shanghala indicated that he is an adult male, who has been a faithful servant of this country for more than two decades. He states that he suffers from

[12] First to Third Applicants' Heads of Argument, para 6.

hypertension, asthma, and sleep apnoea - which requires the use of a CPAP machine, and he is also required to take medication daily. He alleges that his conditions are being exacerbated by his being kept in custody for more than two years now. He further states that he is the father of two five-year-old children, has an aged father and grandfather who depend on him, and that they are adversely affected by his prolonged absence. He continued and contended that his continued incarceration means that he is unable to perform the responsibilities for the greater Ihuhua, Haidula, and Shanghala kin and folk.

[21] In his affidavit in support of his application for bail Mr. Shanghala proclaimed his innocence and his intention to stand trial. He further stated that he shall not evade justice; that he shall not interfere or tamper with witnesses of the State, and that he shall not interfere with the administration of justice.

James Nependa Hatuikulipi.

[22] Mr Hatuikulipi in his affidavit in support of his application for bail also contends that he anchors his application for bail on several weighty factors which fall in the same three broad categories that were enumerated by Mr. Shanghala. I will therefore not repeat those grounds, except for the personal circumstance of Mr. Hatuikulipi.

[23] Mr Hatuikulipi indicated that he is an adult male who has extensive commercial and farming business interests in Namibia. He states, he suffers from hereditary hypertension which requires daily medication and a balanced diet; that he has three surviving siblings, one who resides in the United Kingdom, one in Windhoek and one in Otjiwarongo. He pointed out that while he has a South African residence, he is not a South African citizen. He indicated that his identification document and passport have been confiscated by the Anti-Corruption Commission authorities.

[24] In his affidavit in support of his application for bail Mr Hatuikulipi proclaimed his innocence and his intention to stand trial, he said that he shall not evade justice;

that he shall not interfere or tamper with the witnesses of the State; and that he shall not interfere with the administration of justice.

Pius Natangwe Mwatelulo.

[25] Mr Mwatelulo in his affidavit in support of his application for bail also contends that he anchors his application for bail on several weighty factors which fall in the same three broad categories that were enumerated by Mr Shanghala. I will therefore not repeat those grounds except for the personal circumstance of Mr Mwatelulo.

[26] Mr Mwatelulo indicated that he was ordinarily resident at No 493, Albertos Street, Hochland Park, Windhoek, Namibia. He has a four-year-old daughter who lives with her unemployed mother, but is dependent on him for support. He alleges that in addition to the four-year-old baby girl, he also looks after his 6 year old nephew, two cousins, and his aunt. He states that he created and grew a business known as Otuafika Investment CC, which employs about 19 people, and whose employment hinges on him being able to steward the business.

[27] In his affidavit for bail, Mr Mwatelulo also proclaimed his innocence and his intention to stand trial, he said that he shall not evade justice; that he shall not interfere or tamper with witnesses, and that he shall not interfere with the administration of justice.

Mike Nghipunya.

[28] As I indicated earlier in this judgment, this is the second attempt by Mr Nghipunya for him to be released on bail. He says this is based on new facts. Salionga J in *Hans Sheelongo v S*[13] quoted with approval, a passage from *S v Petersen*[14] where she said:

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[13] *Sheelongo v S* (CC 16/2018) [2020] NAHCNLD 51 (18 May 2020) at para [10].

[14] *S v Petersen* 2008 (2) SACR 355 (C) 371 para 57.

'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.'

[29] I am satisfied that, the facts which Mr Nghipunya contends are new facts and which he has set out, did not exist as at the hearing of his bail application in June 2020. Those facts are thus new facts entitling him to launch another bid to be released on bail. I will thus consider all the facts that Mr Nghipunya has placed before me, new and old, and on the totality of those facts will come to a conclusion whether or not to admit him to bail.

[30] Mr Nghipunya was in the witness box for a period exceeding eight court days. It is thus not an easy task to summarise his testimony and cross examination without unnecessarily burdening this judgment. I will therefore only highlight the aspects in his testimony which in my view, are relevant for me to make a determination with regards to his application to be admitted to bail.

[31] Mr Nghipunya testified that he is a single, 37 year old male, resident at 171, Ichaboe Street, Rocky Crest, but currently detained at the Windhoek Correctional Services, Windhoek, Namibia. He testified that he has lived in Namibia all his life and has no relatives outside Namibia. He further testified that during the year 2014 he was seconded by the Public Service Commission to the Namibia Fishing Corporation (Fishcor), to act as its chief executive officer. He acted in that position until 2016 when he was appointed as Fishcor's substantive chief executive officer.

[32] Mr Nghipunya furthermore testified that at the time when he assumed the role of acting chief executive officer in 2014, Fishcor faced a plethora of challenges including operational difficulties, where its factory would shut down periodically due to such operational challenges. Fishcor also had a lot of debt with financial institutions, such as the Development Bank of Namibia (DBN) and the government of the Republic of Namibia and that the financial institutions were also calling on their debt from Fishcor. The company was in desperate need of a rescue plan and that is when he was tasked to devise a turnaround strategy. He testified that his

achievements at Fishcor are impeccable and that he has managed to turn around the fortunes of Fishcor.

[33] Mr Nghipunya further testified that during November 2019 when the "*Fishrot*" scandal broke to the public he was in Tokyo, Japan on official business. He contends that although he had an opportunity to abscond, if he had so wished, he did not do so as he is a law abiding citizen with faith in the Namibian Justice System. He testified that he was never tempted to run away, as he had no reason to do so. He further testified that following the arrest of some of the co-accused in this matter on 23 and later on 27 November 2019, he was also aware that he was implicated in the alleged '*Fishrot*' scandal. He was still able to travel in and out of Namibia, but never absconded.

[34] Mr Nghipunya furthermore testified that on 14 February 2020 the Anti-Corruption Commission (the ACC) informed him that the summonses were ready and that, they were ready to hand them over to him. To that end and upon legal advice, he made arrangements for him to report to the ACC on Monday 17 February 2020. He was aware even at that time that his arrest was imminent. He acted lawfully and did not abscond nor did he do anything to jeopardize the state's investigation. He then arranged to go to the ACC offices for his arrest on 18 February 2020. He testified he knew long before his arrest of the impending arrest. He contends that this was an indication that he was cooperative and has no intention of absconding the investigations against him.

[35] Mr Nghipunya further testified that the record disclosed by the State is voluminous, especially following the joinder of the Fishcor and Namgomar cases, and therefore the opportunity and need to consult is even more critical. He contends that following receipt of the State's disclosure, he has no reason to abscond as he strongly holds the view that the State's case is based on the misunderstanding of his functions as the chief executive officer of Fishcor; and that he is desperate to clear his name in a Court of law, as he has complete faith in the Namibian Courts. He contends that for the first time he has received a list of statements in the State's disclosure, and having gone through those statements, he says he has no reason to

interfere with those witnesses. He testified that a statement was obtained from his brother and he will ensure that he does not interfere with him.

[36] Mr Nghipunya further testified that, during his tenure as Fishcor's chief executive officer he had clean financial reports and same were presented to the Minister who then submitted it to Cabinet. It was a requirement that independent auditors perform the audits and that the financial books of Fishcor were audited for every year that he was in office. Such audits were undertaken by a firm of auditors, namely, Stier Venter Associates, and which is a firm based here in Windhoek. He testified that no irregularities were ever identified. He testified that an audit by an external firm such as Stier Venter Associates was not an exercise between the chief executive officer and the independent auditors alone. The auditors engaged with the board, the senior management of the organization, and the finance department staff; as they have powers to request information from anyone within the entity.

[37] Mr Nghipunya further testified that the Minister responsible for Fisheries and Marine Resources was the functionary empowered by the Marine Resources Act, 2000[15] to determine policy, to allocate *quota*s, and to designate governmental objectives for Fishcor. He proceeded and testified that there were two types of *quotas* allocated to Fishcor under governmental objectives. At times such *quotas* were for Fishcor's own utilization, in order to pursue its own commercial goals; in many instances such *quota* were allocated to Fishcor. The other type of quota was under governmental objectives, which were allocated to Fishcor as an agent of the government of the Republic of Namibia for the benefit of other parties. These *quotas* were not part of Fishcor's own assets, the testimony went.

[38] Mr Nghipunya further testified that it was Fishcor's financial policy that revenue derived from *quotas* allocated for the benefit of third parties not to be reflected in Fishcor's books, as it was not part of Fishcor's assets. However, there was still a requirement that the utilization of those *quotas* be subjected to full transparency requirements, checks and balances, and to give full accountability to the owner of the *quota* – the owner being the government of the Republic of

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[15] Marine Resources Act, 2000 (Act No 27 of 2000).

Namibia. And this is why Fishcor still subjected the allocation and utilization of such a *quota* to annual audits.

[39] Mr Nghipunya further testified that in respect of each *quota* that was allocated to Fishcor he accounted for each metric ton and the revenue derived from such *quota* was utilized as directed by the Minister of Fisheries and Marine Resources. He testified that to the best of his knowledge, the Minister allocated the *quota* exercising the powers contained in section 3(3) of the Marine Resources Act. He also testified that section 3(3) of the Marine Resources Act was also complied with in that Fishcor was designated as such entity, in that there was a designation agreement concluded between the minister of Fisheries and Marine Resources, and Fishcor which was gazetted under Government Notice 99 in Government Gazette 6017 of 27 May 2016 as amended by Government Notice 14 in Government Gazette 6308 of 15 May 2017.

[39] Based on his testimony Mr. Nghipunya in essence denied that he committed any offence and argued that he is confident that he will at the trial be able to defeat the charges levelled against him and that the state has no *prima facie* case against him.

[40] Mr Nghipunya furthermore testified that he is willing and prepared to be admitted to bail on the following conditions:

(a) That he be ordered to report himself at Otjomuise Police Station every Monday and Friday between the hours 07h00 and 19h00;

(b) That he be ordered not to leave the district of Windhoek without the prior knowledge of the investigating officer or any designated police officer;

(c) That he be ordered to surrender his travelling documents – passport – to the investigating officer, and further that he be prohibited from applying for any travel document pending final determination of the main criminal matter;

(d) That he be ordered not to interfere with the police investigation and/or the state witnesses in the main criminal matter;

(e) That he be ordered to pay and deposit an amount of N$200 000.00 (two hundred thousand Namibian Dollars); and

(f) Such other or further practicably reasonable conditions that this Honourable Court may deem appropriate.

Otneel Shuudifonya.

[41] Mr Shuudifonya testified that his full names are Otneel Nanditonga Shuudifonya and he is 32 years of age. He further testified that he was born at Okaonde Village in the Ohangwena Region of Namibia. He further testified that he was ordinarily resident at Erf 3221, Extension 7, Otjiwarongo, in the Republic of Namibia. He testified that he has three children, the oldest being a four year old, the second youngest being one year old, and the youngest being an eight months old baby. He further testified that all three children live with their mothers, but that the mothers are unemployed and are thus dependent on him for support. He furthermore testified that he is employed by the Otjozondjupa Regional Council, but that his salary has been suspended and such he has no source of income.

[42] As regards his business activities, Mr Shuudifonya testified that he is the sole member of a close corporation titled Ndjako Investments CC and another entity titled Fine Seafood Investment Trust. Mr Shuudifonya further testified that Saga Seafood (Pty) Ltd and Fine Seafood Investment Trust entered into a transaction that is independent from any governmental body, he therefore contended that he accordingly does not see how Fine Sea Food Investment can be linked to the fishing quotas that were allocated to Fishcor. As regards Ndjako Investment CC, he testified that Ndjako provided consultancy services to a company known as Low Key Investment (Pty) Ltd and thus the funds that flowed from Low Key to Ndjako were for legitimate services rendered by Ndjako to Low Key. On this basis he contends that the State has failed to demonstrate a *prima facie* case against him.

[43] Mr Shuudifonya also proclaimed his innocence and his intention to stand trial. He testified that at the time when the news broke that a warrant for his arrest had been issued, he was in the Northern part of Namibia near the Angolan border. He continued and stated that despite that, he seven days later, handed himself over to the ACC and was arrested. He furthermore testified that after his arrest he cooperated with the ACC investigations. He furthermore testified that he shall not interfere or tamper with witnesses and that he shall not interfere with the administration of justice.

Phillipus Mwapopi.

[44] Mr Mwapopi testified that he is an adult male, and 33 years old. He further testified that; he was born at Swakopmund, Namibia, and that he was ordinarily resident at Erf 6411, Extension 16, Khomasdal, Windhoek, Republic of Namibia and that he is married and has a twelve-year-old daughter who is still attending school. He furthermore testified that he is employed by the City Police department in the City of Windhoek as a constable; but has since January 2021 been on suspension without remuneration and as such he has no source of income. He furthermore testified that he is currently a PHD student.

[45] As regards his business activities, Mr Mwapopi testified that during 2016 he floated and registered a close corporation named Wanakadu Close Corporation, of which he is the sole and managing member. Mr Mwapopi further testified that the payments which Wanakadu received from Fishcor were for goods (dried fish) which it sold and delivered to Fishcor. He testified that the payments that Wanakadu received from Low Key Investments Pty (Ltd) were for consultancy services that Gwanyemba Investment Trust rendered to that Company. He testified that Gwanyemba Investment 'delegated' the payment of its invoices to Wanakadu CC, he accordingly denied that the State has a *prima facie* case against him.

[46] Mr Mwapopi in his testimony also proclaimed his innocence and his intention to stand trial. He testified that at the time when the news broke that a warrant for his arrest had been issued, he was also in the Northern part of Namibia near the

Angolan border. He continued and stated that despite that, he seven days later, handed himself over to the ACC and was arrested. He further testified that after his arrest he cooperated with the ACC investigations. He furthermore testified that he shall not interfere or tamper with witnesses and that he shall not interfere with the administration of justice.

[47] Having briefly set out the grounds on which the applicants are basing their applications to be released on bail, I now turn to the basis on which the State opposes the admission of the applicants to bail.

The grounds on which the state opposes the granting of bail.

[48] The State opposes the applicants' application to be released on bail on the following grounds:

(a) The charges are serious offences and they involve a criminal syndicate (enterprise);

(b) That there is strong *prima facie* case against the applicants;

(c) There is a likelihood that the applicants may abscond and not attend their trial;

(d) There is likelihood that the applicants will interfere with the case or the witnesses;

(e) That it is not in the public interest to release the applicants on bail;

(f) That it is not in the interests of the administration of justice to release the applicants on bail.

I will briefly outline these grounds in the ensuing paragraphs.

That there is strong prima facie case.

[49] In opposition to the application for bail, the State called Mr Kanyangela, who testified that he was the Chief Investigating Officer. He narrated to court the nature of the ACC's investigation and the results of a forensic analysis done on behalf of the Anti-Corruption Commission by a local auditing firm on samples collected from the applicants' communication devices, such as: mobile telephones, desktops, and laptops.

[50] Mr Kanyangela also narrated to court the flow of funds between companies which formed part of the Samherij Group and Novanam on the one hand and the six applicants and three other co-accused who are not part of this bail application and close corporations, trusts, and companies in which the applicants and their co accused have one or the other interest on the other hand. Kanyangela backed up his narration with copies of invoices, emails, bank accounts and proof of payments. During Mr Kanyangela's testimony it a emerged that the State is further in possession of more than a dozen witness statements, some of which implicate the applicants of the offences of corruption, money laundering, racketeering, and fraud.

[51] The investigating officer furthermore narrated to Court that all of the funds that 'passed hands' and flowed between the entities mentioned in the preceding paragraph, derived from the allocation of fishing quotas that were, in terms of the Marine Resources Act, 2000 allocated by the then Minister of Fisheries to achieve stated governmental objectives. Mr Kanyangela furthermore informed the Court that those funds did not achieve the objectives for which they were intended but ended up in the 'pockets' for personal use of the six applicants and their co accused. Based on that testimony the State submitted that it had made out a *prima facie* and strong case against the applicants.

The likelihood that the applicants may abscond

[52] Mr Kanyangela during his testimony testified that although all the applicants in this matter proclaim that they will not abscond or interfere with witnesses, these averments must not be taken seriously because the applicants now know the seriousness of the charges they are facing. He testified that they are facing charges involving more than N$ 317 million, and the sentences that are likely to be imposed if

they are convicted will be heavy and lengthy custodial sentences. That knowledge is an incentive to the applicants to abscond, testified Mr Kanyangela.

The likelihood that the applicants will interfere with the case or witnesses

[53] Mr Kanyangela testified that Mr Shanghala is facing charges of defeating or obstructing or attempting to defeat or obstruct the course of justice, because he allegedly sent one of his co-accused to remove documents and physical evidence relating to this case from his residence at Erf 13 B Berg Street Klein-Windhoek.

[54] As regards Mr Hatuikulipi, Mr Kanyangela testified that Mr Hatuikulipi has a pending case in the District Magistrates Court, for the District of Windhoek where he is facing charges under the Anti-Corruption Act, 2003[16] involving bribery as well as obstructing the course of justice; relating to allegations that he and his co-accused, acting in concert and common purpose, attempted to bribe members of the ACC.

[55] Kanyangela testified that Mr Hatuikulipi allegedly sent a certain Mr Iyambo to pay ACC investigating officers an amount of N$250 000-00, in exchange for that officer returning some of the exhibits in the form of bank cards (some belonging to Hatuikulipi and others belonging to Mwatelulo), and which bank cards were seized from them during the investigation of this matter. Kanyangela proceeded and testified that a certain Jason Iyambo denied the charge of bribery, but pleaded guilty to the charge of obstructing the course justice and he was convicted and sentenced to a period of 18 months imprisonment, which he has served.

[56] Kanyangela testified that during the forensic analysis of Mr Hatuikulipi's communication devices, the investigating officers found information which shows that prior to his arrest, Mr Hatuikulipi was in the process of hatching plans to manufacture documents in order to disguise the real reasons for the payment of an amount of US $ 4 000 000 to a company known as Tundavala in its offshore account. He further testified that, that amount was indeed paid into that company's account held in Dubai in the United Arab Emirates. He testified that, that amount has actually been moved out of that account and its whereabouts are unknown.

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[16] Anti-Corruption Act, 2003 (Act No. 8 of 2003).

[57] During his testimony Mr Kanyangela referred the Court to a witness statement by a certain Jose Ramon Camano, who stated that during November 2019, Mr Nghipunya contacted Mr Camano to sign a consultancy agreement between Skeleton Coast Trawling (Pty) Ltd and Gwanyemba Investment Trust and to backdate it to 2017; and which agreement sought to portray that Gwanyemba Investment Trust had provided services of maintenance, catering, vessel management, and repairs to Skeleton Coast Trawling (Pty) Ltd, and claiming that the agreement would offer him and Novanam a form of safety.

[58] In the witness statement Mr Camano went further and stated that Mr Nghipunya, after he was arrested, further contacted him from prison from a telephone that did not display a number and requested him to sign the agreement. He further stated that Mr Nghipunya sought financial assistance from him. In the statement Mr Camano further stated that a certain “Ottie” called him and provided him with the banking details in which he had to pay the money that was requested by Mr Nghipunya, and the said Ottie sought a meeting with Mr Camano. During the proceedings it became clear that the “Ottie” referred to here is the fifth applicant Mr Otneel Shuudifonya.

It is not in the public interest or the interest of justice to release the applicants on bail.

[59] As regards public interest and the interest of justice, Mr Kanyangela simply stated that taking into consideration that the State has a strong case against the applicants and their co accused, the seriousness of the offences, and considering the substantial amount of money involved in this matter - there is a likelihood of heavy sentences being imposed; it is thus not in the public interest or in the interests of the administration of justice to release the applicants on bail.

[60] Having shortly set out the grounds on which the applicants base their application to be admitted to bail, and the grounds on which the State opposes the application for bail, I now proceed to consider whether or not the applicants have discharged the *onus* resting on them.

Discussion.

[61] I, with reference to the cases of *S v Pineiro*; *S v Dausab,* and *Gustavo v S*[17]*,* indicated that an applicant for bail bears the specific *onus* to prove on a preponderance of probabilities that the interest of justice demands that he be permitted to and be released on bail. I furthermore indicated that 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.

[62] The applicants in his matter and particularly the first, second, and third applicants alleged that, the fact that they are denied bail infringes their constitutional rights, particularly the rights conferred on them by Articles 7, 8, and 12 of the Namibia Constitution; and the rights outlined by Justice Oosthuizen in the *Gustavo* matter.

[63] In the matter of the *Disciplinary Committee for Legal Practitioners v Slysken Makando and The Law Society, Slysken Makando v Disciplinary Committee for Legal Practitioners and Others*[18] this Court per Justice Parker had the following to say:

'[9] In considering the first respondent's constitutional challenge based on art 12(1) and art 18, I keep in my mental spectacle the following trite principles of our law . . . (1) constitutional challenge in general and (2) constitutional challenge of a provision of a statute in particular. Under item (1), it has been said that the person complaining that a human right guaranteed to him or her by Chapter 3 of the Constitution must prove such breach (*Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC)) (as Mr Khupe submitted). And before it can be held that an infringement has, indeed, taken place, it is necessary for the applicant to define the exact boundaries and content of the particular human right, and prove that the human right claimed to have been infringed falls within that definition (*S v Van der Berg* 1995 NR 23). Under item (2), the enquiry must be directed only at the words used in formulating the legislative provision that the applicant seeks to impugn

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17 *S v Pineiro* 1992 (1) SACR 577 (Nm) at 580; *S v Dausab,* 2011 (1) NR 232 (HC) at 235, and also *Gustavo v The State (supra).*

18 *Disciplinary Committee for Legal Practitioners v Slysken Makando and The Law Society, Slysken Makando v Disciplinary Committee for Legal Practitioners and Others* Case No. A216/2008 (Judgment on 8 October 2011).

and the correct interpretation thereof to see whether the legislative provision – in the instant case, art 12 (1) and art 18 of the Namibia Constitution – has in truth been violated in relation to the applicant (*Jacob Alexander v Minister of Justice and Others* Case No. A 210/2007 (HC)'.

[64] It follows that, the applicants, in their affidavits and in their oral evidence, had to furnish facts in the form of evidence pertaining to the nature of the violation of their constitutional rights. As regards the evidence which the applicants had to put before the court in their affidavits and oral evidence, I echo the words of Kumleben, then AJA, in the matter of *Radebe and Others v Eastern Transvaal Development Board,* that the allegations (i.e. that the constitutional rights are being infringed) in the founding affidavits and the oral evidence are conclusions of law, they are at best for the applicants inferences, "*secondary facts",* with the primary facts on which they depend on having been omitted.

[65] In the matter of *Willcox and Others v Commissioner for Inland Revenue*[19] Schreiner JA explained the concept of '*primary*' and '*secondary*' facts as follows:

> 'Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts.'

[66] In the instant case, the applicants had to place before the Court primary facts which must be used as a basis to infer the existence of further facts namely that their constitutional rights are being violated or infringed. They did not do that. What they did is that they pleaded a legal result and parroted Articles 7, 8, and 12, of the Constitution. I am of the further view that the appellants' reliance on the *Gustavo* matter is misplaced. I say so, because in that matter the learned Justice Oosthuizen simply enumerates the rights guaranteed under the Constitution, but does not tell the reader of that judgement how the rights were violated. It must be remembered that in this matter all the applicants were arrested on the strength of warrants of arrest issued by a judicial officer, and the legality of the warrants of arrest was tested in this Court; meaning that their arrests are neither unlawful nor arbitrary but in accordance with the law.

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[19] *Willcox and others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602.

[67] This Court per Justice O'Linn had the following to say in the case of *S v Du Plessis and Another*[20]:

'It is apposite here to deal briefly with the continuous and, it seems, selective emphasis placed by some accused persons and their legal representatives on certain sections of the Namibian Constitution and certain fundamental rights such as "the liberty of the subject", "a fair trial" and the principle that an accused person is "regarded as innocent until proved guilty".

These very important fundamental rights are, however, not absolute but circumscribed and subject to exceptions. The particular right relied on must be read in context with other provisions of the Constitution which provide for the protection of the fundamental rights of all the citizens or subjects, which provides for responsibilities of the subject, for the maintenance of law and order, for the protection of the very Constitution in which the rights are entrenched and for the survival of a free, democratic and civilised state.

As to the fundamental right to a fair trial, it seems obvious that there can be no "fair trial" if the trial itself cannot take place because the accused have absconded…

It is also inherent in the Namibian Constitution that the State must protect the subject, as well as the Constitution and the State itself, by combating crime and criminals by apprehending alleged criminals and taking all reasonable steps to ensure that they will stand their trial.

When the subject is detained and his or her rights are infringed or he or she suffers inconvenience or is otherwise prejudiced by such detention, this can never be done arbitrarily but only in accordance with laws and procedures providing for such detention and at the same time providing safeguards.

Furthermore, the common law provides that the subject has an action for damages where his detention and/or prosecution is malicious or otherwise unlawful. In addition, it is the practice of Courts when sentencing an accused person to take into consideration in his or her favour of the period of detention prior to conviction.

Such laws are in the public interest and in the interests of the administration of justice.'

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[20] *S v Du Plessis and another* 1992 NR 74 (HC) at p 81*, also see S v Timotheus* 1995 NR 109.

[68] For the reasons I have set out in the preceding paragraphs I have come to the conclusion that the applicants have not discharged the *onus* resting on them to demonstrate that their continued incarceration is in violation of their constitutional rights.

[69] Messrs Shanghala, Hatuikulipi, and Mwatelulo also based their application to be released on bail on the basis that the current criminal proceedings are the outcome of unlawful investigations by the Anti-Corruption Commission.

[70] I indicated earlier in this judgment that section 60 of the Criminal Procedure Act, 1977 confers on an accused who is in custody the right to apply to the relevant court to be released on bail. Whilst it is true that detained persons, such as the applicants, have certain rights which are protected by law, the proper course to follow when such rights are violated is a different matter. I am of the view that, upon a proper construction of section 60(1) of the Criminal Procedure Act, 1977, a person whose detention has been pronounced lawful and in the interests of justice cannot simply resort to a bail application merely because the pre-detention procedures are flawed. It is, however, available to such person concerned to challenge the detention before a court of law as being unconstitutional or unlawful.

[71] I pause here to observe that in this matter, Mr Soni who appeared on behalf Messrs Shanghala, Hatuikulipi, and Mwatelulo, relying on answers extracted from Mr. Kanyangela during cross examination, urged and invited this Court to take into consideration what this Court remarked and said about the Anti-Corruption Commission in the matters of *Hailulu v The Director of the Anti-Corruption Commission*[21] and *S v Lameck and Others*[22].

[72] I must say I decline that invitation for the following reasons. Article 12 of the Namibian Constitution guarantees everybody (this includes the Anti-Corruption Commission) a fair trial. If I were, to make findings about the impropriety of the Anti-Corruption Commission's conduct, such finding must be based on allegations

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[21] *Hailulu v Director of the Anti-Corruption Commission and Others* 2014 (1) NR 62 (HC) at para [46] & [47].

[22] *S v Lameck and Others* 2019 (2) NR 368 (HC).

properly placed before Court and in terms of which the Anti-Corruption Commission is given an opportunity to refute such allegations. A finding about the reputation of a body which was not given any opportunity to defend itself is grossly unfair.

[73] I accordingly find that the second and 'weighty considerations' relied upon by the first three applicants for their admission to be granted bail are irrelevant to the question of whether or not they must be admitted to bail and I equally find that the first to third applicants have failed to discharge the *onus* resting on them to demonstrate that they are worthy of being admitted to bail.

[74] I now proceed to consider the applicants' application based on what they term the ordinary considerations. The first consideration being whether it is more likely that the applicants would stand their trial or whether it is more likely that they would abscond and forfeit their bail? The applicants (all six of them) testified that they have deep emotional, occupational, and family roots in Namibia; and that, although some of their assets are subject to restraining orders they have assets in Namibia. They also testified that their passports and identification documents have been confiscated by the Anti-Corruption Commission, and they thus have no means to apply for other travelling documents and do not have the capacity to travel.

[75] The State on the other hand has argued that all the applicants are facing serious charges of more than N$317 million and that if they are found guilty the sentence to be imposed will be severe. There is thus a likelihood that the applicants will abscond in order to avoid serving long custodial sentences as Mr Maren De Klerk has done and as the Icelandic co-accused have all disappeared from Namibia, so argued Mr Lutibezi.

[76] In my view the scales, as to whether or not the applicants will abscond, are equally balanced. I cannot make a finding whether the applicants will or will not abscond.

[77] The second consideration relates to the question of whether or not there is a reasonable likelihood that, if the applicants were released on bail, they would tamper with witnesses or interfere with the relevant evidence or cause such evidence to be

suppressed or distorted. The applicants have proclaimed their commitment not to interfere with witnesses or the evidence.

[78] The State is, however, of a different opinion. Mr Lutibezi for the State argued that the State has led evidence, which has not been controverted, that the applicants have tried to interfere with this case and witnesses. He argued that at least four of the six applicants are also charged with offences of obstructing the course of justice. One person who was accused of attempting to allegedly bribe, on the alleged instruction of Mr. Hatuikulipi, an Anti-Corruption Commission investigator with an amount of N$ 250 000-00, was on his own confession, convicted of obstructing the course of justice.

[79] The State further led evidence to the fact that the fourth applicant prior to his first arrest, after his arrest, and whilst in custody, used an unauthorised device to communicate with a witness and persuade that witness to sign an agreement which will give him protection.

[80] The State has also led evidence to the effect that an amount of US $ 4 000 000 (which amount if conservatively converted to Namibia Dollars amounts to anything between 60 and 70 Million Namibia Dollars), and which originated from Norway in respect of revenue derived from the allocation of fishing quotas to Namgomar Pesca SA, was paid into the bank account held in the United Arab Emirates, to a company named Tundavala in which the second applicant holds interest. The State tended that its effort to trace that money has been frustrated.

[81] One of the factors that a Court must take into consideration to determine whether an applicant for bail is likely to or not to interfere or temper with evidence is the question of whether or not any condition preventing communication between any witnesses and the applicant can effectively be policed. The State led testimony that Messrs Shanghala and Hatuikulipi were on two different occasions and in contravention of correctional facility rules found in possession of mobile telephones. If the policing of the applicants not to communicate with the outside world while they are in detention is difficult what more so when they are free.

[82] I agree with the State on this point, that all the applicants have not satisfied the Court that if they are released on bail they will not distort or supress evidence and thus the likelihood that they will interfere with the evidence is reasonably real. In the *S v Timotheus*[23] matter this Court further held that:

'The provisions provided for in the Namibian Constitution read with Act 5 of 1991 are in the public interest and in the interests of the administration of justice. For there shall be no fair trial as anticipated by art 12 of the Namibian Constitution or possibly no trial at all if a situation is allowed to develop whereby the accused interferes with the State witnesses or police investigation.

If a reasonable possibility exists that this might be the case, it will be in the best interests of the administration of justice then not to take the risk and allow such an accused out on bail, even where it is shown that he will likely not abscond.' (Italicised and underlined for emphasis)

[83] The third factor to take into consideration is how prejudicial it might be for the applicants in all the circumstances to be kept in custody by being denied bail. In this matter it is undeniable that the applicants have been in custody for a period exceeding two years. Mr. Engelbrecht referred me to the Botswana case of *Stimela and Another v The State*[24] where Dinkage J had the following to say:

'It seems clear to me that a prison environment may not be necessarily conducive to prepare ones' defence. Prosecution is in some respects similar to a boxing match. It would seem *ex facie* unfair that one of the contestants in the boxing match should remain chained whilst the other is free to roam freely in search of the evidence that can nail the chained contestant without the said contestant being granted the opportunity to do likewise. The principle of equality of arms suggests that as much as practically possible the protagonists (accused and State) must be afforded equal opportunities to gather evidence that must support their respective cases …

The petitioners are already serving a prison term before their conviction or acquittal … It is also too easy to say imprisonment for a few months is nothing out of the ordinary. In my view, even one day in prison is one too many. It is worse if the detention before trial takes many

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23 *Ibid.*

24 *Stimela and Another v The State* 2011 2 BLR 1081 HC, delivered on 21 December 2011.

months. If it exceeds a year it becomes unacceptable in a constitutional democracy that places high premium on the liberty of individuals.*'*

[84] While the sentiments expressed by Justice Dinkage accord with the principle of constitutional democracies, one must not forget that in life there is never a *'one shoe fits all sizes*' situation. Each case must be determined on its own merits. In the matter of *Abraham Brown v State*[25] this Court per Silungwe J and Damaseb AJ, stated[26] that:

'… an applicant for bail, bearing in mind that he has the *onus* to establish the basis justifying the granting of bail, must place sufficient information before the court considering bail to enable that court to make a proper assessment of the merits and demerits of admitting him or her to bail. To simply say I am a business man, I support a family, I will stand my trial and will not interfere with witnesses, without more is, with respect, not enough. If a court were expected to grant bail simply on that basis, I can conceive of no case in which bail can ever be refuse.'

[85] The mere fact that fact that the applicants have spent more than two years in custody does thus not automatically entitle them to be admitted to bail, they must discharge the *onus* resting upon them. In this matter the applicants did not, in my view, place sufficient information before the court to enable me to make a proper assessment of the merits and demerits of admitting them to bail. They simply stated that they are business men, they support their families, and they will stand their trial and will not interfere with witnesses, without more.

[86] This is, as Silungwe and Damaseb observed, with respect, not enough. Furthermore the unsubstantiated personal circumstances (their health, the family relations, employment, and business environments) which the applicants placed before me, are neither unusual nor do they singly or together warrant release of the applicants in the interest of justice.

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[25] *Abraham Brown v State* CA 158/2003 delivered on 31/03/2004.

[26] At paragraph 28.

[87] Taking all the evidence into consideration and weighing that evidence against the applicants' personal circumstances, together with the submissions made on their behalf, I am satisfied that the applicants have failed to prove that it will be in the interests of justice to grant them bail. To the contrary, I hold the view that the administration of justice will be prejudiced if the applicants were admitted to bail. For the reasons set out in this judgment the applicants' application for bail is dismissed.

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Ueitele SFI
Judge

APPEARANCES:

1st to 3rd APPLICANTS:	V SONI Instructed by Murorua Kurtz Kasper Inc. Windhoek
4th APPLICANT:	T PHATELA Instructed by Engelbrecht Attorneys, Windhoek
5TH & 6TH APPLICANT:	M ENGELBRECHT Of Engelbrecht Attorneys, Windhoek
RESPONDENT:	C LUTIBEZI (with him E MARONDEDZE) Of Office of the Prosecutor-General Windhoek