REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2021/00343

In the matter between:

MIKE NGHIPUNYA	**APPLICANT**
and	
THE MINISTER OF JUSTICE	**1st RESPONDENT**
THE ATTORNEY-GENERAL	**2nd RESPONDENT**
THE PROSECUTOR-GENERAL	**3rd RESPONDENT**

Neutral citation: *Nghipunya v The Minister of Justice (*HC-MD-CIV-MOT-GEN- 2021/00343) [2022] NAHCMD 510 (14 October 2022)

Coram: January J, Masuku J *et* Schimming-Chase J
Heard: **31 January 2022**
Delivered: **14 October 2022**

Flynote: Constitutional law – Constitutionality of s 61 of the Criminal Procedure Act, 51 of 1977 as amended by s 3 of the Criminal Procedure Amendment Act, 5 of 1991 - The words 'in the interest of the public' and 'the administration of justice' – Allegedly incapable of full comprehension – Section 61 not easy to interpret but not too vague or incapable of understanding through the

investigation of judicial pronouncements on the section over the years – Limitation contained in s 61 more invasive than in other countries, but reasonable and justifiable in the circumstances.

Constitution – Articles 7, 10, 11 and 12 rights not absolute, limitation permissible if rational and justified in a democratic society.

Constitutional law – Constitutionality of s 61 of the Criminal Procedure Act, 51 of 1977 as amended by s 3 of the Criminal Procedure Amendment Act, 5 of 1991 – While right to bail not absolute, decision whether to grant bail should rest with the court – Court required to conduct a full inquiry into whether or not accused should be released on bail – Inquisitorial powers of the presiding officer are greater, and must be exercised judicially – Duty of judicial officer to conduct bail hearing in a manner that will ensure that both parties are properly heard, without overlooking the inquisitional nature of bail proceedings.

Criminal Procedure – Bail - Pending trial – Accused only has a right to apply for bail, accused bears the onus of proof in a bail application – Accused must prove on a balance of probabilities that he or she is worthy of being granted bail and that the interests of justice will not be prejudiced if bail is granted.

Criminal Procedure – Bail – Pending trial – When to be granted - Balance between liberty of accused and interests of justice in serious offences.

Summary: The accused, a trial awaiting prisoner applied for an order declaring s 61 of the Criminal Procedure Act, 51 of 1977 as amended by s 3 of the Criminal Procedure Amendment Act, 5 of 1991 unconstitutional, on the grounds that the words ‘in the interest of the public’ and ‘the administration of justice’ are unintelligible and incapable of being properly interpreted, resulting in an accused who applies for bail having to face an insurmountable hurdle in order to be granted bail. It was argued that the provision was void for vagueness and impermissibly infringed on the applicant’s constitutional rights to liberty, to a fair trial and to be presumed innocent.

Held that the words ‘in the interest of the public’ and ‘the administration of justice’- are not easy to interpret but Namibian jurisprudence has provided guidelines that can be followed.

Held further that, s 61 was enacted by the legislature in response to a significant increase in serious crime, which is even more prevalent today. Each case is to be decided on its own particular set of facts and circumstances. Section 61 is utilised in particular circumstances and for particular types of offences contained in Part IV of Schedule 2.

Held further that the presiding officer is required to conduct a full inquiry into whether or not the accused should be granted bail. The discretion although wide, is not unfettered in a constitutionally impermissible manner. Grounds of appeal exist in s 65, and the decision of the presiding officer can be interfered with if the decision is wrong. The presiding officer is an administrator of justice and is mandated to obtain the necessary evidence to do justice. This includes explaining to the accused what its concerns are, especially in relation to the words ‘in the public interest’ and ‘in the administration of justice’. Presiding officers are encouraged to play a more inquisitional role.

Held further that the types of serious crimes that can be committed are not a *numerus clausus*, so too, a presiding officer should not be inhibited by a closed list of considerations when it considers application for bail.

Held further that a comparative study of open and democratic societies show that they too have provisions permitting the refusal of bail in the interests of justice in special cases or exceptional circumstances, even in jurisdictions where an accused has a right to bail, as opposed to a mere right to apply for bail.

Held further that the respondent has demonstrated that the limitations on the applicant’s constitutional rights contained in s 61 are rational and justifiable in the circumstances, and required in the interest of legitimate objectives, namely to curtail the increase of serious crime.

Masuku J

Flynote: *Held*: that s 61 provides a higher standard above the ordinary and traditional grounds to satisfy the court that an applicant is worthy to be admitted to bail.

Held that: the onus rests with the accused to persuade the court that he or she must be admitted to bail. It is accordingly difficult for an accused person, who is subject to s 61 to be expected to persuade the court that he or she is a worthy candidate of being admitted to bail, notwithstanding the application of s 61, when he or she does not know what those twin interests of justice and the administration of justice entail.

Held further that: the words: 'the interests of the public and the administration of justice' are not defined and are vague as not to give sufficient guidance for legal debate, therefor rendering them unconstitutional for vagueness.

Held: that it is recommended that legislature follows the examples in other jurisdictions such as South Africa, eSwatini and Canada, which have defined what these interests may entail, of course leaving some room for the court, where appropriate, to include further grounds as they adjudicate matters before them. In the case of *Botha*, the court was hopeful that legislature would define the twin interests. This was as far back as 1995.

Held that: the amount of R600 that is involved in a crime under Schedule 2, for s 61 to be operational, may need to be revisited, considering that the legislation was promulgated 31 years ago and the value of money has changed over the years. If not, persons charged with offences involving the said amount may be denied bail in terms of s 61 when that amount has by now become trifling.

The application was thus upheld with costs.

ORDER

SCHIMMING-CHASE J (JANUARY J concurring):

1. The application is dismissed.

2. There shall be no order as to costs.

MASUKU J (dissenting):

1. The words ‘in the interest of the public or the administration of justice’, occurring in s 61 of the Criminal Procedure Act, 1977, as amended by s 3 of the Criminal Procedure Amendment Act, 5 of 1991, be and are hereby declared unconstitutional, null and void and of no force and effect.

2. The said provision is referred to the National Assembly for amendment.

3. The declaration of invalidity shall not take effect within a period of 12 months from the date of this order.

4. The respondents are ordered to pay the costs of the application, consequent upon the employment of one instructing and two instructed legal practitioners, where so employed.

5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

SCHIMMING-CHASE J (JANUARY J concurring):

Introduction

[1] This application concerns the constitutionality of s 61 of the Criminal Procedure Act, 51 of 1977 (“the CPA”), as amended by s 3 of the Criminal Procedure Amendment Act, 5 of 1991 (“the Amendment Act”).[1]

[2] The applicant seeks the following relief:

(a) An order reviewing, correcting or setting aside a portion of s 61 of the CPA containing the words 'it is in the interest of the public or the administration of justice'.

(b) That the words 'it is in the interest of the public' in the aforementioned provision be struck down.

(c) That the words 'it is in the interest of the administration of justice' contained in s 61 of the CPA be declared unconstitutional, null and void and of no force of law and effect.

(d) That the phrase/words 'it is in the interest of the administration of justice’ in the aforementioned provision be struck down.

(e) In any event, declaring the words 'it is in the interest of the public or the administration of justice' contained in s 61 of the CPA to be unconstitutional for unduly placing an unreasonable limitation on the applicant’s rights contemplated in Articles 7, 10, 11, 12, 22, 24 and 25.

(f) In the event that the court upholds the applicant's constitutional

[1] Hereinafter referred to as ‘s 61’, alternatively ‘s 61 as amended’. This section was brought into force in Namibia on 30 May 1991.

challenge of the above-mentioned section and that the court finds it appropriate, to refer the section back to the legislature for correction and/or amendment. Then in that event that the court exercises its powers under Article 25 of the Namibian Constitution and directs that the applicant's bail application henceforth be considered without the aforesaid words 'it is in the interest of the public or the administration of justice' contained in the aforementioned section.

[3] The applicant is represented by Mr Heathcote SC assisted by Mr Phatela (instructed by Engelbrecht Attorneys) and the respondents are represented by Mr Makando (instructed by Ms Tjahikika from the Office of the Government Attorney).

Background

[4] The applicant was arrested on 18 February 2020 and is awaiting trial. He is the first accused [2] in what has colloquially become known as the 'Fishrot scandal'. The applicant, together with the other accused, is charged with contravening s 43(1) of the Anti-Corruption Act, 8 of 2003, by corruptly, and on diverse occasions using an office or position in a public body to obtain gratification for his own or another's benefit in the amount of N$75,600,000; contravening s 4(b) read with ss 1, 5, 6 and 11(1) of the Prevention of Organised Crime Act, 29 of 2004, and fraud, committed during August 2014 to December 2019 in the amount of N$75,600,000. All charges include in their formulation, the concept of common purpose and the commission of the offences on diverse occasions in terms of s 94 of the CPA.

[5] The applicant unsuccessfully applied for bail in the magistrate's court. He appealed against that refusal to this court. In a judgment of a full bench of this court delivered on 28 October 2020,[3] the appeal was dismissed. Bail was denied to the applicant in both courts on amongst others, the provisions of

[2] The applicant stands charged together with James Hatuikulipi (accused 2), Sakeus ET Shangala (accused 3), Bernard Esau (accused 4), Tamson Hatuikulipi (accused 5) and Pius Mwatelulo (accused 6).

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

s 61 of the CPA as amended by s 3 of the Amendment Act.

[6] For ease of reference, we set out the provisions of s 61 – sought to be impugned – at the outset. The section provides as follows:

> 'If an accused who is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under section 60 to be released on bail in respect of such offence, the court may, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation, refuse the application for bail if in the opinion of the court, after such inquiry as it deems necessary, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his or her trial.'

The constitutional challenge

[7] The gravamen of the applicant's constitutional challenge is that the provisions of s 61 of the CPA, are contrary to Articles 7, 10, 11, 12, 22 and 24 of the Namibian Constitution. He accordingly seeks relief from this court in terms of Article 25. He contends that the section creates a permanent and constitutionally impermissible impediment to him being granted bail under any circumstances. His continued incarceration remains unfair and not in accordance with the dictates of justice. The applicant asserts that the aforesaid provision exceeds the limits of a constitutionally compliant law and is overly broad, mainly because the words render the provision incapable of full comprehension.

[8] In this regard, the applicant submits that the words 'it is in the interest of the public or the administration of justice' contained in s 61, particularly violate his right to a fair trial in terms of Article 12 of the Constitution, because it authorises pre-sentencing detention in terms which are impermissibly vague and imprecise and therefore authorises the denial of bail without just cause. It was further submitted that the said words are incapable of framing a legal debate or structuring judicial discretion in any meaningful manner, and it was argued that the provision gives the judiciary an unguided and untrammelled discretion, which goes beyond the scope of the Constitution. The discretion was described as a

'standardless sweep without the provision of any determinable guidelines'.

[9] It was argued further that, despite attempts by the judiciary in the past to interpret the words sought to be impugned, they remain incongruent and not capable of being properly or succinctly understood by those it is intended to be applicable to, in particular the applicant, an accused person to whom the section applies. Therefore, the impugned portion is too vague to constitute a limit prescribed by law because it cannot be justified under Article 22 of the Constitution.

[10] The applicant contended that Parliament abdicated its plenary legislative powers to the court in the impugned portion of s 61 of the CPA, and created a situation where a court has become an 'omnipotent legislature' where it can refuse bail in the public interest or in the interest of the administration of justice. Thus, a court may effectively refuse bail in all circumstances because there is no prescribed measure for interpretation of the public interest and the administration of justice.

[11] The applicant relies on *inter alia* the decision of the Canadian Constitutional Court in *R v Morales* [4] where it was held that the concept 'public interest' was unconstitutional for vagueness. In addition, the applicant relied on the principles enunciated in the Supreme Court decision of *Alexander v Minister of Justice and Others*[5] where the court set aside s 21 of the Extradition Act, 11 of 1996 as unconstitutional because it interfered with the right to liberty in terms of Article 7 of the Constitution. Reliance was also placed on the Supreme Court decision in *Medical Association of Namibia and Another v Minister of Health and Social Services*[6] where it was held that when the legislature conferred a discretionary power, the delegation must not be so broad or vague that the body or functionary was unable to determine the nature of the power conferred because it might lead to an arbitrary exercise of the delegated power.

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[4] *R v Morales* [1992] 3 S.C.R 711 CCC (3d 91 (SCC)).

[5] *Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC).

[6] *Medical Association of Namibia and Another v Minister of Health and Social Services* 2017 (2) NR 544 (SC).

[12] The respondents contend that the applicant has not established the grounds needed for him to succeed in his constitutional challenge. In this regard, it is argued that the applicant did not properly plead the basis for the so-called infringements of the Constitution relied upon. The respondents submit further that the words contained in s 61 are not unconstitutional and do not impermissibly or unjustifiably infringe on the applicant's constitutional rights as alleged.

[13] In amplification the respondents submitted that the court should take a holistic view of the reasons behind the introduction of s 61 through the Amendment Act by the legislature, namely to curb a very significant rise in serious crime in Namibia. Thus, any curtailment of the applicant's constitutional rights are therefore constitutionally permissible and not a disproportionate interference with the applicant's rights. Reliance was placed on the legislature's reasoning behind the introduction of s 61, and the fact that Articles 7, 11 and 12 expressly permit laws governing the deprivation of liberty.

[14] The respondents submit further that a perusal of Namibian jurisprudence on bail applications decided after the introduction of s 61 reveal that the courts do not capriciously come to the conclusion that bail should be refused in the interest of the public or the administration of justice. The court instead comes to such a conclusion only after a full inquiry proscribed by s 61, and after due regard to all the facts presented, regard being had to all the principles relevant to bail applications.

The merits / legal principles

[15] We cite the relevant Articles of the Constitution that form part of this application:

'Article 7

Protection of Liberty

No persons shall be deprived of personal liberty except according to procedures established by law.'

'Article 8

Respect for Human Dignity

(1) The dignity of all persons shall be inviolable.

(2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.'

'Article 11

Arrest and detention

(1) No persons shall be subject to arbitrary arrest or detention.

(2) …

(3) All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer.

(4) …

(5) …'

'Article 12

Fair Trial

(1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

(b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.

(c) ….

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

(e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.

(f) ……'

'Article 22

Limitation upon Fundamental Rights and Freedoms

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised any law providing for such limitation shall:

(a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;

(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.'

‘Article 25

Enforcement of Fundamental Rights and Freedoms

(1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;

(b) any law which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional. If a competent Court is of the opinion that such law is unconstitutional, it may either set aside the law, or allow Parliament to correct any defect in such law, in which event the provisions of Sub-Article (a) hereof shall apply.

(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

(3) Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.'

[16] The applicant correctly conceded at the outset that for purposes of his constitutional challenge, he bears the onus to persuade this court on a balance of probabilities that:

(a) He is an aggrieved person in terms of Article 25(2) of the Constitution;

(b) A fundamental right or freedom guaranteed by the Constitution has been infringed or threatened; and

(c) His detention predicated on the impugned portion of s 61 is an infringement of his fundamental freedom and right to liberty, his right to dignity, his right to be presumed innocent, and that the law is therefore not compliant with the Namibian Constitution for vagueness and is therefore unconstitutional.

[17] In *Alexander v Minister of Justice* [7] the Supreme Court reaffirmed the principle that a person complaining that a constitutional freedom has been breached must prove such breach. Once the onus is discharged, it is for the party relying on a permissible limitation to prove that the limitation falls within the scope of what is permitted in terms of the Constitution.

[18] For purposes of the determination of the constitutionality of s 61, we consider the issue under the following broad headings: (i) interpretation of Article 7; (ii) the law relating to bail in Namibia; (iii) the provisions of s 61 and how it has been interpreted in Namibia; (iv) a comparative study of other jurisdictions'

[7] *Alexander* supra para 122; *Africa Personnel Services v Government of Namibia and Others* 2009 (2) NR 596 (SC) para 65 and the cases there cited.

interpretations of provisions similar to s 61 (this will include the *Morales* judgment referred to by the applicant)*;* and (v) whether the provisions of s 61 as amended are constitutional.

Interpretation of Article 7

[19] The right to liberty is one of the cornerstones on which a democratic society is built. The importance of the right to liberty was acknowledged in our jurisprudence even before independence. In *Katofa v Administrator of SWA and Others*, Levy J stated that:

> 'Illegal deprivation of liberty is a threat to the very foundation of a society based on law and order.' [8]

[20] The ambit of Article 7 of the Constitution was comprehensively dealt with in *Alexander v Minister of Justice* (supra) where the Supreme Court had occasion to interpret the right to liberty in an application to declare s 21 of the Extradition Act, 11 of 1996 unconstitutional. This section provided that once a person has been committed in terms of s 12(5) of that Act, he or she will not be entitled to bail pending the final decision of the Minister of Justice that he or she should be returned to the country that seeks extradition.

[21] After a synopsis of comparable provisions in other jurisdictions the court held that Article 7 provides substantive protection to the liberty of the individual because most, if not all of, fundamental rights and freedoms were inspired by and are pervaded with the dignity of the individual as a human being. This is clear from the preamble to the Constitution and the express statement in Article 8(1) that the dignity of all persons shall be inviolable.[9]

[22] The Supreme Court also made it clear, that Article 7 is not absolute, as it authorises deprivation of liberty according to procedures established by law, and where such limitation is authorised, it should go no further than what is necessary

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[8] *Katofa v Administrator of SWA and Others* 1985 (4) SA 211 (SWA) at 220I.

[9] *Alexander* supra para 98-99.

to achieve the object for which the limitation was enacted. This much is also apparent from the wording of Article 22 which prohibits a limitation that negates the essential content of the right. Therefore, where the Constitution permits a limitation of a constitutional right, the test is whether such limitation constitutes a disproportionate interference with the applicant's rights to liberty and the right to a fair trial.[10]

[23] The Supreme Court held that s 21 of the Extradition Act fell short of the constitutional right to liberty because the section placed an absolute prohibition on the granting of bail pending the decision of the Minister of Justice. Effectively a person committed under the Extradition Act had no right to apply for bail and remained in prison until removal from Namibia.[11]

General principles relating to bail

[24] The provisions relating to bail are governed by Chapter 9 of the CPA, and specifically ss 58 to 71 thereof. A consideration of these provisions shows that in principle, the purpose of bail is to secure the attendance of the accused at trial, and to support public safety. In considering whether or not to grant bail, the courts are directed by certain principles, guidelines, precedent and directives as crystalised over centuries. Ultimately it boils down to the exercise of a judicial discretion whether or not an applicant in a particular case is a good candidate for bail.

[25] The CPA also does not prescribe the procedure to be followed in a bail application. Bail applications are neither civil nor criminal proceedings, they are *sui generis* (in a class of their own). Bail is unique in nature, procedure and purpose. It is not aimed at ascertaining the guilt of an accused or determining the liability of a person for injuries caused to another. [12]

[26] The Constitutional Court of South Africa in *S v Dlamini; S v Dladla; S v*

[10] *Ibid* paras 116-119.

[11] *Ibid* paras 65, 104 and 110.

[12] *Shekundja v S* (CC 19/2017) [2020] NAHCMD 339 (22 July 2020) para 10.

Joubert; S v Shietekat [13] described bail applications in paragraph 11 as follows:

'Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the inquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance.'[14]

[27] An accused who is detained has a right to apply for bail but not an entitlement to bail. Bail can therefore not be claimed as a right and an accused must establish that he or she is a candidate worthy of being granted bail. If bail is refused, the accused can apply for bail on new facts. [15]

[28] Apart from only having a right to apply for bail, as opposed to a right to bail, the accused also bears the onus on a balance of probabilities to show that he/she should be released on bail.[16] In this regard, the Constitution does not refer specifically to a right to be released on bail, but it does provide for a right to a fair trial, the protection of liberty and reinforces the presumption of innocence.[17]

[29] In the result, in practice, it is for the accused to lead evidence first in bail

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[13] *S v Dlamini; S v Dladla; S v Joubert; S v Shietekat* 1999 (2) SACR 51 (CC).

[14] *Ibid* para 11.

[15] *Alexander* supra para 10; *Shekundja* supra para 1.

[16] *S v Du Plessis and Another* 1992 NR 74 (HC).

[17] *S v Dausab* 2011 (1) NR 232 para 12.

applications.[18]

[30] At the heart of any bail application lies the consideration of two main aspects. The seriousness of the offence and the strength of the State's case. Also relevant are whether the accused will stand his or her trial; the likelihood of the accused to interfere with the investigation of the case or interfere with witnesses and the likelihood of the accused to commit similar offences. These factors do not constitute a *numerus clausus* of circumstances and the court will ultimately have to decide whether the interest of justice or the interest of the public will be prejudiced if an applicant is granted bail.

[31] In *S v Acheson,*[19] this court detailed the considerations relevant to a bail application with the caveat that each application for bail must be considered in the light of the circumstances which appear at the time when the application is made. The court held that an accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice. [20]

[32] The considerations which the court takes into account in deciding this issue include the following:

> '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
>
> (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?

[18] *S v Dausab* supra para 14 and 15.

[19] *S v Acheson* 1991 NR 1 (HC).

[20] *Acheson* at 19B and E.

(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.'[21]

[33] The accused in *Acheson* faced a charge of murder of Advocate Anton Lubowski on 12 September 1989. The deceased was a prominent figure in the liberation struggle before independence. By application of the principles set out above, the accused was granted bail with stringent bail conditions being set. The accused absconded nonetheless and did not stand his trial.

Introduction and interpretation of s 61

[34] Subsequent to the events in *Acheson*, s 61 was introduced via the

[21] *Acheson* supra at 19F-20F.

Amendment Act on 30 May 1991. The background to this amendment was expressed in *S v du Plessis and Another* [22] in the following terms:

'The Legislature has recently in Act 5 of 1991 included theft where the value involved exceeds R600 and offences relating to dealing in or possession of precious metals and precious stones where the value involved exceeds R600, in the list of serious crimes and offences where the Court would be entitled to refuse bail on the grounds of the interest of the public or the interest of the administration of justice, even where it has been proved to the satisfaction of the Court that it is unlikely that the accused will abscond, or interfere with any witness for the prosecution or with the police investigation.

Act 5 of 1991 must be seen as an expression of the concern of the Legislature at the very serious escalation of crime and the similar escalation of accused persons absconding before or during trial when charged with serious crimes or offences. The amending legislation was obviously enacted to combat this phenomenon by giving the Court wider powers and additional grounds for refusing bail in the case of the serious crimes and offences listed in the new part (IV) of the Second Schedule of the Criminal Procedure Act 51 of 1977. At the same time the substitution of the new s 61 for the previous section took away the power of the Attorney-General and since independence, the Prosecutor-General, to prevent the Court from considering bail.'[23]

and

'It is furthermore clear from the amendment that the Legislature intended to restore the discretion to grant bail to the Courts. But in this way the Legislature also placed an additional responsibility on the Courts to consider the grounds on which the Prosecutor-General could prevent bail, as grounds on which the Court can now refuse bail, under its wider powers to refuse on the grounds that it is not in the interest of the public and/or not in the interest of the administration of justice.

The amending legislation has also in s 61 extended the list of crimes and offences significantly where the Court can refuse bail on the grounds of public interest and interest of the administration of justice, compared to the list of crimes or offences where the

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[22] *S v du Plessis and Another* 1992 NR 74.

[23] *Du Plessis* at 82 E-H; *Charlotte Helena Botha v S*, unreported judgment of the full bench of this court delivered on 20 October 1995, CA70/995 at 13.

Prosecutor-General could prevent bail under s 61 as it stood before the substitution of a new s 61.

The fact that the Court's additional power to refuse is stated in wider terms indicates that the Court, when considering public interest, is not restricted to the limited form of public interest on which the Prosecutor-General could rely in the substituted s 61 as the second ground, viz the ground that the release is likely to "constitute a threat to the safety of the public or the maintenance of the public order".

The latter ground is surely one of the possible examples of public interest on the ground of which bail can be refused by the Court, but it is not the only one.'[24]

[35] The statements made in 1995 concerning the serious escalation of crime rings that much more true today. One would not dispute the significant and widespread increase in serious crime in Namibia, resulting in the 'sabotage of the economy'.[25] One can also not ignore the expectations of the Namibian public that measures are to be adopted by the legislature to curtail the omission of a category of serious offences.

[36] The provisions of s 61 are indeed not an easy hurdle for an accused person to cross. The words complained of have practically since the inception of the section, been described as "difficult to define" [26] and "a phantom". The Full Bench in *Charlotte Helena Botha* suggested a solution for a better definition of these concepts to be considered by the legislature, which has unfortunately not been undertaken.[27] However certain guidelines were also laid down in that matter, on how the s 61 enquiry was to be conducted. The guidelines have been followed in our jurisprudence.

[37] Section 61 expressly requires an inquiry to be conducted by the judicial officer concerned based on the facts presented to the court, and the particular circumstances of the case. The function of the court is as administrator of justice

[24] *Du Plessis* supra at 83 B-E.

[25] *Du Plessis* supra at 82D.

[26] *Charlotte Helena Botha* at 11.

[27] *Charlotte Helena Botha* at 42.

and the judicial officer must play an active and inquisitional role.

[38] Thus, although the discretion is wider, it only comes into play when an accused is charged with an offence referred to in the Schedule. Factors that would be considered include whether the release of the accused is likely to constitute a threat to the safety of the public or the maintenance of public order. The opinion but not *ipse dixit* of the investigating officer on the strength of the state's case, and questions such as whether or not it is likely that the accused will abscond, or interfere with state witnesses or with the investigation would also carry some weight. A clearly established or notorious public outcry would be considered, but it would be only one of several indicators.

[39] The net is cast wide, to the extent that the court has a discretion to refuse bail in the public interest or in the administration of justice even if satisfied on a balance of probabilities that it is unlikely that the accused will abscond or interfere with state witnesses, or with the investigation of the case. Bail can accordingly be refused if the presiding officer, after consideration of all the facts placed before the court, is satisfied that there remains a reasonable possibility that the accused will abscond or will interfere with state witnesses or will interfere with the investigation. This would play a role where it has been established that there is a strong *prima facie* case against the accused, or where the accused elects to lead evidence and admits guilt. To an extent, this would count against the accused for release on bail, because of the public interest or the administration of justice. [28]

[40] Other traditional factors considered in a s 61 inquiry include whether there is a strong prima facie case that an accused is guilty of one or more serious offences;[29] the likelihood to commit further offences;[30] the probable heavy sentence as an incentive to abscond;[31] the nature and gravity of the manner in which the offences are alleged to have been committed; the state of police

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[28] *Charlotte Helena Botha* at 15-20

[29] Du Plessis 2001;

[30] S v *Dausab* 2011 (1) NR 232 (HC).

[31] *S v Yudin and others* 2005 NR 196 (HC)

investigations; previous convictions;[32] the circumstances under which the crime was committed and whether the public must be protected against a dangerous offender; the propensity to commit further crimes; whether there has been a public outcry over the commission of the crime committed;[33] the interest of justice, the interest of accused and bail granted on conditions;[34] new facts, fear of committing suicide and medical condition of an accused; multiple serious crimes; serious escalation of crimes and the escalation of accused persons evading the course of justice by absconding.[35]

[41] These traditional grounds culminate in the ultimate question: whether the interests of justice will be prejudiced if the accused is granted bail?[36] It therefore follows that at the very least, the question of what is in the interest of the administration of justice is an overarching, all-encompassing consideration.

[42] In this regard, the words 'notwithstanding' contained in s 61 were held not to equate to restricting the applicability of s 61 only to instances where a court finds that an applicant is not likely abscond or interfere with witnesses or the investigation, the approach that the presiding officer should take being described as holistic rather than restrictive.[37]

Comparative study of other jurisdictions

[43] The above principles, according to the applicant, render the situation more dire, because the 'interest of the public' principles that must be complied with in order to be released on bail are vague and determined at the whim of the

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[32] *Elifas v S* (HC-MD-CRI-APP-CALL-2018/00072) [2019] NAHCMD 249 (19 July 2019).

[33] *De Klerk v S* (CC 06/2016) [2017] NAHCMD 67 (09 March 2017).

[34] *Salom v S* (HC-NLD-CRI-APP-CAL 2019/00019) [2019] NAHCNLD 111 (10 October 2019).

[35] *Sheelongo v S* (CC 16/2018) [2020] NAHCNLD 51 (8 May 2020).

[36] *S v Pineiro* 1992 (1) SACR 577 (Nm). *Van Wyk v S* (HC-MD-CRI-APP-CAL-2020/00076). [2020] NAHCMD 399 (7 September 2020) at para 15.

[37] See *Nghipunya v S* HC-MD-CRI-APP-CAL-2020/00077) [2020] NAHCMD 491 (28 October 2020) para 30 and the authorities collected at fn 34.

presiding officer. Reliance was placed on the Canadian constitutional decision in *R v Morales* [38] in which s 515(10)(b) of the Canadian Criminal Code was declared unconstitutional for vagueness. That section provided that a '. . . pre-trial detention is justified when the detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice'.

[44] The Constitutional Court held that it was impossible to give the 'public interest' standard a settled meaning and that it was incapable of 'framing the legal debate in any meaningful manner or structuring discretion in any way'.[39] It was in breach of s 11(e) of the Charter in that it authorised a denial of bail without just cause and was therefore invalid. This is where the term ‘standardless sweep’ (in relation to an unfettered discretion) was mentioned. It was also held, however, that the protection of public safety provision did not infringe the Charter.

[45] It is important to note that the decision in *Morales* was a majority decision, two judges[40] having dissented, specifically disagreeing with the finding that the criterion of public interest is unconstitutional on the grounds of vagueness. In the reasoning of the dissenting judgment, mention was made that the concept ‘just cause’ as used in the legislation concerned, was indeed very broad, but not so vague as to be unconstitutional, because like many legal concepts which are broad in their scope, it is a concept that could be particularised in several ways, including particularisation by means of legislative provisions. The term ‘public interest’ was identified as falling within the purview of just cause and was intended to be one particularisation of just cause. Gonthier J expressed the principle thus:

‘I am unable to reach the conclusion that this is so. Public interest is a concept long recognised in our legal system. It is a notion which has traditionally been recognised as affording a means of referring to the special set of considerations which are relevant to those legal determinations concerned with the relationship of the represented private

[38] *R v Morales* 1992 77 CCC (3d 91 (SCC)).

[39] Per Lamer CJC at 103f-g.

[40] L’Heureux-Dubé and Gonthier J.

interest or interests in the broader interests of the public. The phrase "public interest" is used to capture substantive law criteria in matters of law ranging, for example, from the boundaries of privilege in relation to the ordering of production of documents to the formulation of rules governing the restraint of trade. While these substantive rules are not relevant here, it is significant that the accommodation within this phrase "public interest" of numerous and varied considerations has not traditionally been viewed as grounds for its exclusion from operation in any particular legal domain. To view it in such a way would suggest that it is not appropriate to have recourse to the context in which a concept exists or is applied in the law in order to elaborate that concept properly. Similar to the process of the application of the notions or "due process" in the administration of justice and "fairness" in the exercise of discretionary powers, the evaluation and elaboration of a public interest criterion must proceed with reference to the particular context in which it is to operate.'[41]

[46] It was pointed out that a bail application does not involve a finding of guilt as to past conduct. It is rather concerned with governing future conduct during the interim period awaiting trial. The concept 'public interest' requires flexibility in order for the holder of the discretion to hold a full enquiry and weigh all options, given the specific set of facts available to the court at the time. The discretionary exercise was explained thus:

'The liberty interest of the accused is, undoubtedly a very important matter which must be brought to bear on any consideration of the process by which bail is granted or denied. Yet, it is also evident that it is only one of several important considerations of this kind which bear on such an enquiry. While a finding of guilt under the criminal law will often result in a deprivation of the liberty of the guilty party, depending upon the sentence, a finding of criminal guilt also constitutes a recognition of a contravention of one or more of the most important norms which govern our society. It is a breach of rules of this kind which contributes to the justness of the detention. It is partly for this reason that a special stigma is viewed as being attached to a criminal conviction.

Unlike that of the application of the criminal law, the purpose of a denial of bail is neither punishment, nor is it retribution or reform. Rather it is better understood as a part of the process by which those aims of the law may eventually be achieved by safeguarding the proper functioning of the justice system. Far from obscuring the importance of liberty, a

[41] *Morales* at 752.

consideration of the administration of justice in these broader terms is necessary for the due recognition of the ways in which the administration of justice allows liberty to be properly respected.'[42]

[47] In *Lameck and Another v President of the Republic of Namibia and Others*[43]*,* this court referred with approval to the summarised applicable principles to a challenge on the basis of vagueness in a constitutional dispensation. These principles are summarized as follows by Ngcobo J in *Affordable Medicines Trust and Others v Minister of Health and Others* [44] with reference to *R v Pretoria Timber CO (Pty) Ltd and Another:* [45]

'The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives. As the Canadian Supreme Court observed after reviewing the case law of the European Court of Human Rights on the issue:

> "Indeed . . . laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State

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[42] *Morales* at 752-753 a-d.

[43] *Lameck and Another v President of the Republic of Namibia and Others* 2012 (1) NR 255 at 279 para 89.

[44] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 108.

[45] *R v Pretoria Timber CO (Pty) Ltd and Another* 1950 (3) SA 163 (A) at 176G.

> action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.'"

[48] Closer to home, a similar section contained in the South African Criminal Procedure Act was interpreted in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat.*[46] Four matters were referred for a determination. One of the aspects for determination by the Constitutional Court of South Africa was the provisions of s 60(11)(a) [47] of the amended CPA which reads as follows:

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

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

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

[49] The charges relating to the accused Dladla placed him within the provisions of s 60(11)(a). His contention was that his prospects of being admitted to bail pending trial were materially diminished, because of the insurmountable hurdle of having to prove that exceptional circumstances exist which in the interests of justice permit his. Our s 61 reads substantially along the lines of s 60(11)(b), however, for purposes of this judgment, the reasoning and approach of

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46 *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).

47 *S v Dlamini* supra para 33.

the South African Constitutional Court (after its own journey in considering the jurisprudence from comparable jurisdictions) is of value when it comes to the principles to be considered for a determination of this matter.

[50] Also, it is to be noted that the South African CPA underwent a significant overhaul in 1995. The amended s 60 contains a host of considerations to assist a presiding officer in the exercise of his or her discretion in the decision to grant bail. However the legislature saw fit to include s 60(11), which, like s 61, contains additional barriers for an accused applying for bail, in the event that the accused has been charged with one of the listed serious crimes.

[51] In engaging in a comparative study of the principles governing bail in other jurisdictions, the Constitutional Court recognised that in many democratic societies, legislative provisions permit a court to deny bail to accused persons in certain circumstances and that each system of criminal justice applies its own substantive rules dependent upon procedures and practices peculiar to each system.[48] The principles relating to bail in the United Kingdom, the United States, Australia, and Canada [49] were considered. The court came to the conclusion that the granting of bail is similarly limited in open and democratic societies, but noted that the limitation imposed by s 60(11)(a) is an unusual, and more invasive one.[50]

[52] The court further accepted that s 60(11)(a) did not contain an outright ban on bail in relation to certain offences, but leaves the particular circumstances of each case to be considered by the presiding officer. At para 74, Kriegler J, as he then was, writing for a unanimous court stated that

> 'The ability to consider the circumstances of each case affords flexibility that diminishes the overall impact of the provision. What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted.'[51]

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[48] *S v Dlamini* para 69.

[49] The decision of *R v Morales* was referred to in *S v Dlamini* para 72.

[50] *S v Dlamini* paras 70-73.

[51] *S v Dlamini* para 74.

[53] The court held that the evaluation must always be done judicially, looking at substance not form, and concluded that:

'[79] It should of course never be forgotten that the Constitution does not create an unqualified right to personal freedom and that it is inherent in the wording of s 35(1)(f) that the Bill of Rights contemplates - and sanctions - the temporary deprivation of liberty required to bring a person suspected of an offence before a court of law. The hypothesis, indeed the very reason for the existence of s 35(1)(f), is that persons may legitimately and constitutionally be deprived of their liberty in given circumstances. This clearly establishes that, unless the equilibrium is displaced, an arrestee is not to be released. Section 60(11)(a) therefore does not create an onus where nothing of the kind existed before. It describes how it is to be discharged, and adds to its weight. As in the case of reliance on any other right in the Bill of Rights, if accused persons wish to rely on the provisions of s 35(1)(f), they must bring themselves within its ambit. The words 'interests of justice permit' form part of the definition of this right; they delineate its ambit. The court must be satisfied that 'the interests of justice permit' the release from detention. Where all the relevant facts are common cause, the matter is decided by the presiding judicial officer exercising a value judgment according to all the relevant criteria on the basis of these facts in the manner described in this judgment. If facts indispensable for establishing that the interests of justice permit the arrestee's release are not established, the arrestee is not entitled to the remedy under the subsection.

[80] But it was argued that the subsection imposes an onus which is so difficult to discharge that the right to release on bail is illusory. In practice, so it was submitted, the accused would face an impossible hurdle: the onus is on the accused to prove the exceptional circumstances; so is the duty to begin; evidence has to be adduced, but an accused, with no knowledge of the prosecution case, cannot hope to discharge the onus in the dark. If that were indeed what the subsection demanded, the contention would probably have been well founded. However, the argument overlooks the important qualification built into ss (11)(a) that the accused must be 'given a reasonable opportunity' to establish what the subsection requires. The lawgiver did not specify how that is to be done, nor what would be necessary to qualify as 'reasonable'. This much is clear, however: an opportunity has to be afforded and it has to be reasonable; and it has to be reasonable having regard to the limits that the subsection places on the category of arrestees concerned. They are indeed faced with an uphill battle, and they have to be given a fair chance, for example by ordering the prosecutor to furnish sufficient details of

the charge(s) to enable the applicant to show why the circumstances are exceptional. Freedom is a precious right protected by the Constitution; that is why the subsection specifically requires that Schedule 6 arrestees facing the more formidable hurdle of ss (11)(a) be afforded this opportunity. The requirement of reasonableness is peremptory, though the subsection does not spell out what that means. Nor need it do so. What is or is not a reasonable opportunity must depend upon the facts of each particular case. But no accused can ever be lawfully confronted with the dilemma postulated - the presiding judicial officer would be failing in his or her duty were that to be permitted to happen. In this context it would be salutary to note the clear exposition by Schutz JA in Naude and Another v Fraser:

"It is one of the fundamentals of a fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces."

The principle is clearly applicable where an accused must try to make out a case under s 60(11)(a).'

[54] For the above reasons, the constitutional court held that although s 60(11)(a) and the words exceptional circumstances as read with 'interests of justice permit' limited the accused's constitutional rights, the limitation was reasonable and justifiable in terms of the constitution. [52]

Discussion

[55] It is important to note that in Canada, the UK, Australia, and even South Africa (except when s 60(11) comes into play), the accused is entitled to bail. In Namibia, the accused only has a right to apply for bail. In addition, in our jurisdiction, the accused draws the onus to show that he should be released on bail. According to Namibian jurisprudence as set out above, the issue of the public interest and the administration of justice will always be overriding factors, but the State also bears the duty to show that the alleged crimes or offences are serious, with a likelihood of severe sentences, and that there is a probability of conviction

[52] *S v Dlamini* para 77.

should that be the State's contention. [53]

[56] It cannot be disputed that the legislature intended to create a more stringent test in the application for bail especially for certain classes of offences.

[57] The cases considered for purposes of this judgment reveal that in every bail application the court is expressly vested with a wide discretion which needs to be exercised judicially and not in a vacuum. Section 61 of the CPA stipulates that the discretion must be exercised after an inquiry that the court deems necessary. The inquiry is the place where the presiding officer ensures that he or she has received all relevant information, and that the evidence has been properly evaluated for purposes of making an informed decision.

[58] This would mean that the presiding officer would be required in law to properly inform an unrepresented person of what concerns he or she has with the granting of bail. The function of a judge is an extremely important consideration. The oft quoted words by Curlewis JA in *R v Hepworth*[54] remain true, namely:

> 'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done'

[59] The court can therefore not refuse bail in a vacuum without exercising a judicial discretion after evaluating facts established during the inquiry. It needs to be emphasized that the adjudication and exercise of a judicial discretion takes place in an atmosphere where the Constitution remains the supreme law. We are not persuaded therefore, by the applicant's contention, that the courts now have an 'unfettered discretion' and base their bail decisions solely on the words 'in the interest of the public and the administration of justice'. In addition, s 65(4) of the

[53] *Charlotte Helena Botha v S*, unreported judgment of the full bench of this court delivered on 20 October 1995, CA70/995 at 7.

[54] *R v Hepworth* 1928 AD 265 at 277.

CPA also provides for appeals against a refusal to grant bail to a single judge in this court, and the 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.

[60] The judicial presiding officer's discretion is not, with respect, to be equated with the discretion of an administrative functionary, as was the case in *Medical Association v Minister of Health and Social Services.* [55]

[61] The issue in that case was that the Medicines and Related Substances Control Act, 12 of 2003 ran contrary to the right of doctors to practice their profession in terms of Article 21(1)(j) because the section required medical practitioners to first obtain a licence from the Medical Regulatory Council before they could sell medicine to their patients. The Council had to be satisfied that the granting of the licence is in the public need and interest and that the medical practitioner had the required competence.

[62] We hold the view that a functionary such as the Medical Regulatory Council and a judicial officer vested with a discretion, particularly in a criminal matter are completely different 'animals', one of which has no or limited legal experience given the position held, and the other that is legislatively enjoined exercise a discretion and to conduct a full factual inquiry and receive and evaluate evidence. Therefore we hold the view that the facts in that matter are distinguishable and not applicable in this instance.

[63] The constitutional dispensation in Namibia is based on the doctrine of separation of powers which is embodied in our Constitution. The legislature therefore is constitutionally empowered to enact or amend legislation in accordance with the expectations of the interest of the public and administration of justice. The judiciary needs to interpret that legislation subject to the Constitution. In his submission that Parliament has abdicated its plenary legislative powers to the court in the impugned portion of the CPA, the applicant lost sight of the

[55] *Medical Association v Minister of Health and Social Services* 2017 (2) NR 544.

doctrine of separation of powers, where the there is a rational connection to the legitimate object sought to be implemented by the legislature.

[64] It is clear on examining all the above factors and considerations that they are all relevant to the just ends of justice, the interest of the public and interest of the administration of justice. The legislature cannot interfere with judges or judicial officers in the exercise of their independent judicial functions. In our view, to define the impugned concept or phrases would become tantamount to limiting the judicial discretion in prescribing in what circumstances bail should be granted, when each case is to be determined on its own particular set of facts and circumstances.[56]

[65] In our view, it is justifiable and understandable why the concepts are not defined in s 61 of the CPA. This is to enable the court to conduct a proper inquiry without being restricted to principles that might not have particular application to the case at hand, but where there are clear facts, that cumulatively, point to a refusal of bail being in the public interest or the administration of justice. It is clear that there cannot be limited list of circumstances and factors in the consideration or determination of what is in the interest of the administration of justice or the public.

[66] Other factors for consideration in the interest of the public or administration of justice, for instance, may be where an accused threatens to damage a complainant's property by arson or malicious damage to property, to kill or injure a person, to steal, ensure that witnesses are not traced etc. It was therefore necessary to legislate the issue of bail in broad terms and leave it for the courts to interpret subject to the Constitution.

[67] In light of the foregoing we hold the view that s 61, interpreted with the line of authorities that have developed over the years, imposes a constitutionally permissible restriction on an accused person that is charged, specifically, with an offence contained in Schedule 2. This is because the legislature has seen fit to create a more difficult hurdle for those charged under the schedule, in order to express its dissatisfaction with the significant increase in serious crime. That said,

[56] *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

the hurdle is not insurmountable given the responsibility placed on a judicial officer to hold a proper and judicially acceptable enquiry. A failure to do so would result in the accused having a right of appeal to a single judge in terms of s 65.

[68] We would however like to make an addition to the procedures that must take place at the commencement of the bail application. And it is this. The prosecution should be required to particularise on record the grounds why it opposes bail in the interests of the public or administration of justice. In the absence of this, the magistrate must require a formal set of grounds for the State's objection for the record. The magistrate should also be sure to provide proper reasons for the benefit of the accused, so that he or she can make an informed decision about future applications for bail, and also explain to the accused, what aspect of the public interest or administration of justice issue is of concern so that there is more clarity on the hurdle for the accused to cross.

Costs

[69] Finally, we deal with the issue of costs. It is trite that all awards of costs are in the discretion of the court, [57] and that the discretion must be exercised judiciously, with due regard to all relevant considerations. The court's discretion is a wide and an equitable one.[58] Of course it is equally well established that normally costs follow the event and that the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present.[59]

[70] The respondents have succeeded, however, this is a constitutional matter, raising important considerations.

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[57] *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) and *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

[58] See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045.

[59] *Kambazembi Guest Farm CC T/A Waterberg Wilderness v The Minister of Land Reform and 5 Others* (A197/2015) [2016] NAHCMD 366 (17 November 2016) at para [125]

[71] In *Affordable Medicines Trust and Others v Minister of Health and Others* [60] Ngcobo J said:

'The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is *frivolous or vexatious*. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case. In *Motsepe v Commissioner for Inland Revenue* this Court articulated the rule as follows:

> "(O)ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or "chilling" effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks.'"

[72] In this matter and given in its particular facts, we hold the view that the making of a costs order against the applicant would, in these circumstances, have a chilling effect. This is because the challenge is not capricious, nor vexatious, and the question is of importance to the public. Therefore we decline to make a costs order in this matter.

[73] In light of the foregoing we make the following order.

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[60] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 138-139.

1. The application is dismissed.

2. There shall be no order as to costs.

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EM SCHIMMING-CHASE
Judge

_____
H JANUARY
Judge

MASUKU J (Dissenting):

Introduction

[74] This is a case that depicts a tension and lack of confluence between what may be loosely called the State's prerogative to pass laws that serve to curtail and bring under control what are considered serious crimes and the eligibility of persons accused of such serious crimes, to be admitted to bail. The latter must be viewed via the constitutional prisms of the right to liberty in Art 7 and the presumption of innocence in Art 12(1)(*d*) of the Constitution.

[75] I have had the honour and privilege to read and assimilate the erudite and scholarly judgement authored by Schimming-Chase J, to which January J concurred. The judgment carefully captures all the critical issues submitted to the court for determination – the facts, the respective positions of the parties and the arguments presented to the court. For that reason, it is unnecessary for me to engage the issues for determination in much detail as they have been well articulated in the majority judgment.

[76] Having read the order issued by my learned Sister and Brother, and the reasons provided therefor, I find myself precariously placed in a position in which I am unable, with respect, to agree with the reasons provided, the conclusions reached and the order ultimately issued.

[77] In this regard, I should state that I have not had the luxury of time to analyse all the issues that arise and to deal with them as closely as would otherwise have been the case. I proceed nonetheless to deal, the best way possible in the circumstances, with the main reasons for my dissention. In this respect, I will ultimately pronounce the order that I have anxiously considered and find is merited, given the facts and the law applicable to this matter, according to my understanding and judgment.

Discussion

[78] I do not quibble with the position of the law as it has been authoritatively stated to be in Namibia regarding bail, namely that unlike in other jurisdictions, with Constitutions differently worded, accused persons, who are in custody, do not have a right to bail but a right to move an application for bail. In this connection, it is the duty of the court to which the application for bail has been moved, to decide whether on the facts of that matter, and where applicable, taking into account the provisions of s 61, that particular case is a proper one in which to grant bail to the accused person.

[79] In my considered view, the provisions of Art 7 and 12(1)(*d*) of the Constitution are imperative. Art 7 states that 'No persons shall be deprived of personal liberty except according to procedures established by law'. Art 12(1)(*d*), on the other hand provides that 'All persons charged with an offence shall be presumed to be innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.'

[80] It is my considered view that the two provisions underscore the importance and value attached by the drafters of the Constitution to liberty. First, it is imperative that any denial of liberty to a subject, must be consistent with the legal

procedures established by law. This underscores that liberty is paramount and may not be denied to a person, willy-nilly.

[81] In this connection, the letter and spirit of the law must be considered to decide whether in that particular instance, a subject can be denied his or her liberty. Furthermore, it seems to me that it is when you have your liberty intact that you can be able to exercise and enjoy most of the other freedoms enshrined in the Constitution. In this sense, liberty is primordial.

[82] Second, the presumption of innocence should have the effect of tilting the court's mind and causing it to lean towards granting bail. This should be so unless there are certain circumstances, including legal impediments imposed by legislation, that point in the opposite direction.

[83] In this latter connection, in *Townsend v S,*[61] Sibeya AJ expressed himself eloquently as follows in dealing with consideration of bail applications:

> 'The court has a discretion, which it should exercise judicially, whether or not to grant bail to an accused person. The primary consideration in the exercise of such discretion is to seek to strike a balance between protecting the liberty of the individual and safeguarding the administration of justice. It is settled law that in this process, courts must be mindful of the constitutional presumption that an accused is presumed innocent until proven guilty. Pre-trial incarceration should thus not be a form of anticipatory punishment. Courts will thus always lean in favour of granting bail for as long as the interests of justice will not be prejudiced in such process'.

[84] I fully associate myself with the reasoning of the learned judge quoted above. To underscore the importance of liberty and how it can be secured by bail where a person is either charged with an offence or has been convicted thereof, I find it opportune to quote the words written by Kriegler J in *Bongani Dlamini v The State*,[62] where he stated the following:

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[61] *Townsend v S* (CC 19/2013) [2020] NAHCMD 457 (6 October 2020), para 45

[62] *Bongani Dlamini and Others v The State* Case (1) CCT 21/98, para 100, delivered on 3 June 1999.

'Not only the innocent are entitled to their release on bail pending their trial. On the contrary, even those who have been convicted and sentenced to imprisonment can be and often are released on bail pending appeal.'

[85] It will have been obvious by now that the provision sought to be impugned in this matter is s 61 of the CPA. The contents thereof have already been quoted in the main judgment above. Because I intend to zoom in on some portions of the said provision, it is imperative that I quote the said provision once again.

[86] The said provision reads as follows:

'If an accused who is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under section 60 to be released on bail in respect of such offence, the court may, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation, refuse the application for bail if in the opinion of the court, after such inquiry as it deems necessary, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his or her trial.'

[87] Schedule 2 lists the offences and in respect of which the provisions of s 61 apply. These include any offence under any law relating to illicit conveyance, or supply of dependence-producing drugs or intoxicating liquor; any offence under any law relating to the illicit dealing or possession of precious metals or precious stones; breaking or entering any premises, whether under the common law or a statutory provision with intent to commit an offence, treason, sedition, murder, rape, robbery, arson, theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, in each case if the value on the offence exceeds N$600. The list is very long.

[88] I should mention that there is no contention among the parties that the offences of which the applicant has been charged fall within the schedule mentioned above. Ordinarily speaking, this would lead to a conclusion that the provisions of s 61 of the CPA apply to the applicant.

[89] It becomes plain, on a reading of the provision, together with the offences listed in the schedule, that these are offences that are deemed by the legislature to be of a serious nature. As a result, an accused charged with any such offence listed in the schedule, may be refused bail regardless of the fact he or she would have satisfied the court that (i) he or she is unlikely, if released on bail to, abscond; (ii) he or she is unlikely to interfere with any state witness; or (iii) he or she is unlikely to interfere with the police investigations.

[90] It would seem, on a close consideration of the words employed by the legislature that the overriding consideration that would necessitate the accused person being retained in custody, regardless of satisfying the court that he or she is otherwise a worthy candidate to be admitted to bail in line with the three criteria mentioned immediately above, are if the court, after conducting an inquiry, as it deems necessary, takes the view that it will not prejudice the interests of the public or the administration of justice to grant bail to the accused.

[91] To my mind, it would seem that the position can be stated thus: an applicant for bail needs to satisfy the court that he or she is a good candidate for admission to bail. In this regard, the bail applicant would be expected to satisfy the court that he or she meets the criteria required by the traditional grounds. If he or she cannot pass that initial hurdle, it would be the end of the matter and bail could be refused.

[92] If that party manages to persuade the court that he or she meets the traditional considerations for admission to bail, it then behoves that party to overcome the second hurdle, namely, if charged with an offence falling under Schedule 2, to persuade the court that it is in the interests of justice and the public interest to admit him or her to bail.

[93] It is thus clear that at the end of the day, a candidate, who meets the traditional criteria of being admitted to bail, will be refused his or her liberty by the court, if the court forms a view that it is not in the public interest or the interests of the administration of justice, to so release him or her. The fact that all other

considerations applicable, point inexorably in the direction of admitting the accused to bail, count for nothing.

[94] It is common cause that the key and operative criteria for keeping a worthy candidate in custody despite being otherwise meritorious to be released on bail, have not been defined by the legislature. It would seem that the responsibility to decipher and decide what these interests are and whether they arise in any matter, lies with the court in which a bail application is being moved. This exercise will probably involve the court conducting an inquiry and then deciding whether the interests of justice or the public permit of the accused person being admitted to bail.

[95] It is not far-fetched, in my considered view, that the approach to the twin interests may vary not only from case to case, but also from court to court. The absence of the definition in the legislation is breeding ground for different interpretations and approaches to the twin interests.

[96] In *Shetu Trading CC v Chair of Tender Board for Namibia and Others (1)*[63] Heathcote AJ, warned against the unguarded use of discretion in the following manner:

> 'Exercising a discretion judicially; " . . . is by no means the same as general intuition" as "a judge who decides merely as he thinks fit, without reference to existing legal rule, is to be feared more than dogs and snakes . . . the discretion may not be exercised according to the "whim of the judge's own brain'.

[97] The present scenario, where the legislation in question does not define the key words, namely interests of justice and public interest, creates fertile ground for judicial officers to exercise their 'opinion' as required by s 61, according to the whim of their own brain. This is a dangerous recipe that may result in injustice and should be avoided considering the nebulous and expansive nature of the twin interests, leaving accused persons in the dark regarding what they need to say to

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[63] *Shetu Trading CC v Chair Tender Board of Namibia and Others (1)* (Appeal 352 of 2010) [2011] NAHC 179 (22 June 2011), para 8.

inform the opinion of the court. Arbitrariness, in this regard, will be ever lurking.

[98] This is the very complaint raised by the applicant that the twin concepts of interests of justice and public interest are nebulous and imprecise. As a result, they serve to deprive an accused person of the possibility, in considering his or her case, an opportunity to, where he or she inclines to the view that he or she is otherwise a worthy candidate for bail, decipher and make submissions regarding what the twin interests in his or her case may involve.

[99] In dealing with this very issue, a Full Bench of this court in an appeal by the applicant[64] had occasion to deal with the twin interests in the following language:

> '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 trial; will the accused interfere with witnesses; and whether the accused is likely to commit similar offences if released on bail. These traditional grounds culminate in the ultimate question: whether the interests of justice will be prejudiced if the accused is granted bail. It therefore follows that at the very least, the question of what is in the interest of the administration of justice is an over-arching, all-encompassing consideration even when the offence does not resort under Part IV of the Schedule 2 of the CPA, as the administration of justice would not permit the release on bail of an applicant who has failed on a traditional ground.'[65]

[100] I am, with due deference to my colleagues, who decided that matter, of the considered view that the summation made above does not adequately characterise the distinction between what can be called the traditional grounds for bail and the twin interests introduced by s 61 of the CPA. I say so for the reason that in s 61, the traditional grounds to be satisfied are mentioned, namely, that it is unlikely that the accused will abscond, that he or she will not interfere with witnesses and police investigations.

[101] Furthermore, the court stated 'that the question of what is in the interest of

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

[65] *Ibid* para 27.

the administration of justice is an over-arching, all- encompassing consideration even when the offence does not resort under Part IV of Schedule 2 of the CPA . . .' It seems to me incorrect to say that offences beyond those mentioned in Schedule 2 can be dealt with in terms of s 61 of the CPA. I say so for the reason that the offences mentioned are limited to those appearing in the Schedule. (Emphasis added).

[102] These grounds, once satisfied would normally result in the court considering the accused person as a worthy candidate for admission to bail. What more, after all is said and done, must an accused person satisfy the court with than that he or she will not abscond the trial, will not interfere with witnesses and police investigations? Prove these to the satisfaction of the court and you are an eminent candidate for bail.

[103] Section 61 upsets that apple cart. It dictates that even if you have satisfied those traditional criteria for being admitted to bail, if you are charged with an offence that falls under Schedule 2 of the CPA, then you have a higher standard above the ordinary and traditional grounds to satisfy the court – namely, that the interests of justice and the public, look favourably upon you being granted bail. It would therefor seem to me that the twin interests of the administration of justice and of the public constitute a higher and additional bar that an accused person charged with an offence under Schedule 2 has to meet in order to be eligible for bail.

[104] The majority judgment correctly records that the twin interests have not been well received for the fact that they are as bare as can be. Not only that, it was recorded in *Charlotte Botha* that they were 'difficult to define' and 'a phantom'.[66] It is in that very sense that my dissension stems. The majority of the court, maybe correctly so, state that in this respect, it is not an administrative official or a state functionary that is charged with interpreting and giving life and expression to the twin interests but the court.

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[66] Page 22 of the majority judgment, para 36, quoting from pp 11 and 42 of the *Charlotte Botha* case.

[105] The court, in the *Botha* matter, stated the following, at para 19, that expresses the magnitude of the mission the court was called upon to determine in s 61:

'I concede that the terms with which we are here concerned have a wide meaning and may be difficult to apply. It is nevertheless an important tool provided by the Legislature to combat crime and to prevent or deter person (*sic*) accused of serious crimes from absconding before or during their trial. The court must therefore make a serious effort to give effect to the provisions of the amending legislation.'

[106] In my considered view, the fact that the discretion is reposed in the courts, grants little comfort to a person charged with a serious offence and who has, it must be mentioned, otherwise satisfied the traditional grounds for being admitted to bail. He or she, is informed that he or she may, notwithstanding, be refused bail if it is in the interests of justice or the public to do so. No indication whatsoever, is given to the accused, what these interests might be and what he or she can say in an attempt to persuade the court that those interests favour the accused being admitted to bail.

[107] During the hearing, reference was made to a person from Tsumkwe, who is charged with an offence under Schedule 2. The question posed to the respondents was how would this person know what public interest and the interests of the administration of justice are for the purpose of trying to make a case to convince the court that the circumstances of his or her peculiar case are not hampered by the operation of the twin interests?

[108] In point of fact, the court in *Botha,* remarked as follows on the issue of the 'phantom' called the interests of the administration of justice and public interest:[67]

'I have sympathy with the frustration. There is a lot of confusion. Perhaps the best solution would be if the Legislature provides a better definition of these concepts in amending legislation. In the meantime the guidelines set out in previous decisions of this Court and in this decision, will hopefully assist the Courts and the practitioners.'

[67] *Ibid* p 42 third paragraph of the judgment.

(Emphasis added).

[109] The frustration that the court expressed more than 25 years ago, engulfs me today. The difficulty of defining the provisions of s 61, acknowledged in *Botha* [68] remains to this day. The recommendation in *Botha* that the Legislature should define the twin concepts remains unfulfilled. Furthermore, the *spes* that the court had, in *Botha,* that the previous decisions and possibly subsequent ones passed, post *Botha*, would have the desired effect, has, in my judgment remained unfulfilled. This is especially the case for those who are unrepresented because they cannot afford legal representation with costs therefor being notoriously prohibitive.

[110] It has been accepted in this jurisdiction that in bail applications, the onus rests with the accused to persuade the court that he or she must be admitted to bail.[69] I am aware that in South Africa, the correctness of this position has raised a high level of debate, which need not be addressed in this case. In view of the Namibian position in this regard, it would also seem to me that the accused person to whom s 61 applies, bears the onus to ultimately satisfy the court, on a balance of probabilities, that the interests of the administration of justice and public interest, will not be prejudiced, if he or she is admitted to bail.

[111] The question that immediately follows is this – how is the accused person, who is subject to s 61 expected to persuade the court that he or she is a worthy candidate of being admitted to bail, notwithstanding the application of s 61, when he or she does not know what those twin interests are? Does it suffice only to say that the opinion of the court and guidance provided by the court would cure the uncertainty? I think not.

[112] I move on from the person from Tsumkwe and come to a legal practitioner. If the legal practitioner is representing a client who is subject to s 61, what does he or she do to be able to properly advise the client on whether to apply for bail and

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[68] *Ibid* p 11 para 2.1.

[69] *Ibid* p 11 para 1.2. See *S v Du Plessis & Another* NmHC, 15/5/92 (unreported) and *S v Acheson* (*supra*) at 821 H.

what the omens are? The key to properly assessing the matter and rendering legal advice to the client, lies with the definition of the twin interests. If the legal practitioner does not know what these are, he or she cannot be able to properly advise the client and persuade the court eventually.

[113] The argument made is that the courts have, through judgments, interpreted what is to be understood by these twin interests. The first hurdle, is that court judgments are not accessible to all people in this country. Secondly, besides judgments may not be easily understood by some, possibly the majority of persons who are not lawyers. It is a fact that judgments are often long and may be cumbersome to read, let alone understand especially for those who are not lawyers – not to mention those whose encounter with the classroom may have been very brief. Is it fair and just that such key phrases, which may be decisive as to whether an accused person gets his or her freedom or not be 'hidden' in court judgments?

[114] I am of the view that the doctrine of notice, if I may call it that, is central to our jurisprudence. Where the exercise and enjoyment of a constitutional right or freedom is being curtailed or likely to be, it is imperative that the person negatively impacted by the exercise of the power affecting the enjoyment and exercise of that right must be afforded clear and unequivocal notice so that they are able to place their matter before court for adjudication. This becomes more pronounced as in this case, where the onus is on a bail applicant to persuade the court that he or she is a worthy bail candidate and able to meet the requirements relating to the twin interests.

[115] The majority of the court opines that the prosecution must be required to particularise on the record the grounds on which it opposes bail in the interests of the public or the administration of justice. 'The magistrate should also be sure to provide proper reasons for the benefit of the accused, so that he or she can make an informed decision about future applications for bail, and also explain to the accused, what aspect of the public interest or administration of justice issue is of concern so that there is more clarity on the hurdle to cross.'[70]

[70] Para 68 of the majority judgment.

[116] The point to make in regard to the above paragraph is that the stage at which the majority of the court suggests the prosecution should advise of the bases of opposition to bail does not benefit the accused. This is for the reason that this disclosure comes in the course of the bail hearing and not before the accused makes a decision, whether personally or via counsel, whether to apply for bail. It does not assist the accused at the appropriate time, namely, at the point of deciding whether or not to bring the bail application in view of the decisive role played by the twin interests in the ultimate decision whether to grant bail or not.

[117] Another point made by the majority of the court is that the magistrate should provide proper reasons to the accused ostensibly for refusing bail on the basis of the twin interests. Those proper reasons, where given, are given too late in the day and after the accused would have filed an application for bail in the dark, totally unaware of what the twin interests entail. If he or she is to be assisted by the reasons provided in the future, it will be if he or she either applies for bail on changed circumstances or if he or she commits another offence and seeks to be admitted to bail.

[118] The majority of the court, in para 67, state that an accused can only be denied bail after the judicial officer conducts a proper enquiry into the bail application, failing which the accused may exercise his or her right to appeal to this court. It must be noted in this regard that the grounds of appeal are limited in matters of bail to what is stated in s 65(4) of the CPA. That provision reads 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.'

[119] It is evident, from reading the above section that the grounds on which the appellate court can set aside the decision of the lower court are restricted. The bar for the appellate court to intervene in bail applications, is higher than in ordinary

appeals. It is only where the appellate court is of the view that the decision of the lower court was wrong. It becomes clear therefor that the right to appeal does not provide a panacea to a person who has been denied bail in terms of s 61 of the CPA.

[120] In any event, the explanation by the judicial officer of what the requirements of s 61 may entail during the bail hearing provides little to no comfort to the accused who is expected to lead evidence regarding s 61, that satisfies the court that the twin interests will not be prejudiced if he or she is admitted to bail. An appeal, it must not be forgotten, will be decided based on the evidence on record, therefore, what the accused did not place before the court *a quo*, will not be considered on appeal.

[121] Furthermore, the excerpt in para 68, from the majority judgment unfortunately, in my considered view, fails to appreciate that the onus is on the accused person to prove that he or she is a good candidate for admission to bail. To this extent, it is part of the onus, where the accused is charged with schedule 2 offence, to show that his or her release will not prejudice the twin interests. In this regard, it will be cold comfort and too late in the day for the prosecution to notify the applicant of the bases for the opposition on grounds of the twin interests in the middle of the proceedings. A lengthy and detailed explanation by the court envisaged, does little to improve the applicant's lot at that stage where a bail application has already been lodged.

[122] It is my considered view that the accused must know before he decides to lodge a bail application what the interests of the administration of justice and the public interest entail. This must be so, regardless of whether the application will eventually be opposed. The provisions of s 61 are applicable once the accused person is charged with an offence falling under the Schedule.

[123] Once the accused has been charged, he or she must consider the implications of the twin interests and their possible implications on his or her bail application. It is at that point that he or she will be best placed to decide whether the bringing of a bail application is a route worth embarking on. In this connection,

it must be remembered that moving a bail application may have serious financial implications for an accused person. The bar that the accused must meet must not be something that manifests itself in fullness to the applicant when he or she is knee-deep in the torrential waters of the bail application and where he or she condemned to either swim or sink. In point of fact, the latter is more likely.

[124] The main judgment, as I read it, appears to agree with the minority view expressed in the *Morales* case. It must be mentioned in this regard, that the Bench in the said matter, consisted of seven Justices. Only two of them dissented. Having read the said judgment, I am persuaded that the majority judgment was correct when the facts of the instant case are placed in view.

[125] The majority of the court stated that the words 'public interest', as a prerequisite for pre-trial incarceration, were vague and imprecise. The court agreed that they were 'the most nebulous basis for detention'. This, it was said because they were too vague as not to satisfy the requirement that a limitation on Charter rights be prescribed by law.

[126] At page 715 of *Morales,* it was held that 'a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate.' The following ensues:

'The term "public interest", as currently defined by the courts, is incapable of framing the legal debate in any meaningful manner or structuring discretion in any way. Nor would it be possible to give that term a constant or settled meaning. The term gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention but creates no criteria for defining these circumstances. No amount of judicial interpretation of the term "public interest" would be capable of rendering it a provision which gives any guidance for legal debate. Such unfettered discretion violates the doctrine vagueness. This doctrine applies to all types of enactments and is not restricted to provisions which define an offence or prohibit certain conduct. The principles of fundamental justice preclude a standardless sweep in any provision which authorises imprisonment. A standardless sweep does not become acceptable simply because it results from the discretion of judges and justices of the peace rather than the discretion of law enforcement officials.'

[127] I am of the considered opinion that when proper regard is had to the twin principles employed by our legislature in s 61, they are on all fours with the complaint levelled by the Justices of Canada in *Morales*. As clearly stated by them, the words employed in s 61 of the CPA are not capable, it seems to me, of framing the legal debate nor do they assist judicial officers in exercising the discretion reposed in them. They possess no constant or settled meaning that would assist those affected by its provisions to understand what they have to do to meet the requirements of these twin interests, so as to be entitled to be admitted to bail.

[128] I am of the considered view that although the words relating to the twin interests are employed in respect of a different purpose in the instant case, it is important to note that they impact negatively on an important constitutional right, namely the right to liberty. For that reason, and because of the prejudicial effects of s 61 to a person who the court is satisfied is likely to stand trial and is unlikely to interfere with the investigations and witnesses, it is imperative that the twin interests must be couched in unveiled terms.

[129] It is my considered opinion that the words in s 61, relating to the twin interests, are vague within the meaning attached to *Morales* in that they lack precision so as not to give sufficient guidance for legal debate. Lawyers cannot agree on what the twin interests entail. Much less would be expected from members of the public, who are not schooled to articulate what the twin interests mean and require.

[130] The judicial discretion that is exercised by the courts in matters implicating s 61, must in my considered view, be exercised not in the middle or the tail end of the bail proceedings when it has not, all along been apparent to the accused person what factors come into the equation. I cannot stress enough that the person who should understand the nature and seriousness of the impediment to being admitted to bail, must be the accused person, right from the time he or she is arraigned.

[131] It is my view that gaining clarity and the possible meanings regarding the nature and implications of the twin interests during the course of the proceedings, hampers him or her in properly deciding on the issue of bail, particularly so, from an informed position. This is not, in my considered opinion, the lot that the framers of the Constitution would have envisaged, especially when it touches on so fundamental a right as the right to liberty. I dare say that even judicial officers may not be in full agreement regarding the meaning, scope and character of the twin interests.

[132] The argument advanced by the majority judgment that any wrong that may have been perpetrated on an accused by a lower court in a bail hearing can be cured on appeal, is in my considered opinion elusive. This is because both the court entertaining bail and the accused would not be *ad idem* from the beginning as to what the twin interests entail. What these words mean must be clear right from the beginning before an applicant decides to launch a bail application and not for them to become progressively clearer as the proceedings unfold.

[133] It is one thing for a court to hold that certain facts and considerations are relevant to the twin interests and quite another for the accused persons to know that right from the beginning after being charged with an offence resorting under s 61. It would not amount to usurping the judicial discretion if the legislature, which is the author of the nebulous concept of the twin interests, defines as far as words can permit, what factors and considerations should be taken into account in determining what the interests concerned entail.

[134] It must be stated that this happens everyday in legislation, in which parliament is often astute not to present the courts with *numerus clausus* but relevant considerations which are not limited to those mentioned. The danger is, however, brought about not by usurping the discretion of the court, with parliament stating what the definitions of the interests are, but with accused persons not knowing those factors and considerations in the first place and being unable to assist and persuade the court that those interests will not be prejudiced if the accused is admitted to bail.

[135] The wisdom imparted by the Supreme Court in *Medical Association v Minister of Health and Social Services*[71] must not be allowed to fall on fallow ground. The Supreme Court expressed itself as follows, with Damaseb DCJ, writing for the majority of the court:

'[62] In *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others* 2009 (2) NR 506 (SC), para 65-68 (*APS*), this court explained the approach to be taken in determining whether an impugned law passes muster under art 21(2) and art 22. The government bears the onus to justify the limitation of a constitutionally protected right or freedom. It must also show that the limitation falls "clearly and unambiguously within the terms of the permissible constitutional limitations, interpreted objectively and as narrowly as the Constitution's exact words will allow". The limitation must be an exception, and the restriction on the exercise of the freedom or right must be strictly construed so that it is not abused to confine the freedom's exercise to a scope narrower than what the Constitution permits.' The limitation can only be justified on the "criteria" listed in the sub-article (being "reasonable" also expressed as rationality; "necessary" and "required").

[63] Conferment of discretionary power to be exercised by administrative bodies or functionaries is unavoidable in a modern state. However, where the legislature confers discretionary power, the delegation must not be so broad or vague that the body or functionary is unable to determine the nature and scope of the power conferred. That is so because it may lead to arbitrary exercise of the delegated power. Broad discretionary powers must be accompanied by some restraint on the exercise of the power so that people affected by the exercise of the power will know what is relevant to the exercise of the power and the circumstances in which they may seek relief from adverse decisions. Generally, the constraints must appear from the provisions of the empowering statute as well as its policies and objectives: *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) (2005) (6) BCLR 529; [2005] ZACC 3) at 267 paras 33-34'. (Emphasis added).

[136] The majority judgment was not enamoured to the above decision for the reason that the Supreme Court was dealing with government functionaries yet in the current case, the discretion has been imposed on judicial officers. I am of the considered view that the fact that the legislation reposes the discretion it does on

[71] *Medical Association v Minister of Health and Social Services* 2017 (2) NR 544, para 62-63.

judicial officers does not render the limits placed by *Medical Association of Namibia* judgment totally inapplicable.

[137] Judicial officers are not unknown in certain areas of the law, although infrequently, to act arbitrarily. As a result, there are cases where such arbitrary decisions are taken on review. In the instant case, there is no denying that the right curtailed by s 61, namely, liberty, is a fundamental right. The discretionary power given to the court to determine what may amount to public interest and the interests of administration of justice, is not limited, neither is it defined. As such, there is no restraint on the exercise of the powers by the courts. As such, the people affected by the exercise of that power will not know what is relevant to the exercise of the power by judicial officers. It must be recalled that legislation, which impinges on fundamental rights, must be restrictively construed.

[138] The legendary Lord Denning[72] states the following in his work entitled, *The Due Process of the Law*:

> 'I must however first deal with Judges themselves. They too are not perfect. They make mistakes and they do injustice. You may remember the parable of the unjust "judge who feared not God, neither regarded man". He decided in favour of the widow "lest by her continual coming she weary me". (St Luke 18:2-5). In many cases a mistake of a judge can be corrected on appeal. But some mistakes cannot. These may be due to ignorance or incompetence or bias and even malice. They may put the litigants to much expense, anxiety and damage. In most other professions, negligence may give rise to an action for damages. Is a judge exempt when other professional men are liable?'

[139] This excerpt suggests that judicial officers are not themselves beyond reproach when it comes to the performance of their judicial functions. They are not immune from committing errors, which may have catastrophic consequences for the litigant on the losing side of their decision. Liberty, in this regard, is a very important fundamental right. This very fact indubitably underscores the need for the legislature itself to define the meaning to be attached to the twin interests.

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[72] Lord Denning, *The Due Process of the Law,* Oxford University Law Press, 2008, p 57.

[140] This may avoid a possible injustice being visited on a litigant due to the obscure meaning of public interest and the administration of justice. This must be so especially when full and proper regard is had to the primordial nature of the right to liberty, the presumption of innocence on the one hand and the draconian nature of the provisions of s 61 on the other.

[141] It would seem that s 61 does not have any restraints imposed by the legislature on the exercise of the powers reposed in judicial officers regarding refusal of bail on the basis of the twin interests. This leaves the persons who are subject to the exercise of the powers imposed, at the mercy of the judicial officers, which is an antithesis of the principle of constitutionalism.

[142] In the premises, I am of the considered but respectful opinion that the relevant parts of s 61 are unconstitutional for vagueness. They leave persons whose liberty is at risk in a position where they are unable to understand what it is that they can do to persuade the court that they are eminent candidates for admission to bail.

[143] In this regard, the admonition issued in the *Affordable Medicines* case must be adhered to. It was recorded that the 'doctrine of vagueness is founded on the rule of law and requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they regulate their conduct accordingly.' This standard is not met by the language employed in s 61 of the CPA.

[144] In the instant case, I subscribe to the view that the application of the doctrine of vagueness in this matter does not serve to impede or prevent State action in furtherance of social objectives. It becomes clear, from what has been stated above, that the relevant parts of the provision are unintelligible and do not meet the standard of maintaining a balance between societal rights and individual rights and freedoms. It is skewed against the latter.

[145] It is imperative, as I draw this issue to a close, to quote the following words,

which fell from the lips of a renowned Zimbabwean human rights lawyer Mr Stenford Moyo.[73] The former president of the Law Society of Zimbabwe and the SADC Lawyers Association stated the following:

'When the law is vague and unclear, the rights and obligations of those governed by it become equally unclear. Furthermore, the limits of the executive authority of those who enforce it become equally unclear. Vague and unclear laws are consequently entirely inconsistent with the observance of human rights. They are, furthermore, promotive of wide and discretionary powers in the hands of the executive.'

[146] These words ring true in the instant case. The fact that the lack of clarity in the words of the legislation is left to the judiciary to contend with, does not, in any manner, shape or form, detract from the fact that the words employed are vague and uncertain. A similar cloud that would engulf the executive in implementing the application of these words, confronts the judiciary with no measure of clarity, thus potentially sacrificing the rights of those affected by the provision in question.

[147] Another issue of concern, although it may not form the basis for rendering the provision unconstitutional, relates to the amount mentioned in s 61. The amount involved in a crime, for s 61 to be operational, is the equivalent of N$600 in respect of financial offences. The amendment of the legislation was promulgated in 1991. That is some 31 years ago.

[148] There is no debate that the value of money has changed over this time. One wonders whether it remains proper to maintain this amount as the lowest amount to trigger the application of s 61. Would it not yield an injustice to detain people and they are not entitled to bail because of the elusive twin interests in this day and age. Parliament may consider attending to this anomaly, which reflects a serious disproportion between the amount and the deleterious and draconian effects of s 61.

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[73] Stenford Moyo, 'The Role of the Legal Profession in Promoting and Protecting the Rule of Law and the Independence of the Judiciary', published in Francis Neate, '*The Rule of Law – Perspectives from Around the Globe,* LexisNexis, 2009, p 166.

[149] I would, for the foregoing reasons, align myself with the majority decision in *Morales*. It would not be a tall order for the legislature to now roll its sleeves and apply what was recommended in *Botha,*[74]namely, that a definition of the twin interests be provided in legislation for clarity and understanding of those whose right to liberty the present legislative regime impacts negatively.

[150] That is a course that other countries, including neighbours South Africa[75] and eSwatini[76], have followed. Canada also promulgated s 515 of the Canadian Criminal Code of 1985. The legislation contains a compendium of what these interests may entail, of course leaving some room for the court to, where appropriate, to include further grounds as they adjudicate matters before them.

[151] Mr Heathcote urged the court, if it finds for the applicant, that his bail application be considered afresh without the impugned words. This, it was argued, was necessary for him to reap from the fruits of his success. I am disinclined to grant such an order. The law must be applied to all people and for the court to sanction selective application of the law, would set a dangerous precedent. It would also render hollow the declaration of invalidity applied for and would cause confusion and possible uncertainty in the application of the provision in the interregnum.

Costs

[152] The general rule applicable to costs is that costs follow the event. In the instant case, the applicant was the successful party. He is thus entitled to his costs. The rule applied in *Kabazembi*[77] would not apply in this matter, in view of the applicant being successful in this dissenting judgment.

Conclusion

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[74] *Botha* (*supra*) para 42

[75] Section 60 of the Criminal Procedure Act, 1977, as amended.

[76] Section 96(4) of Criminal Procedure and Evidence Act, 1938, as amended.

[77] *Ibid*.

[153] As I draw the reasons for my dissension in this matter to a close, I find it propitious to quote the words that Lord Denning recorded in his work entitled, *The Discipline of the Law*.[78] I do so in the fervent hope that they may some day, ring true. The learned judge reasoned as follows in the House of Lords, where he dutifully served with distinction:

'I venture to think that if there is one place where it should be reconciled on principle – without being tied to particular precedents of a period that is past – it is in this House: and if there is one time for it to be done, it is now, when the opportunity offers, before the law gets any more enmeshed in its own net. This I have tried to do. Whatever the outcome, I hope I may say, as Holt CJ once did after he had done much research on his own: "I have stirred these points, which wiser heads in time may settle.'" (Emphasis added).

[154] If our legislature would yield to the imperatives set out in this dissenting judgment some day, that will fulfil the hope and wishes that were expressed by O' Linn J so many years ago in the *Botha* case as alluded to earlier in this judgment. He would, in that celestial jurisdiction, possibly smile with satisfaction that at last, justice has been served and that the injustices occasioned by s 61 would have been eliminated. 'Better late, than never', I imagine he would quip.

Order

[155] In view of the discussion and conclusions above, I come to the considered opinion that the following order would be appropriate in this matter:

1. The words 'in the interest of the public or the administration of justice', occurring in section 61 of the Criminal Procedure Act, 1977, as amended by section 3 of the Criminal Procedure Amendment Act 5 of 1991, be and are hereby declared unconstitutional, null and void and of no force and effect.

2. The said provision is referred to the National Assembly for amendment.

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[78] Lord Denning, *The Due Process of Law*, LexisNexis, Butterworths, London, 1979, p 288.

3. The declaration of invalidity shall not take effect within a period 12 months from the date of this order.

4. The respondents are ordered to pay the costs of the application, consequent upon the employment of one instructing and two instructed legal practitioners, where so employed.

5. The matter is removed from the roll and is regarded as finalised.

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TS MASUKU
Judge

APPEARANCES

APPLICANT:	R Heathcote SC (with him T Phatela) Instructed by Engelbrecht Attorneys
FIRST TO THIRD RESPONDENTS:	S Makando Instructed by Office of the Government Attorney