

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: HC-MD-CRI-APP-CAL-2023/00010

In the matter between:

ALLEN EGERER

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Egerer v S* (HC-MD-CRI-APP-CAL-2023/00010) [2023]

NAHCMD 276 (19 May 2023)

Coram: SHIVUTE J *et* JANUARY J

Heard: 21 April 2023

Delivered: 19 May 2023

Flynote: Criminal Procedure – Appeal against refusal of bail in lower court – Appellant charged with contravening s 56(e) read with ss 1 and 56(aa) of the Immigration Control Act 7 of 1993 and s 84(3) of the Criminal Procedure Act 51 of 1977 – Appellant burdened with onus to prove on balance of probabilities – Traditional factors in bail

application considered – Whether or not such may be considered in isolation – Appellant failed to rebut State’s objections to bail – No misdirection – Appeal dismissed.

Summary: The appellant stood charged with contravening s 56(e) read with ss 1 and 56(aa) of the Immigration Control Act 7 of 1993 and s 84(3) of the Criminal Procedure Act 51 of 1977, as amended, fabricating, forging or falsifying a permit, certificate or other document for the purpose of entering or remaining in Namibia. Appellant appeals against bail refusal in lower court. Appellant has the onus to prove on balance of probabilities that he is a good candidate for bail. The court confirmed that the traditional factors in relation to bail are not to be considered in isolation. Appellant failed to rebut State’s objections. No misdirection in lower court. Appeal dismissed.

ORDER

The appeal against the refusal of bail is dismissed.

APPEAL JUDGMENT

JANUARY J (SHIVUTE J concurring)

Introduction

[1] Appellant stood charged with contravening s 56(e) read with ss 1 and 56(aa) of the Immigration Control Act 7 of 1993 and s 84(3) of the Criminal Procedure Act 51 of 1977, as amended, (CPA) in the Katutura Magistrate’s Court. The particulars of the charge are:

'In that during August 2022 and at or near Windhoek in the district of Windhoek the accused, for entering into Namibia or to remain therein, or to assist any other person to so enter or remain in Namibia, did wrongfully and unlawfully fabricate, forge or falsify a permit, certificate or other document to wit: visitor's entry permit or that the accused uttered, used or attempted to use such document which has not been issued by a lawful authority, or which, though issued by a lawful authority, the accused is not allowed to use, or the accused used such document, knowing it to have been fabricated, forged or falsified.'

The penalty clause in s 56(aa) is prescribed to a fine of N\$20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment. And the accused may be dealt with under Part VI as a prohibited immigrant.

[2] He brought a formal bail application in the lower court. The application was opposed by the respondent and dismissed by the court below on 20 December 2022. The appellant was represented by a legal representative during the bail proceedings.

[3] This appeal is against the dismissal of his bail application. It is opposed by the respondent. The appellant is represented in this appeal by Mr. Gaeb and the respondent by Ms. Esterhuizen.

[4] The State objected to the granting of bail on the following grounds:

- a) The offence committed is serious.
- b) The State has a strong case against the appellant.
- c) That there is real risk of the applicant absconding.
- d) That there is risk that the applicant will interfere with police investigation and or with the state witnesses.
- e) The granting of bail will be against public interest and/or the administration of justice.

Grounds of Appeal

[5] The grounds of appeal are stipulated as follows:

'1. The Learned Magistrate erred in law and on the facts in failing to consider, or to properly and fairly consider, and decide in favour of the Appellant on the following:

1.1. She, on the consequence of all evidence given under oath failed to properly and fairly consider the evidence and find on the basis of such evidence the Appellant in fact made out a case and proved that:

- 1.1.1 He will not abscond if granted bail:
- 1.1.2 He will not interfere with State witnesses or investigations;
- 1.1.3 The State does not have a prima facie case against the Appellant;
- 1.1.4 That it will be in the public interest and the administration of justice if the Appellant is granted bail.

2. She failed to properly consider the evidence of the Appellant together with the full content of the circumstances under which the *stamps* came into the Appellant's passport and the co-operation given by the Appellant to the officials at the Ministry of Home Affairs, Immigration, Safety and Security prior to the Appellant's arrest. She thus erred in finding that the State has a strong prima facie case of forgery against the Appellant. On the totality of the evidence presented such findings and statements are not supported.

- 3. The Learned Magistrate erred in failing to properly consider the evidence of all the witnesses called and finding that on the basis of such evidence that it was in fact in the public interest and the administration of justice that the Appellant be granted bail with conditions.
- 4. The Learned Magistrate erred in law and on the facts in giving undue weight to the content (versions) apparently in witness statements of at least one State witness (Andima), when such witness was not called to testify and when such witness statement was not tendered into evidence as an exhibit.
- 5. The Learned Magistrate erred in giving undue weight to the hearsay evidence tendered by the Investigating Officer in the face of exculpatory oral evidence tendered by the

Appellant as an eye witness to the events and his exculpatory detailed explanation of what transpired.

6. The Learned Magistrate erred in finding that in respect of Count 1 relating to the forgery of the *Stamps* the State had a strong prima facie case despite the evidence of the Appellant that he did not forge any official document or *Stamps*. In fact the Investigating Officer testified that the Appellant did not forge any *stamp* but rather that the *stamps* were 'unprocedurally' inserted into the Appellants passport by his co-accused, Ergo, no offence having been committed by the Appellant.
7. The Learned Magistrate erred in law and on the facts in failing to consider that the Appellant had been discriminated against on the basis of his nationality when compared to his co-accused. This is despite the fact that two co-accused (one being an Immigration Official to whom the stamps appearing in the Appellant's passport belongs to) were released on bail on 30 November 2022 as the State did not object to the granting of bail to those two co-accused. The two co-accused faces (sic) two additional charges in terms of the *Anti-Corruption Act*. In fact, the Investigating Officer tendered evidence that one of the co-accused absconded to the Republic of Zambia and Angola when informed of the charges against him (co-accused). Further, that the said co-accused stole certain contents of the police docket prior to his arrest. The Learned Magistrate thereby effectively violated the Appellant's constitutional right to equality and freedom from discrimination in terms of Article 10 of the Namibian Constitution.
8. The Learned Magistrate erred in not meaningfully considering the provision of section 61 of the Criminal Procedure Act (as amended) with due regard to the overriding provisions of Article 12(d) of the Namibian Constitution dealing with the presumption of innocence which all persons charged with offences are entitled to. The *Court a quo* accordingly gave no serious consideration to the presumption of innocence-and if it is found to have done so, in the alternative the Appellant alleges that then it simply gave lip service to and tokenly (sic) considered Article 12(1)(d) of the Namibian Constitution.
9. The Learned Magistrate erred in that she misapplied and misconstrued section 61 of the Criminal Procedure Act in the circumstances where on the evidence presented, she should have found that it was in the public interest to grant bail to the Appellant.

Particularly, the Court a quo failed to objectively, fairly and impartially conduct a proper inquiry necessary **prior** to the application of section 61.

10. The Learned Magistrate erred in taking it and holding that it is trite that a strong case against the Appellant and the possibility of a severe sentence would in a particular case be sufficient alone to have the court refusing bail to an accused. In this respect the Learned Magistrate ignored and gave less regard to the right to liberty considered in the light of constitutional values and common law principles on liberty.
11. The Learned Magistrate erred in, after identifying some adverse effects to the administration of justice if the Appellant is released on bail or risks attendant upon the release of the Appellant, refusing bail without making a proper enquiry and consideration in order to determine whether or not appropriate conditions could be used to address the identified concern or risk, as alternatives to a refusal of bail. In that respect the court a quo gravely misdirected itself by failing to apply its mind in respect of possible conditions.
12. The Learned Magistrate erred in unduly relying on the strength of the State's case (which remains disputed), the possibility of a harsh sentence and the purported risk that the Appellant might not stand his trial as the lone criteria and factor to deny the Appellant bail thereby improperly fettering her wide judicial discretion.'

[6] It is clear that the appellant tried to cast his net as wide as possible hoping to find some valid fact and/or law upon which the Magistrate erred or misdirected herself. It is reiterated that grounds of appeal should be clear, concise and unambiguous to enable this court, the Magistrate and the parties to know what the issues are in law and/or in fact. It is trite that grounds that are merely conclusions by the drafter do not constitute proper grounds and may be ignored. Further, some of the grounds are overlapping. For instance, grounds four and five refer to the admission of hearsay evidence and the weight that the Magistrate attached to it. Ground seven, eight and nine (eight and nine overlapping) contain conclusions by the drafter.

[7] We could discern that the appeal is based on the findings by the Magistrate that: the State has a strong prima facie case; that the crime is serious; that there is risk of absconding; that it will not be in the interest of the public and/or the administration of justice to grant the appellant bail even with conditions attached.

The approach in a bail appeal

[8] This court is guided by the provisions of s 65(4) of the CPA which provides as follows:

‘(4) 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.’

[9] This court considered and approved the interpretation of the section in *S v Valombola*¹ where the following was stated:

‘The interpretation and application of s 65(4) was illustrated in *S v Barber* 1979 (4) SA 218 (D) by Hefer J who said at 220E – G:

“It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.”

The above approach was adopted in *S v Gaseb* 2007 (1) NR 310 (HC) and I will also be guided by this legal principle in this appeal.’

[10] Likewise this court will follow the same approach.

¹ *S v Valombola* 2014 (4) NR 945 (HC).

The background/evidence

Appellant

[11] The appellant testified in support of his bail application. He testified that he is an American citizen and is 27 years old. He was born in Zimbabwe where his mother resides whereas his father resides in the United States of America (US) at Wisconsin. He has a Zimbabwean ID but no such passport. He has a US passport. He schooled in Zimbabwe until the age of 18 years old and went back to the US for a year whereafter he returned to Zimbabwe. Thereafter, in 2015, he came to Namibia for studies. He studied at UNAM and Triumphant College where he completed two diplomas in IT. He entered Namibia on a visitor's permit, which eventually was changed to a study permit renewable on a yearly basis. His last study permit expired during 2021.

[12] He re-applied for a study permit in February 2021 but it was rejected. He opted to appeal the rejection with the assistance of a friend and handed all the necessary documents to this friend to appeal on his behalf. He was assured that the appeal was filed but after a while he could no longer trace the friend and heard nothing about the appeal. He was then introduced to a so-called agent who turned out to be the third accused in the trial court. Accused three advised him to apply for a work permit. Accused three required an amount of N\$5000 for the application on behalf of the appellant. After some time, accused three required the appellant's passport for endorsement. The passport was returned after about three weeks with endorsement stamps that were not so clear. Accused three ensured him that the stamps were legal and that he may even travel with those stamps endorsed in the passport.

[13] He testified that the unclear stamps did not bother him further as endorsement stamps were also unclear in the past, like when he last travelled to Botswana in 2016.

[14] During August 2020, the appellant wanted to travel to Zimbabwe to visit his mother. He enquired from accused two if it is in order to travel whereupon he was assured that he was allowed to travel and that everything was in order. Accused three requested him to travel with accused two. They travelled to the Gobabis border post to go via Botswana to Zimbabwe.

[15] He presented his passport to the immigration officials. These officials looked at the passport and immediately told the appellant that the stamps are not correct. They scanned the passport and detected that the appellant and his history of movements are not on their electronic management system. He was interviewed, eventually refused entry into Botswana and informed to return to Windhoek. Upon his return to Windhoek, he immediately contacted his US Embassy and informed them of the issue. On their advice, he contacted the Ministry of Home Affairs and scheduled a meeting. An official at that Ministry advised him after deliberations with other officials to immediately book a flight ticket out of Namibia to the US. This was in all probability because at the time the appellant unlawfully overstayed in Namibia. It emerged during the deliberations that the relevant stamps in his passport were allocated to an immigration official at Hosea Kutako Airport, who turned out to be accused two.

[16] The appellant went and bought an air flight ticket to Chicago. He thereafter returned to the offices of the Ministry of Home Affairs. Eventually, on that day he was taken into a boardroom and interviewed by a number of immigration officials. He provided the telephone numbers of accused two and three and also was asked to write a statement. He was also shown an arrival form at Hosea Kutako Airport written in his name but not in his handwriting. He denied that he arrived at that airport but stated that he departed from it at some time. His passport was then confiscated and he was instructed to leave.

[17] He went to the offices of Sisa Namandje and informed them about the incident. Some months thereafter he was called to go to the airport. On his arrival he was arrested and taken to Seeis police station. Eventually, he was taken to court where bail

was refused. He testified that he will stand his trial if granted bail and agreed that bail conditions may be imposed. He resides at his girlfriend's mother's residence at 3 Hillside, Brakwater. He stated that he does not have any previous convictions. He can afford bail of N\$5000.

[18] In cross-examination, the appellant stated that he is unemployed. The appellant admitted that he did not leave Namibia on 10 March 2022 whereas the passport stamp reflects that he did. The appellant stated that he was informed by accused two to say that he arrived on 10 August 2022 in Namibia. Further, when confronted with his response to Andima that he arrived with the Lufthansa airliner and that there was no record by that airliner of a passenger with the appellant's credentials, he had no response. He was confronted with an arrival form dated 10 August 2022 upon which he denied any knowledge about it. He claimed that somebody fraudulently completed the form on his behalf. He admitted that he completed a departure form, dated 20 August 2022. Further, he stated that the address of Woodpecker Court, Rocky Crest was his previous address where he resided. The address of Hilton Hotel, reflecting on the arrival form, he has no knowledge of.

[19] He testified that he does not know who the State witnesses are.

Opposition and evidence of the investigating officer

[20] The appellant stands charged with two other co-accused. The investigating officer testified that the appellant is an American citizen. He further testified that according to statements in the police docket the appellant tried to cross the Namibian border at the Trans Kalahari Border Post in the company of three other persons on the 20th of August 2022. One of the persons is a senior immigration officer, Tahafeni Hambinga who is the second accused person in the case. Upon inspection of the passport of the appellant, it was discovered by another immigration officer at the border post, a certain Mr Andima, that the endorsement stamps in the passport are not clear. The immigration officers did some inquiries on their electronic border management

system to determine if the stamps are genuine and investigated the travelling history of the appellant. They discovered that there was no history of the movements of the appellant on the electronic system.

[21] Mr Andima enquired from the appellant about his entry into Namibia upon which the appellant stated that he entered Namibia at Hosea Kutako Airport on 10 August 2022. Upon further investigation and enquiries, discrepancies were discovered on arrival and departure forms that were obtained. The discrepancies relate to absent signatures of an immigration officer and signatures that were not matching. The immigration officers at the border refused to allow the appellant and the second accused to exit Namibia and to enter Botswana. The appellant returned to Windhoek.

[22] Upon further investigation it was discovered that there were discrepancies with stamps reflecting the appellant's departure from Namibia on 10 March 2022 and the electronic management system reflecting the history of movement of the appellant. The appellant was questioned, during further investigation of the matter, about an entry permit that was not clear on the passport and which bore an expiry date of 28 September 2022. This endorsement also did not reflect on the electronic system. The appellant responded that he, during July 2022, handed his passport to a certain Willy, who is accused three in the case, to assist him with a work permit as the appellant was illegally in the country after the renewal of his study permit was rejected. He allegedly paid N\$5000 to this Willy to assist him. On the return of the passport it was endorsed with the unclear stamps. The investigating officer testified that the procedure of acquiring the endorsement is wrong. It was established that the unclear stamps were assigned to the second accused and it was only him that had access to them.

[23] In relation to the forgery, the investigating officer testified that there must have been a conspiracy to endorse the passport. He came to such a conclusion because the arrival form dated 10 August 2022 has the details of the appellant but does not reflect his signature and hand writing. Further, the purported arrival of the appellant does not reflect on the electronic management system. The evidence furthermore indicates that

the appellant was allowed entry into Namibia as a student from 2015 to 2017 and again to 2020. The appellant tried to renew that permit during 2021 but it was rejected in March 2021. He was born in Zimbabwe.

[24] The investigating officer testified further, that the appellant does not have roots and family in Namibia, is not employed here and does not have a permanent residence permit. According to the investigating officer, he also charged the appellant of contravening s 34 of the Anti-Corruption Act 8 of 2003. However the proceedings only relates to the charge in connecting with the forgery of stamps in the passport. Currently, there is only one charge to wit: Fabricating, forging or falsifying a permit or other document for the purpose of entering or remaining in Namibia; levelled against the appellant but according to the investigating officer he might face additional charges of corruption and overstaying in Namibia. The investigating officer stated that the accused knows accused two who is an immigration officer. He, thus, is capable to interfere with the investigation of the case. He referred to the fact that after the case was registered, accused two stole an original of a relevant departure form of which a copy was made for purposes of this case. Further, there are fears that the appellant may abscond and not stand his trial as he has the means to do it. The charge is serious and a heavy sentence is anticipated, Bail conditions would not cure the situation.

[25] In cross-examination, nothing much gainsaid the evidence in chief. Most of the evidence in chief was confirmed. The witness testified that the questioned unclear stamps were allocated to accused two when he was an immigration officer at Hosea Kutako Airport.

[26] The following facts are common cause: the appellant is an American citizen who entered Namibia on a visitor's entry permit. He was eventually granted a study permit which was renewed from time to time until 2021. However, in 2021, after its expiry, the application for renewal was rejected. He wanted to exit Namibia at the Buite Pos border post and presented his passport with two stamps that were unclear. The unclear stamps alerted the immigration officers and the officers investigated the origin and authenticity

thereof. The appellant's particulars were entered into an electronic management system which could not produce the movement history claimed by the appellant. Further investigations revealed that there was an arrival form not completed by the appellant and dates reflected of arrival or departure from Namibia did not match. The unclear stamps was allocated to the second accused in the matter.

Appellant's submissions

[27] The appellant's counsel submitted that the learned Magistrate's decision to deny bail is fundamentally flawed. He reasoned that the Magistrate erred in her assessment that the appellant is a flight risk and underemphasised his constitutional right to liberty i.e. did not give proper weight to the right to liberty. It was submitted that she in her reasoning amongst others, formed several erroneous conclusions that fundamentally influenced her ultimate decision to deny bail. Counsel highlighted the following in this regard: he submitted that the Magistrate poured scorn over the appellant's evidence stating that he put bare statements before the court that he will not abscond and interfere with witnesses; further, although, the State did not put good evidence before court that the appellant is likely to abscond, she concluded that she had serious doubts that he will not stand his trial; She erred in finding that there was a strong prima facie case against the appellant and if convicted he faces a substantial custodial sentence and or/fine or both; it was submitted that the finding of a likelihood of absconding is based on conjecture and speculation.

[28] Counsel further submitted that the respondent failed to prima facie, prove the crime of forgery had been committed in view of the fact that the stamps had been found to be genuine and allocated to an immigration officer. He submitted that the evidence at most, prove prima facie that an administrative official did not follow the correct procedure in issuing the stamps and that no blame has to be put on the appellant. Accordingly, so it was submitted, the appellant followed due process and did not commit a crime.

[29] Counsel, in addition, contended that the magistrate discriminated against the appellant as a foreign citizen in his refusal of bail, whereas she granted bail to the two Namibian co-accused who are implicated in the crime and, all the more, face, serious additional charges in the case. Further, the magistrate erred in not considering to grant bail with suitable conditions. Counsel also took issue with the fact that the investigating officer testified about hearsay evidence obtained from witnesses who were not called to testify in court. His contention was that less weight ought to be attached to such evidence, especially in light of the fact that it was disputed.

[30] Counsel submitted that the magistrate was reckless in her application of the public interest provisions in s 61 of the CPA and not granting bail with conditions. Further, it was submitted that she misconstrued and misapplied s 61 of the CPA. It was argued that in the circumstances of the appellant, it was in the interest of the public and the administration of justice that bail should have been granted.

Respondent's submissions

[31] Counsel for the respondent referred the court to the magistrate's judgment where she found that the State proved a strong prima facie case. Further, where she considered that the appellant does not have strong emotional roots or ties in Namibia. The appellant does not have family responsibilities, employment or occupational responsibilities and no assets in Namibia. He only testified that he has plans to marry his girlfriend in Namibia and provided the address of the girlfriend and her mother. The Magistrate considered that the appellant resided in Namibia without the necessary permit to legalise his stay here. Further, she considered various factors whether or not the appellant may pose a flight risk in conjunction with the seriousness and strength of the State's case.

[32] It was pointed out that the appellant is a foreigner, the ease with which he may cross or penetrate Namibian borders in conjunction with the fact that he befriended one of the immigration officers, the fact that replacement documents may be obtained with

ease and that air carriers are equipped to carry individuals. In addition, the appellant has contacts in the US and Zimbabwe. Counsel submitted that the Magistrate in the circumstances did not misdirect herself by refusing to grant bail in the interest of the public or the administration of justice by finding that he may not stand his trial or is a flight risk.

[33] Counsel pointed out that evidence in the normal course of events in a bail application is given through the investigating officer, that it is not a trial but an enquiry and that hearsay is admissible. Further, that the investigating officer was vigorously cross-examined but stood his ground.

Discussion

[34] The appellant did not dispute that he does not own any immovable property in Namibia. It was submitted that the appellant will not abscond. The court was referred to the case of *Boulter v State*² where the court held as follows:

‘The purpose a bail inquiry is to assess whether the applicant is likely to stand trial and the focus is on the probabilities apparent from the relative strength or deficiency of the state’s case. Definite findings on the merits or demerits of a case and or defense postulated are best left for the trial court. The fact that an applicant is a foreign passport holder, alone, does not automatically mean that such person is not entitled to bail in any circumstances’.

[35] In *Pienaar v State*,³ the Supreme Court found that there was a great possibility that the applicant, also a foreigner, would abscond. In this regard the court made the following remarks:

‘It must not be understood to say that a peregrinus is not entitled to bail by any circumstances or in favour of detention without trial. Liberty is one of those rights men and women of this country fought and died for and should be jealously protected at all costs’

² *Boulter v State* (HC-MD-CRI-APP-CAL-2021/00045) [2021] NAHCMD 330 (15 July 2021).

³ *Pienaar v S* (SA 13/2016) [2017] NASC 3 (3 February 2017) para 13.

[36] It is trite that an accused cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of innocence entails that an accused is innocent until his guilt has been proven beyond reasonable doubt in a court of law.⁴ The Magistrate in her inquiry appropriately considered this principle and applied it to the facts in the application.

[37] In a bail application, the correct approach is that a court will lean in favour of the liberty of an individual provided that the interest of justice will not be prejudiced by granting bail. We endorse what was stated in *S v Hlongwa*⁵ where the court stated the following:

‘The correct approach to the decision of bail application is that the court will always grant bail where possible and will lean in favour of and not against the liberty of the subject provided that it is clear that the interest of justice will not be prejudice thereby’.

[38] The strength of the case, seriousness of the case and the likely sentence to be imposed are interrelated to the determination of the likelihood that an accused would abscond instead of standing his trial. We endorse what was stated in *Nghipunya v S*⁶: where the court stated the following:

‘The question whether the appellant is likely to abscond is closely linked to the apparent strength of the State’s case and the resultant sentence likely to be imposed.’

Hannah J in *S v Yugin and Others*⁷ stated the following in this regard:

‘In determining this question (Abscondment) a court will have regard to various matters. The seriousness of the charge which the accused faces is one, but not, as has been judicially pointed out, in itself. I will come to that shortly.... The relevance of the seriousness of the

⁴ *S v Acheson* 1991 NR 1 (HC) at p19 D-E.

⁵ *S v Hlongwa* 1979 (4) SA 112 CD. See also: *Immanuel v State* (CA 41/2013) [2013] NAHCMD 245 (12 September 2013) p 10.

⁶ *Nghipunya v S* (HC-MD-CRI-APP-CAL-2020/00077) [2020] NAHCMD 491 (28 October 2020) para 55.

⁷ *S v Yugin and Others* NR 196 (HC) p 200A-F.

offence lies in the sentence which will probably follow upon a conviction. If the probable sentence is one of a substantial period of imprisonment, then there is obviously a greater incentive for the accused to avoid standing his trial than if the probable sentence is an affordable fine.'

[39] The court in *Nghipunya v S* also quoted the following from *Lazarus Shaduka v The State*:

'Where an accused person has been charged with the commission of a serious offence, and that if convicted a substantial sentence of imprisonment will in all probability be imposed, that fact alone would be sufficient to permit a magistrate to form the opinion that it would not be in the interest of either the public or the administration of justice to release an accused on bail...'⁸

[40] Considering the maximum sentence provided for in this crime of forgery of a document or the use thereof, no doubt, it is regarded as a serious offence. If regard is had to the offence allegedly committed, the sentence likely to be imposed, and that in addition, the appellant may be dealt with as a prohibited immigrant, coupled with the fact that parts of Namibian borders are unmanned, this court remains unconvinced that the appellant is a good candidate for bail. On a balance of probabilities the appellant failed in this regard and it is fatal to the appeal. The court a quo cannot be faulted for refusing to grant bail on the facts before it.

[41] We endorse what Liebenberg J stated in *S v Nghipunya*:

'It must be remembered that traditional grounds relevant during a bail enquiry include *inter alia*, the seriousness of the offence; the strength of the state's case; whether the accused will stand his trial; will the accused interfere with witnesses; and 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 overarching, all-encompassing consideration even when the

⁸*S v Nghipunya* (supra).

offence does not resort under Part IV of 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'.⁹

[42] In the result, this court is in agreement with the court a quo and it is ordered that:

The appeal against the refusal of bail is dismissed;

H C JANUARY
JUDGE

N N SHIVUTE
JUDGE

APPEARANCES

⁹ See: *S v Nghipunya* (supra).

APPELLANT: Mr. K. N. Gaeb
Of Sisa Namanje & CO. Inc,
Windhoek

RESPONDENT: Ms. K Esterhuizen
Of the Office of the Prosecutor-General,
Windhoek.