

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
BAIL APPEAL JUDGMENT

CASE NO: HC-MD-CRI-APP-CAL-2023/00040

In the matter between:

MARIO SANTOS

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Santos v S* (HC-MD-CRI-APP-CAL-2023/00040) [2023]

NAHCMD 797 (6 December 2023)

Coram: JANUARY J *et* USIKU J

Heard: 10 November 2023

Delivered: 6 December 2023

Flynote: Criminal Procedure – Appeal against refusal of bail in lower court – Appellant charged with count one; Fraud read with s 94 of the Criminal Procedure Act 51 Of 1977, as amended (the CPA) and count two; Money Laundering in contravention of s 4(b)(i) of the Prevention of Organised Crime Act, as amended (the Act), read with s 94 of the CPA – Appellant burdened with onus to prove on balance of probabilities – Traditional

factors in bail application considered – Magistrate wrong to pre-judge a verdict in the trial – Misdirection not to consider bail with stringent conditions – bail granted with conditions.

Summary: The appellant stands charged in the Rundu Magistrates Court, with, count one; Fraud read with s 94 of the Criminal Procedure Act 51 of 1977, as amended (the CPA) and count two; Money Laundering in contravention of s 4(b)(i) of the Prevention of Organised Crime Act 29 of 2004, as amended (the Act), read with s 94 of the CPA; and count three: theft . The appeal is against the refusal of bail in the 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. The court found that the magistrate considered irrelevant factors and pre-judged the verdict in the trial. It was further wrong for the magistrate not to consider bail with stringent conditions. The court grants bail with conditions.

ORDER

1. The appeal against the refusal of bail is upheld.
2. The decision of the Magistrate Court held at Rundu, to refuse the appellant bail, is set aside and substituted with the following:
 - 2.1 The appellant is granted bail in the amount of N\$25 000 (twenty five thousand) on the following conditions;
 - 2.2 The appellant must hand in his passport to the investigating officer and should not obtain any travelling documents until the finalization of this case;
 - 2.3 The appellant must report himself three times a week, on Mondays, Wednesdays and Fridays between the hours of 08h00 and 18h00 to the Investigation Officer at the Rundu Police Station;
 - 2.4 The appellant is not allowed to leave the district and area of Rundu without written permission from the Investigating Officer;

- 2.5 The appellant should not interfere with State witnesses or with police investigations;
- 2.6 The appellant must hand over the BOB cards (credit or debit cards) of his son, Jose De Almeida Santos and the late Da Fonseca to the investigating officer if he is in possession thereof;
- 2.7 The appellant must attend court on the date that his case is remanded to and every subsequent date of postponement thereafter.
- 2.8 The matter is removed from the roll and regarded finalised.

BAIL APPEAL JUDGMENT

JANUARY J (USIKU J concurring)

Introduction

[1] Appellant stands charged in the Rundu Magistrates Court with count one: Fraud read with s 94 of the Criminal Procedure Act 51 of 1977, as amended (the CPA) and count two: Money Laundering in contravention of s 4(b)(i) of the Prevention of Organised Crime Act 29 of 2004, as amended (the Act), read with s 94 of the CPA . The particulars of count one are as follows whilst counts two and three are paraphrased to save time:

'Count one: That the accused is guilty of the crime of fraud on diverse occasions; In that upon or about between 01st August 2021 and 31st August 2022, on diverse occasions and at or near Standard Bank Namibia- Rundu in the district of Rundu, the said accused did wrongfully, unlawfully, falsely and with intent to defraud give out and pretend to Franco Esterhuizen and/or Standard Bank Namibia that he was entitled to and had the authority to reset Finacle Systems Account passwords of staff members at Rundu Standard Bank and

Nkurenkuru Standard Bank in order to have access to them and used them to transfer money to the total of N\$1 754 567.53, transferred from Standard Bank Suspense Account to Account number 60001265244 for Martha Ndara; Account number 60005440512 for Theresia Paulus; Account number 60004718940 for Bonafatius Tchindoga; Account number 6000544055 for Theresia Kameya; Account number 60005524341 for Simeon Ntsamba and for Account number 6003738158 for Lizandra Andre and finally transferred it to accounts to which he had access to fund, to wit: Account Number 15506894 for the late Da Vonseka Joseph Johannes and Account number 6005043475 for his son Candido Santos and did then and there by means of the said false pretenses induce the said Franco Esterhuizen and/or Standard Bank Namibia to the actual or potential loss or prejudice of Franco Esterhuizen to transfer funds in the amount of N\$1 754 567.53 from the Standard Bank Suspense account to the aforementioned bank accounts.

Count two: money laundering, in that the accused concealed or disguised the unlawful origin of the abovementioned money; and

Count three: that he stole the money in the amount of N\$1 754 567.53.'

[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 February 2023. 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 Amoomo and the respondent by Mr Moyo.

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

- a) Interference with police investigations.
- b) The charges that the accused is facing are serious.
- c) The State has a strong prima facie case against the accused and if convicted he will face a heavy and lengthy sentence which is an incentive for him to abscond.

- d) It will not be in the interest of the administration of justice and public interest for the accused to be granted bail because the money stolen belongs to members of the public and the public has an interest in the matter.

Grounds of Appeal

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

1. The court gravely misdirected itself when it relied on the provisions of section 61 of the Criminal Procedure Act 51 of 1977 in circumstances where the court had already found that the accused is likely to abscond. Once the court found that the accused was likely to abscond, the court could not rely on section 61 of the CPA to deny him bail as a section 61 enquiry is only possible in the event where the court is satisfied that an accused is not likely to interfere to abscond. (sic)

2. Assuming that it was permissible for the court to proceed to an enquiry despite having found that an accused person is likely to abscond. The appellant submits that the court misdirected itself by failing to carry out an all-embracing enquiry as required by law. In this regard the court failed to:

- 2.1. Consider possible bail conditions that may be imposed to ensure that the administration of justice is not undermined;
- 2.2. Consider the fact that the appellant is unlikely to commit further offences.
- 2.3. Consider the fact that the accused is unlikely to interfere with police investigations.
- 2.4. Consider the fact that the accused has a family rooted in Namibia and has two minor children.
- 2.5. Consider the fact that the accused does not have any previous convictions or pending offences.

3. The court erred in finding that there was an increased risk of the appellant absconding, simply based on the fact that in the court a quo's view, the accused person has the money elsewhere and that he can take that money and move to another country where he can start a new life. There was simply no evidence to support this humble view. The only evidence on record is that accused has no family outside the country and he has never travelled the country and he does not intend on doing so.

4. The court a quo erred and committed a serious misdirection by making a finding that the accused was of the "view that even if he had stolen money, that money was not public money". The accused never made an admission that he stole money nor did he plead an alternative defense that in the event where he is found to have stolen money, the money is public money.

5. The court a quo erred in unduly finding that there was a strong case against the accused person when the State merely relied on hearsay evidence through the investigation officer. The court failed to recognize this evidence as hearsay evidence and gave undue weight to the said evidence. The accused exculpatory version was not rejected by the court. Not a single witness statement or documentary evidence was handed up during the hearing and therefore the court could not have found that there is a strong case against the accused.

6. The court a quo erred in refusing bail on the basis of public interest when there was no evidence on the basis of which such a finding could be made and particularly in circumstances where:-

6.1 It was not proved that the appellant will abscond;

6.2 It was not proved that the appellant will interfere with the investigation;

6.3 It was not proved that the appellant may cause any harm or danger to society in one or the other way if he was released ; and

7. The court a quo erred and committed a gross irregularity in not making an explicit finding that there was no evidence that the appellant will interfere with investigation, particularly in circumstances where the State did not rely on and tender any cogent or objective evidence.

8. The court a quo erred in not properly considering the fact that the investigation was almost finalised and that the administration of justice would be served by the release of the appellant pending his trial.'

[6] We reiterate 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. Ground 5 is a mere conclusion 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.

The approach in a bail appeal

[8] This court is guided by the provisions of s 65(4) of the Criminal Procedure Act 51 of 1977 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:

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

“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.

The background/evidence

Appellant

[11] The appellant testified in support of his bail application. He testified that he is a Namibian citizen and is 33 years old. His parents are also Namibian. He has two children. He testified that he has never been outside Namibia and has no family outside the country. He is an employee of Standard Bank from 2010 and has been employed there for about 10 years. He started as a teller until 2015. He obtained a passport in June/July 2022 for the purpose of travelling for work-related duty. The travelling was, however canceled. He does not have fixed assets, except a plot which is not registered in his name. He owns a car.

[12] He was promoted in 2015 to the position of supervisor for the tellers until 2019 whereafter he was promoted to team leader branch support. From 1 October 2021 to 31 August 2022 he was still team leader of branch support and reported to the branch manager, Kampasenawa Bawasa. The appellant's responsibility was to ensure the smooth operation of the bank, to ensure that all paper works relating to inquiries and

customer consultancy were filed, that all PC's were in an operating condition, ensure the premises were clean and that staff do their duties properly. When money was loaded into ATM's, he supervised the person responsible for it. He approved the opening of new accounts, transactions for withdrawal of money and assistance of tellers. He had a good relationship with the branch manager. He was responsible for two agencies namely, Nkurenkuru and Divundu.

[13] He stated that he will plead not guilty on the charges levelled against him. He stated that he never worked in the IT department. He knows Franco Esterhuizen as the forensic investigator at the bank. The appellant had the authority to change anyone's password. When that was done, that person would not have been able to log into his/her account. He denies having taken any money or received any money from suspense accounts at the bank. At some stage Franco Esterhuizen informed him that there were fraudulent transactions at the bank which needed to be investigated. At the time, Esterhuizen requested for transaction and receipt documents which the witness handed to him. He accompanied Franco Esterhuizen to Nkurenkuru for investigation. Thereafter, he resigned because he was not on good terms with his boss. His resignation was accepted on 13 September 2022. On 24 October the appellant was called to the office of Mr Mukerenge of Commercial Crime Unit, informed that a case was opened against him and was arrested. He left work, never had access to Standard Bank systems and never took any documentary evidence from Standard Bank.

[14] He further testified that he is the breadwinner, takes care of both his parents who are pensioners, also his two siblings who are unemployed and his son who lives with his parents. He is responsible for school fees. He resigned not to interfere with police investigations. He wants bail in order to take care of his family and pay for legal fees. He is willing to surrender his passport, report weekly to the Namibian police, will face his case and will not escape.

[15] In cross-examination the witness denied that he transferred money to any of the different accounts that he was confronted with. He confirmed that some of his main

responsibilities were to monitor activities at the three branches. As a team leader, he could change and reset passwords. He had a user ID to help persons to change passwords but it could be changed from the bank's IT- department in Windhoek at any time. It was only him who knew the ID password. He admitted that he was allocated with a computer in Rundu. He was not sure if it was identified as Rundu 02 with a username, B187843 and address with the digits, 10.248.68.171.

[16] He was confronted with evidence from witnesses' statements that he assisted to change password on their computers from his computer to get access to their bank account. Some assistance he admitted but when confronted that he changed password of some co-employees when they were on leave or sick leave, he was not sure of it. Most of the answers were either that he does not know about it or he is not aware of it. He specifically denied that he transferred money to his son's account on which he (the appellant) had signing powers. He was confronted with the fact that there are CCTV footage and computer information displaying and reflecting that he changed passwords from his computer; that he transferred money from accounts and later again transferred those monies to his son's account and the account of a deceased person, Da Fonseca. He was confronted that there are audit reports showing the transfers of the money and that he transferred money from suspense accounts. He stated that he was not sure about that.

[17] Further, in cross-examination, he denied that he possess bank cards of his son and the late Da Fonseca. He denied that he bought assets with the alleged stolen money and stated that he only bought a motor vehicle through the bank. He stated that he does not know how he will interfere with investigations and if that was the case he could have done that before his arrest because he was aware of the case being investigated against him. He conceded that the charges are serious and if convicted, a heavy sentence may be imposed. He re-stated that he will not abscond as he has nowhere to go. His family and children are in Namibia.

[18] In re-examination, the accused stated that when he stated in cross-examination that he is not sure of the allegations, he meant that he did not know about that.

Opposition and evidence of the investigating officer

[19] The investigating officer testified that he knows the appellant because he used to work together with him. He assisted the police to get information from the bank in terms of s 179 of the CPA in the past. The witness is the investigating officer in the matter. He opposed bail because the accused may interfere with investigations, more specifically financial investigations. He testified that they still had to send a report to financial intelligence to investigate the bank accounts of the accused and his family's bank accounts to establish what happened to the money allegedly stolen.

[20] He testified that the appellant will tamper with evidence still to be obtained. Further, the appellant will move the remaining stolen money and sell property he might have acquired with the stolen money. In addition, the investigator had to send reports to the financial intelligence center to investigate all relevant bank accounts and especially bank accounts of family members of the appellant. He testified that the amount involved is N\$1 754 567, 52 which is a substantial amount. He testified that if there will be interference, the strength of the State's case will be jeopardized. This implies that the State does not have that strong a case.

[21] He further testified that the appellant processed two BOB cards in the name of his son and Mr Da Fonseca's account. The appellant withdrew money from the suspense account, transferred it into another account and then into the account of his son and that of the late Da Fonseca. The BOB cards have not been retrieved yet, thus he fears that the cards will be destroyed and needs to be recovered. According to him, the State has a strong case, the offence is serious and if convicted, a heavy sentence

may be imposed. This may be an incentive to abscond. He further opined that it is public money.

[22] The witness testified that there is CCTV video footage, reflecting that the appellant went to the ATM, inserted cards and withdrew money. The witness stated that it was the stolen money that was withdrawn. We, however, consider this a neutral fact because at the time, there was no proof that it was the money in question that was withdrawn. During investigation, it emerged that the transactions of transferring money, was done from the computer of the appellant and with passwords of fellow employees at the bank. Video footage confirms that at the time the transfers were done, the appellant was on his computer. The witness testified that the borders to Angola are not tight and not guarded all over. Thus, it will be easy for the appellant to abscond.

[23] In cross-examination, the witness testified that the CCTV footage confirm the changing of passwords but not the transfer of money. There are no other suspects in the matter. He stated that he is in possession of witness statements in relation to the alleged crime. It was only the forensic evidence and the BOB cards that were outstanding. Further, he confirmed that the appellant assisted colleagues to change their passwords to default passwords. He confirmed that the audit report was conveyed to appellant on 05/09/2022 and that appellant resigned on 07/09/2022. He was arrested on 24/10/2022 and did not escape or attempt to escape beforehand. Neither was there an attempt to interfere with police investigations. Further, there is no evidence that the appellant has family outside Namibia. The passport of the appellant was not confiscated because there was no reason to do that.

Appellant's submissions

[24] The appellant's counsel submitted that there is a misconception that when an accused person is granted bail, that is his attainment of freedom. It was submitted that such an accused enjoys limited freedom under the custody of conditions imposed by the courts. It was further submitted that primarily, bail was refused because of the fear that

the appellant will abscond. Counsel referred to previous cases, *S v Pienaar*², *State v Epaphraditus Unengu*³ and *S v Swanepoel*⁴ where despite, they being serious cases, bail was granted. It was submitted that the refusal of bail was a misdirection because the appellant had the opportunity after he became aware of the investigation against him until his arrest and did not abscond. Further, that the court erred in finding that the appellant 'has the money elsewhere and that he can take that money and move to another country where he can start a new life.' It was submitted that there was no evidence supporting that. Counsel submitted that the magistrate committed a serious misdirection by finding that the appellant was of the 'view that even if he had stolen money, that money is not public money'. It was submitted that the appellant never admitted that he stole money nor did he plead to that effect.

[25] It was submitted that there was a serious misdirection by the magistrate to rely on s 61 of the CPA where the court found that there was a likelihood that the accused will abscond. Counsel submitted that a s 61 enquiry is only permissible in the event where the court is satisfied that an accused is not likely to interfere or abscond.

[26] Counsel criticized the magistrate to have erred by relying on hearsay evidence and finding that there was a strong prima facie case. He submitted that the magistrate did not reject the exculpatory explanation of the appellant and further, no single witness statement was handed up in support of the evidence of the investigating officer that there was a strong prima facie case. Further, that it was a misdirection to find that it will not be in the public interest to grant bail where it was not proved that the appellant will abscond; that he will interfere with the investigation and/or cause harm or danger to society in one way or another.

[27] In conclusion, it was submitted that the court a quo erred and committed a gross irregularity by not making an explicit finding that there was no evidence that the appellant will interfere with the investigation, particularly where the State did not rely on

² *S v Pienaar* (CA 30/2010) [2010] NAHC 135 (5 October 2010).

³ *Unengu v State* (CA 38/2013) [2013] NAHCMD 202 (18 July 2013).

⁴ *S v Swanepoel* 2004 (10) NCLP 104.

and did not tender cogent and objective evidence to that effect. Further, the court failed to consider that the investigation was almost finalized and that the administration of justice would be served by the release of the appellant pending his trial.

Respondent's submissions

[28] Counsel for the respondent referred the court to the provisions of s 65(4) of the CPA, as amended, and that this court does not have an unfettered discretion to interfere with the lower court's decision to grant or refuse bail but only do so when 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.⁵

[29] It was submitted that the magistrate's decision was not wrong as he cannot be faulted for invoking s 61 of the CPA considering that fraud, one of the charges the appellant is facing, is covered in Part IV of the CPA. In relation to the section, it was submitted that the requirement for applying it are at least threefold namely:

- a. The accused must be in custody
- b. Such custody must be in respect of any offence referred to in Part IV of Schedule 2 of the CPA; and
- c. He or she must apply for his or her release on bail.

[30] Further, counsel submitted that there is no impediment for the magistrate to make a finding in terms of s 61 after finding that there was a risk of absconding. Counsel submitted that no authority was provided in support of the contention. It was further submitted that the magistrate was alive to the principles applicable to bail applications as was recently re-iterated in the Supreme Court case of *S v Gustavo*⁶.

⁵ *Unengu v The State* CA 38/2013 delivered 18 July 2013; *S v Gaseb* 2007 (1) NR; *S v Miguel and Others* 2016 (3) NR 732 (HC).

⁶ *S v Gustavo* (SA 58/2022) [2022] NASC (2 December 2022) para 46.

[31] In addition, it was submitted, that the magistrate extensively teased out a number of relevant factors that she considered in the bail application before coming to the decision to refuse bail on the basis that it was not in the interest of the public or the administration of justice contrary to the claims that she did not carry out an all-encompassing enquiry as required by law.

[32] Further, that there was no error or misdirection by relying on hearsay, considering what was held in the recent Supreme Court judgment that:

[46] The procedure in bail applications is less formal than a trial. The evidentiary material presented in a bail application need not comply with the rules governing the admissibility of evidence. The State is not obliged to prove its case against an accused in bail proceedings, but would need to demonstrate through credible evidence the strength or apparent strength of its case with reference to the evidence in its possession in the form of witness statements and documentary evidence.⁷ This evidence is usually given through the investigating officer and is what occurred in these proceedings’.

[33] Finally, that there is nothing in the record from which it can be concluded that the court a quo took into account irrelevant considerations, disregarded relevant considerations and applied the law wrongly or considered facts wrong.

Discussion

[34] The appellant did not dispute that he was employed at Standard Bank as a team leader and that he assisted colleagues to reset passwords. In the case of *Boulter v State*⁸ 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

⁷ *S v Yugin & others* 2005 NR 196 (HC). See also *De Klerk v State* (CC 06/2016) [2017] NAHCMD 67 (9 March 2017).

⁸ *Boulter v State* (HC-MD-CRI-APP-CAL-2021/00045) [2021] NAHCMD 330 (15 July 2021).

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] The magistrate correctly summarized the evidence, considered and applied the principles applicable in bail applications and made certain findings. This court’s task is to adjudicate the matter to determine if the magistrate was wrong not to grant bail in the circumstances.

[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.⁹ It is not for a court, hearing a bail application, to determine the innocence or guilt of an accused. That is for a trial court to decide. In this regard, the magistrate agreed with the prosecution that there is evidence that the appellant committed the offences he is charged with. This was not for her to adjudicate, but to decide if there was a strong or weak prima facie case. This was a misdirection. She, in fact, pre-judged on the guilt of the appellant.

[37] The magistrate found that the evidence of the State is factual as there is, what she called, a paper trail and evidence showing how the appellant moved money from one account to another and eventually withdrawing this money from an ATM from the accounts where he initially transferred it into’. She found that there is not a strong likelihood that the appellant will interfere with investigations as most of the investigation was concluded. She drew an inference that the money is somewhere and the appellant, if granted bail, he can take that money to another country where he can start a new life. This inference is another misdirection, wrong and based on the unfounded speculation of the investigating officer. Although, there is strong prima facie evidence that the appellant may have appropriated the money, there is no strong evidence that he withdrew or will withdraw the relevant money and move to another country. He has

⁹ *S v Acheson* 1991 NR 1 (HC) at p19 D-E.

strong ties in Namibia and never visited another country. We have already stated above, that the fact that he is seen withdrawing money, was not strong to prima facie prove that it relates to withdrawing alleged stolen money.

[38] The magistrate, further, found that the money is public money because it belonged to members of the public in deciding whether or not it would be in the interest of the public to release the appellant on bail. This finding is also wrong. She considered if he was a flight risk in view of the fact that he offered to report regularly to the police, if released on bail. Further, she considered what weight to attach to the ipse dixit to stand his trial. She mentioned that even if the appellant had stolen that money, that the money is public money. In this regard, the accused denied the allegation that he stole the money. This consideration is therefore irrelevant. She found that should he be released on bail, he may decide to be a fugitive from justice and not stand his trial. The alleged stolen money cannot be labelled public money simply because it belonged to members of the public. It remains money of private individuals and/or to the bank as an entity.

[39] Lastly, she considered whether or not it will be in the interest of the public and administration of justice in accordance with s 61 of the CPA with reference to *Nghipunya v Minister of Justice*¹⁰ and *S v Gustavo* (supra). She found the State's case appeared to be strong, a strong likelihood to be convicted, receive a heavy sentence and therefor may abscond and not stand his trial. The enquiry of the magistrate in terms of s 61 is not a misdirection because fraud is included in the crimes listed in Part IV schedule 2 of the CPA. The overarching consideration in any bail application is, after all, to determine if it will be in the interest of the administration of justice or the public interest to grant bail.

[40] 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

¹⁰ *Nghipunya v Minister of Justice* (HC-MD-CIV-MOT-GEN-2021/00343 [2022] NAHCMD 510 (14 October 2022)).

granting bail. We endorse what was stated in *S v Hlongwa*¹¹ 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'.

[41] 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*¹²: 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*¹³ 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 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'.

[42] 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

¹¹ *S v Hlongwa* 1979 (4) SA 112 D. See also: *Immanuel v State* (CA 41/2013) [2013] NAHCMD 254 (12 September 2013) p 10.

¹² *Nghipunya v S* (HC-MD-CRI-APP-CAL-2020/00077) [2020] NAHCMD 491 (28 October 2020) para 55.

¹³ *S v Yugin and Others* NR 196 (HC) p. 200A-F.

in the interest of either the public or the administration of justice to release an accused on bail...¹⁴

[43] The crime of fraud is indeed a serious offence. It emerged that in the present case, the State has a strong prima facie case against the accused and if convicted, the likelihood of a heavy sentence is inescapable. It, however, emerged from the investigating officer's evidence that the case is not that strong without outstanding forensic evidence still to be obtained. Although these are relevant factors, they are not the only factors to consider. The investigating officer testified that the appellant did not interfere or attempt to interfere with investigations. Further, there is no evidence that he attempted to escape although he was arrested more than two months after he became aware of the investigation against him. At the time of his bail application, most of the investigation was completed and witness statements were obtained. The appellant proved that he is a Namibian citizen with no ties outside the country. The inference by the magistrate that he has the money somewhere and if granted bail, he can take that money and move to another country where he can start a new life is, with respect, wrong. We have already alluded to the misdirection of the magistrate in this regard. No money was found with the appellant and no assets bought with the alleged stolen money traced.

[44] The fear that the appellant will hide BOB cards is also unsubstantiated. This fear can be addressed by imposing bail conditions. The video footage, although strong evidence, does not prima facie confirm that he transacted with the allegedly stolen money *per se*. Further, the magistrate was of the view that there is a real possibility that the appellant will not stand his trial. She stated that even if she is wrong in coming to that conclusion, she agreed with the submission that it would not be in the interest of the public to release him on bail. She further considered the fact that the appellant spent five months trial awaiting and that it could be longer because the investigation might take longer. She considered it as consolation that the period of pre-trial incarceration may reduce the likely sentence.

¹⁴*S v Nghipunya* (supra).

[45] We endorse what Liebenberg J stated in *S v Nghipunya* (supra):

'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 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'.¹⁵

[46] The magistrate did not consider to grant bail with conditions despite the appellant's undertaking that he is prepared to adhere to it. The fears expressed by the investigating officer in relation to money that could possibly be moved were unfounded as already pointed out. Despite there being a strong *prima facie* case, it was wrong for the magistrate not to consider bail with stringent conditions and is a misdirection and wrong. We find the appellant to be a good candidate for bail with stringent conditions to curb the fear of a likelihood of absconding.

[47] Having carefully considered the grounds and factors for and against bail, relevant to the case at hand, the appeal court is satisfied that the appellant is a candidate for bail.

[48] In the result:

1. The appeal against the refusal of bail is upheld.
2. The decision of the Magistrate Court held at Rundu, to refuse the appellant bail, is set aside and substituted with the following:

¹⁵ See: *S v Nghipunya* (supra)

- 2.1 The appellant is granted bail in the amount of N\$25 000 (twenty five thousand) on the following conditions;
- 2.2 The appellant must hand his passport to the investigating officer and should not obtain any travelling documents until the finalization of this case;
- 2.3 The appellant must report himself three times a week, on Mondays, Wednesdays and Fridays between the hours of 08h00 and 18h00 to the Investigation Officer at the Rundu Police Station;
- 2.4 The appellant is not allowed to leave the district and area of Rundu without a written permission from the Investigating Officer;
- 2.5 The appellant should not interfere with State witnesses or with police investigations;
- 2.6 The appellant must hand over the BOB cards (credit or debit cards) of his son, Jose De Almeida Santos and the late Da Fonseca to the investigating officer if he is in possession thereof;
- 2.7 The appellant must attend court on the date that his case is remanded to and every subsequent date of postponement thereafter;
- 2.8 The matter is removed from the roll and regarded finalised.

H C JANUARY
JUDGE

D N USIKU

APPEARANCES

APPELLANT: K Amoomo
Of Kadhila Amoomo Legal Practitioners,
Windhoek.

RESPONDENT: E Moyo
Of the Office of the Prosecutor-General,
Windhoek.