



REPORTABLE

CASE NO: SA 58/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

STATE

Appellant

and

RICARDO JORGE GUSTAVO

Respondent

Coram: MAINGA JA, SMUTS JA, and HOFF JA

Heard: 14 November 2022

Delivered: 2 December 2022

Summary: The respondent is arraigned together with nine other natural persons and 18 corporate entities on a number of charges (ie including racketeering under the Prevention of Organised Crime Act 29 of 2004 (POCA), money laundering under POCA, other contraventions of POCA and the Anti-Corruption Act 8 of 2003, fraud, fraud in the form of tax evasion and conspiring to commit crimes and theft). Vast sums of money are alleged to be involved in the commission of these offences. The indictment alleges the sum of N\$150 million is involved in offences levelled against the respondent. After the respondent's arrest, he applied for bail in the Magistrates' Court on 22 May 2020 which the State opposed. On 3 June 2020, the magistrate, exercising that court's discretion under s 61 of the Criminal Procedure Act 51 of 1977 (the CPA), declined to admit the respondent to bail on the grounds that it would not be in the

interest of the public or the administration of justice for him to be released on bail. The respondent appealed against the Magistrates' Court's ruling in the High Court – primarily attacking the magistrate's finding that it would not be in the interest of the public or the administration of justice to release him on bail. In his bail appeal, respondent argued that 'white collar crimes' fell outside the ambit of s 61 which was rather confined to cases involving violence such as murder, robbery and rape. This argument was rejected, given the express wording of s 61 of the CPA which explicitly includes fraud where the amount involved exceeds N\$600. The court per Miller, AJ further found that the charges faced by the respondent are inherently serious, not only in relation to the vast sums of money involved but also by reason of the manner in which the offences were allegedly committed, and that the respondent has a *prima facie* case against him which allegations remain largely unanswered as he had declined to answer several questions put to him in cross-examination. Miller, AJ dismissed the appeal. As the criminal case against the respondent and his co-accused was referred to the High Court, the respondent applied for bail to the High Court, basing the application on new facts (ie that there would be no threat of interference on his part because the investigation was completed; secondly, that the respondent has various medical ailments he had suffered while in custody, including contracting Covid-19; thirdly, he pointed out that two cases had been joined (ie CC 6/2021 and CC 7/2021) into a single trial which would mean that the trial would be protracted. The respondent contended that this amounted to an infringement of his constitutional right to a fair and speedy trial. In the fourth instance, it was stated that the State has added additional charges not canvassed in the initial bail application; and finally, it was stated that the respondent's personal circumstances had deteriorated exponentially whilst incarcerated over the previous two years). The respondent gave evidence on the new facts and repeated much of his previous evidence on not being a flight risk. For the State, Mr Kanyangela of the Anti-Corruption Commission (the ACC) gave extensive evidence also including documentary evidence which had become available to the ACC. Respondent further indicated his willingness to be monitored by a Global Positioning System device (GPS) if admitted to bail. There was no specificity provided as to the type of device, its identity, efficacy, effectiveness and the legal framework for its operation. The State opposed the use of an unspecified device of that nature as a condition for bail. This new bail application served before Oosthuizen, J. The court *quo* in reaching its decision dealt with the requirement of being in the interest of the public or the administration of justice for a court to exercise its discretion to refuse bail

as provided for in s 61 of the CPA - finding that the 'public interest for consideration by the court in bail applications is the common law as pronounced by the courts and the provisions of the Constitution and legislation'. The court granted the respondent bail of N\$800 000 subject to several conditions restricting the respondent's movements, ability to travel and to not have any contact with State witnesses and including that the respondent should wear a GPS device. The State is appealing against this decision.

On appeal, this Court must determine whether the court *a quo* exercised its discretion to grant bail wrongly or not?

Held that, in dealing with applications for bail, a court engages in a balancing exercise – by balancing the need to preserve the liberty of individuals presumed to be innocent until proven guilty and the interests of due administration of justice on the other hand. In this latter regard, relevant considerations are the seriousness of the offence and the strength of the State's case as well as whether the accused will stand his or her trial, and the likelihood of interference with the investigation and witnesses and also the likelihood of similar offences being committed by the accused. By engaging in this balancing process, the courts exercise a discretion to decide whether a person in custody awaiting trial should or should not be released on bail pending that trial.

Held that, s 61 of the CPA is to be viewed in its legislative context, thus expanding the range of offences in respect of which the Prosecutor-General could previously effectively deny bail and thereby substitute the considerations of public safety and the maintenance of law and order with the broader concepts of the 'interest of the public' and the 'administration of justice'.

Held that, seeking to confine s 61 of the CPA to cases involving violent crime and public safety, as the respondent would have it, is contrary not only to the offences expressly included within its ambit but also fails to take into account the legislative history and the purpose of its introduction, affording the court wider powers to refuse bail in the context of escalating crime.

Held that, whilst the concept of the interest of the public is wide and difficult to define and given the statutory purpose behind the provision, it is clear that it embraces more than considerations of public safety, given the express inclusion of economic crimes

within its ambit and the manner in which the provision has been interpreted by the courts since its introduction.

Held that, the purpose of s 61 of the CPA was after all to afford the courts the power to refuse bail even if an accused has shown on a balance of probabilities that he or she will not abscond or interfere with the investigation or witnesses. The court is afforded the power to do so in the interest of the public or administration of justice. The statutory context and purpose in interpreting that phrase is thus the context of a court exercising the power to refuse bail even where the court is satisfied that it is unlikely that an accused will abscond or interfere with the investigation.

Held, although the CPA does not specifically deal with bail application based on new facts, s 65(2) does so indirectly. It precludes an appeal in respect of new facts which arise or are discovered after the decision against which the appeal is brought. An accused is required to first place those facts before the court against whose decision an appeal is brought.

Held that, this Court follows the approach in *Shanghala & others v State* (CC 6/2021) [2022] NAHCMD 164 (1 April 2022) in respect of bail applications based on new facts as was correctly stating the position - as being facts which did not exist as at the hearing of the earlier bail application and that a court would then consider all the facts which an accused has placed before the court – new and old – and decide on the totality of those facts.

Held that, the court below was thus required to consider the five new facts brought before it against the totality of all the facts and come to a conclusion. If the new facts did not establish a new perspective or impact upon the old facts, it was not open to the court to admit the respondent to bail.

Held that, the court *a quo* only referred to two of the new facts in the judgment and then only in very brief terms. The court *a quo* failed to explain the impact of these new facts when viewed against the totality of the facts, nor did it conclude that the new facts impel the court to admit the respondent to bail. It was incumbent of the court *a quo* to do so. The failure to do this of its own constitutes a misdirection and shows that the discretion was wrongly exercised. Neither fact individually or viewed cumulatively

together could lead to such a conclusion in the context of the prior decision not to grant bail.

Held that the acceptance by the court below of the respondent's offer to wear a GPS was unsatisfactory in that no evidence was placed before court concerning which type of device would be used, its efficacy and effectiveness, its availability and how and in what manner it would be monitored. The court also failed to take into account that the State opposed the unspecified offer. The order itself in this regard was vague and not properly enforceable, given the respondent's release was not conditional upon a device being in place.

Held that it was also a misdirection on the part of the court below by failing to take into account the evidence and opinion of the investigating officer and particularly concerning the seriousness of the charges and the strength of the case against the respondent.

Held that, the rule of law, a foundational principle of our Constitution and the principle of accountability inherent in our constitutional values require the State to prosecute those who transgress the law without fear or favour in order to uphold and protect the Constitution itself. The interest of the public is served by the State addressing serious crime and the scourge of corruption within the operation of the rule of law.

Held that, the allegations against the respondent are gravely serious and involve vast sums of money (some N\$150 million) and criminal conduct directed at diverting State resources for the benefit of the respondent and certain co-accused within a syndicate involving ministers of State. A strong *prima facie* case was made out by the investigating officer of the respondent's alleged involvement in corrupt and criminal conduct on a massive scale in the context of the Namibian economy.

Held that, the court *a quo* failed to take into account the seriousness of the charges against the respondent and the impact of the criminal activity and its scale upon the public and the interest of the public being so adversely affected by the alleged commission of those offences as well as the deleterious impact upon the rule of law and accountability in which the public have an interest.

The discretion exercised by the court below in respect of the criteria of s 61 of the CPA should not have arisen because the new facts did not result in their reconsideration. If anything, the evidence reinforced the earlier decision in that regard. The discretion concerning s 61 was wrongly exercised as it was based on wrong principles.

Given these misdirections, all of which were material, it is clear that the decision of the court below was wrong and falls to be set aside.

Held that, the appeal against the judgment of the High Court succeeds and its order granting the respondent bail is accordingly set aside.

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and HOFF JA concurring):

Introduction

[1] The State appeals against the granting of bail to the respondent. The State appeals with the leave of this Court obtained on petition after leave to appeal was refused by the High Court.

[2] The respondent has been arraigned together with nine other natural persons and 18 corporate entities on a number of charges, including racketeering under the Prevention of Organised Crime Act 29 of 2004 (POCA), money laundering under POCA, other contraventions of POCA and the Anti-Corruption Act 8 of 2003, fraud, fraud in the form of tax evasion and conspiring to commit crimes and theft. Vast sums of money are alleged to be involved in the commission of these offences. The indictment alleges the sum of N\$150 million is involved in the offences levelled against the respondent and a further N\$150 million where the respondent is not alleged to have been involved.

[3] The litigation history is pertinent to this appeal.

Litigation history

[4] The respondent was first arrested on 23 November 2019 but was then released on 24 November 2019 following a successful challenge to a similar warrant by a co-accused. The respondent was re-arrested on 27 November 2019.

[5] The respondent first applied for bail in the Magistrates' Court on 22 May 2020. He gave evidence in support of that application. It was opposed by the State with an investigator in the service of the Anti-Corruption Commission (ACC), Mr Cloete, also testifying. After hearing the evidence, the presiding magistrate postponed the proceedings to 26 May 2020 for oral submissions.

[6] On 3 June 2020, the magistrate declined to admit the respondent to bail on the grounds that it would not be in the interest of the public or the administration of justice for him to be released on bail, exercising that court's discretion under s 61 of the Criminal Procedure Act 51 of 1977 (the CPA). Section 61 provides:

'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.'

[7] Included in the offences listed in Part IV of Schedule 2 to the CPA are the offences of theft and fraud where the amount exceeds the amount of N\$600.

[8] The respondent appealed against that ruling by the magistrate. That appeal was heard by Miller, AJ. The appeal was primarily directed against the magistrate's finding that it would not be in the interest of the public or the administration of justice to release him on bail.

[9] According to the judgment of Miller, AJ it was argued on the respondent's behalf that 'white collar crimes' fell outside the ambit of s 61 which was rather confined to cases involving violence such as murder, robbery and rape. This argument was rightly rejected, given the express wording of s 61 which explicitly includes fraud where the amount involved exceeds N\$600. In his careful analysis, Miller, AJ found that the magistrate correctly found that the charges faced by the respondent are inherently serious, not only in relation to the vast sums of money involved but also by reason of the manner in which the offences were allegedly committed. After examining the magistrate's conclusion that it was in the interests of the public and or the administration of justice not to admit the respondent on bail, Miller, AJ held that the magistrate did not exercise his discretion wrongly. Miller, AJ pointed out that, if convicted, the respondent would likely face a long term of imprisonment. Miller, AJ also held that a reading of Mr Cloete's evidence established a *prima facie* case against the respondent and that his allegations remained largely unanswered as the respondent had declined to answer several questions put to him in cross-examination, mainly on the basis that he had not received a full disclosure of the evidence to be tendered at the trial. The appeal to Miller, AJ heard on 17 July 2020, was accordingly dismissed on 28 July 2020.

The present proceedings

[10] After the criminal case against the respondent and his co-accused was referred to the High Court, the respondent applied for bail to the High Court, basing the application on new facts. This application was heard by Oosthuizen, J in mid-November 2021 with oral submissions made on 25 November 2021.

[11] The new facts were five fold. Firstly, the completion of the investigation was raised, with the respondent contending that there would be no threat of interference on his part.

[12] In the second place, the respondent referred to various medical ailments he had suffered while in custody, including contracting Covid-19.

[13] It was thirdly pointed out that two cases had been joined (CC 6/2021 and CC 7/2021) into a single trial which would mean that the trial would be protracted. The respondent contended that this amounted to an infringement of his constitutional right to a fair and speedy trial.

[14] In the fourth instance, it was stated that the State has added additional charges not canvassed in the initial bail application.

[15] Finally, it was stated that the respondent's personal circumstances had deteriorated exponentially whilst incarcerated over the previous two years.

[16] The respondent proceeded to give evidence on those new facts, but also repeated much of his previous evidence on not being a flight risk. This despite the finding of the magistrate that he was not considered a flight risk. The respondent

referred to the joinder of cases CC 6/2021 and CC 7/2021. The one case essentially related to the events surrounding Namgomar Pesca and the other concerned Fishcor. He pointed out that none of the charges relating to Fishcor had been preferred against him. He referred to a total of 175 witnesses listed in the Namgomar case and 167 witnesses in the Fishcor matter, with about 20 witnesses overlapping and thus set to testify in both matters. The respondent complained that the scheduled proceedings would be gravely protracted, adversely affecting him and being unfair to him.

[17] The respondent spoke of his changed circumstances since incarceration, with reference to his reduced financial circumstances and the impact of that upon him and his family and his intention to obtain employment if granted bail. He also gave evidence concerning the circumstances of his incarceration at the Windhoek Correctional Facility and a deterioration in his health. He had contracted Covid-19 in prison and complained that Covid-19 protocols were not fully observed. His blood pressure had also deteriorated and that he suffered from excessive fatigue in the aftermath of Covid-19. He also said he suffered from pulmonary embolisms. He was in a single cell and was concerned that a medical emergency could arise at night which could go unnoticed.

[18] The respondent also referred to new charges pursued against him since the previous bail application. Those charges included racketeering (under POCA) in which was alleged to be the *de facto* owner of an entity Namgomar Pesca Namibia (Pty) Ltd (Namgomar), which he denied. He acknowledged he was a director of that entity but denied being a shareholder. He claimed that an Angolan entity is the holding company of that entity. He also referred to a cooperation agreement between the Angolan holding company and Samherji, an Icelandic fishing concern which did fishing on

behalf of Namgomar. He pointed out that he was not a party to this and other related agreements, including one with a subsidiary of Samherji, called Esja Holdings.

[19] The respondent stated that as a director and employee of the Namibian entity (Namgomar), he merely operated on instructions from a representative of the Angolan holding company. His task, he said, was to make sure the Namibian entity complied with regulatory and fiscal requirements.

[20] The respondent accepted that the alleged Angolan holding company received fishing quotas of some 50,000 metric tonnes over a six year period and said this was but a small percentage of the total allowable catch over those years and according to him would not have resulted in the job losses in the fishing industry which had been laid at his door and of the other accused on social media and in protests against them.

[21] The respondent was cross-examined at length and discursively by the State concerning the new charges and email correspondence and other documentation which had become available to the State concerning those charges. The respondent conceded that he had benefitted to the tune of some N\$22,5 million through his involvement in the activities of Namgomar but denied it was as a consequence of illegal activity on his part. This despite refuting that he had received some N\$14 million from Namgomar at the previous bail hearing. The respondent again in the present proceedings declined to be drawn on several questions and expressly stated he would rather wait for 'the appropriate time where I have got my own records in place that can support and substantiate any answer that I would give to such a question' and conceded that his approach to answering questions was 'tactical'.

[22] When confronted with email correspondence directed or copied to him, he conceded that he was aware at the time of the involvement of a fellow accused (Mr James Hatuikulipi) in a corporate entity (Tundavala Investments) in Dubai which was alleged to have received substantial payments (exceeding U\$4 million) from the Samherji group arising from the alleged offences.

[23] This answer stands in stark contrast to his replies given at the earlier hearing when the documentation in question was not as yet available. At the earlier bail hearing when asked about Tundavala Investments receiving payments, his response was initially to deny knowledge of its existence by stating '(W)ho is Tundavala Investments?'. When then asked if he was not aware that it was owned by his fellow accused (Mr Hatuikulipi), he then answered that he became aware of it 'in the charges that were levelled against me'. When then asked if he was aware of a company by that name owned by Mr Hatuikulipi in Dubai, he then answered, 'I believe those are the allegations that were placed against him'.

[24] Apart from being cross-examined at length about the additional charges, the respondent did not face much cross-examination on the other new facts relied upon.

[25] The officer-in-charge of the Windhoek Correctional Facility was called by the State to give evidence on the conditions in the facility. He testified about Covid-19 protocols and the fact that the respondent was permitted to consult his own private medical professionals. He also testified that facilities to consult legal practitioners were adequate and that space was made available for the accused in the case to store voluminous documentation disclosed to them.

[26] The Chief Investigating Officer with the ACC, Mr Kanyangela also testified at the hearing. His evidence centred on documentary evidence which had become available to the ACC, including emails obtained from Mr Hatuikulipi's cloud storage connected to his cellular phone. He also gave evidence of the statements he had obtained relating to the respondent and his role in the alleged offences. His evidence was, as was noted by the High Court, with reference to statements and documents, to the effect that the respondent was a 'member of sophisticated syndicate whose criminal activities had a devastating and crippling effect on the economy and state resources'. He referred to the witness statement of Jóhannes Stefánsson of Samherji to the effect that, when 'the Namgomar project' was set up, the respondent together with certain of his co-accused attended meetings where they discussed how the Samherji group and his co-accused would benefit from that 'project'.

[27] Mr Kanyangela testified that between 2011 and 2014 the Minister of Fisheries could not allocate fishing quotas to non-right holders. As a consequence the accused jointly came up with a scheme of putting in place a bilateral agreement between Namibia and Angola, as devised by his co-accused Mr S. Shanghala, then Chairperson of the Law Reform and Development Commission and later Attorney-General and Minister of Justice. A memorandum of understanding (MoU) was subsequently signed between the two governments represented by their respective Minister of Fisheries. The Namibian minister at the time is a co-accused of the respondent and the son of the Angolan minister is alleged to have participated in the scheme. Namgomar Pesca SA, supposedly an Angolan entity, was nominated to receive quotas under the MoU. Mr Kanyangela testified that he had received a statement from the head of Interpol in Angola that no such entity existed.

[28] He also testified that the respondent together with co-accused, Messrs Shanghala, Hatuikulipi and another accused, met in Iceland with Mr Stefánsson of Samherji where a catching agreement was signed in 2014 between Namgomar and the Samherji group. This agreement entailed a usage fee (of the quota) of N\$500 per metric ton. This fee was to constitute 25 per cent of the total fee being payable to Namgomar, with the remaining 75 per cent of the fee to be paid to Tundavala Investments in Dubai – an entity in which Mr Hatuikulipi had an interest. Mr Kanyengela referred to emails which set out how this 75 per cent portion was to be paid and pointed out that the respondent was copied on certain of these. He also testified that the respondent, after receiving funds from the Samherji group on behalf of Namgomar, disbursed funds from Namgomar to the other accused or entities in which they had an interest.

[29] Mr Kanyengela also gave evidence of the respondent addressing letters on behalf of Namgomar Pesca SA – the entity nominated to receive quotas pursuant to the MoU – to the Ministry of Fisheries, representing that Namgomar Pesca SA was a joint venture between Namibians and Angolans, which was the basis for the ministry to award those quotas to that alleged entity. (The respondent however said in his evidence that there was no such joint venture).

[30] Mr Kanyengela also testified that the respondent had said in his warning statement that he was in fact born in Angola, although his identity document indicated that he was born at Oshakati. Mr Kanyengela spoke of the respondent having business and other connections in Angola which was confirmed by the respondent in his evidence. Mr Kanyengela also said that the border between Namibia and Angola was porous and that Namibians could freely cross the border without being in

possession of a passport. Mr Kanyengela was concerned that the respondent would be a flight risk in view of the serious charges faced by him, supported by more documentary evidence than previously in the possession of the State and the likelihood of a lengthy custodial sentence being imposed upon him. He testified that the case against the respondent was very strong. He pointed out that the sums of money involved in the offences were vast and according to the State's case amounted to the looting of natural resources on a large scale for the benefit of the respondent and his co-accused.

[31] When asked about the issue of public interest when giving his evidence, Mr Kanyangela testified that the interest of the public extended to their expectation that accused persons 'in higher positions' or who were well connected should be held accountable for corrupt activities and be subject to the full force of the law.

[32] During his evidence, the respondent indicated his willingness to be monitored by a GPS monitoring device if admitted to bail. No specificity was provided as to the type of device, its identity, its efficacy, effectiveness and the legal framework for its operation. The State opposed the use of an unspecified device of that nature as a condition for bail.

Approach of Oosthuizen, J

[33] The High Court, per Oosthuizen, J granted the respondent bail of N\$800 000 subject to several conditions restricting the respondent's movements and ability to travel and not to have any contact with State witnesses. The court also ordered that the respondent must at his own costs 'affix a personal GPS device to . . . (his) wrist or ankle in order to acquire the ability to monitor the movements of the accused 24/7 (at

all hours), alternatively the State shall be allowed to affix an advanced GPS device to the vehicle(s) which the accused is going to use while on bail and the accused is obliged to identify such vehicle(s). The fixing of the GPS device shall not suspend the accused being released on bail but serve as an incentive to acquire easy monitoring capability as soon as possible in the interest of the proper administration of justice'.

[34] Most of the High Court's judgment deals with the requirement of being in the interest of the public or the administration of justice for a court to exercise its discretion to refuse bail as provided for in s 61 of the CPA.

[35] The court held in this regard: 'The public interest for consideration by the court in bail applications is the common law as pronounced by the courts and the provisions of the Constitution and legislation.' The court proceeded to refer extensively to Art 1 and other provisions in the Constitution which protect persons from arbitrary arrest and detention, protect human dignity and equality and the right to a fair trial and the independence of the courts. The court summarily concluded:

'Public interest a court of law should consider is contained in the above summation of some of our constitutional principles. A public outcry which fell foul of the above principles deserves no accreditation or consideration by our courts.'

[36] The court, after referring to the charge against the respondent as serious, equivocated concerning the strength of the State's case against the respondent. Initially the court expressed the view that the State's case against the respondent 'is arguably strong, although according to the applicant, he is innocent'. Much later in the judgment the court however stated:

'I am not convinced thereof that the accused will be found guilty of all or some of the offences charged with. It is common cause that I do not sit as a judge in the criminal case. I adjudicate on a bail application.'

[37] The court made much of the respondent's offer to be monitored by way of a GPS device and incorporated that in the conditions it set for bail, although it was less than compulsory, given the wording of the order. The court in two brief paragraphs towards the end of the judgment referred to two of the new facts upon which the application was based. It merely acknowledged that the investigation was completed and referred to the duration of the trial, given some 300 state witnesses listed and expressed the view that it would take from two to four years to complete.

[38] The State timeously applied for leave to appeal against this judgment. That application was heard on 11 March 2022 and judgment reserved to 29 April 2022. On that date, the delivery of the ruling was postponed to 24 May 2022 when a brief two page ruling refusing leave was handed down. The State thereafter petitioned this court on 14 June 2022 for leave to appeal which was granted shortly thereafter and the appeal was set down for hearing in the following term on 14 November 2022.

Submissions on appeal

[39] Counsel for the State stressed that the application before the court below was not a fresh bail application but one based on the listed five new facts. Counsel argued that the court was required to determine whether those listed facts brought a new dimension to the enquiry as to whether bail should be granted or not. It was argued that the court below had failed to do so. It was submitted that the aspect which held considerable sway for the court was the respondent's offer to wear an unspecified GPS device. Counsel pointed out that the respondent had the onus to show that he

should be admitted to bail and that this offer was not a new fact raised and pointed out that no evidence was tendered as to the identity, nature, efficacy and effectiveness of any such device or as to the legal basis for its enforcement.

[40] It was also contended on behalf of the State that the principal reason for the refusal of bail by the magistrate was on the grounds of interest of the public as provided for in s 61 of the CPA. Counsel argued that this aspect had worsened for the respondent, given the further evidence of a documentary nature linking the respondent to being part of a criminal syndicate to harvest the natural resources of the country to benefit themselves. This evidence had not been available when the application for bail served before the magistrate. Counsel submitted that the State's case against the respondent was strong, and referred to his failure to comment upon or answer to key aspects of the allegations against him.

[41] Counsel for the State argued that the court had wrongly applied its discretion to the enquiry and that the order should be set aside.

[42] Counsel for the respondent on the contrary argued that the State's appeal should fail for three reasons. Firstly, it was argued that the decision to grant bail to the respondent entailed the exercise of a narrow discretion by the High Court and that a court of appeal should only interfere with it when the lower court had exercised its discretion injudiciously. Counsel contended that Oosthuizen, J had exercised his discretion judiciously.

[43] In the second place it was argued that even if the discretion vested in the High Court was not of a narrow nature, the judgment and order of the High Court was correct and should not be overruled.

[44] Counsel for the respondent, in supporting the judgment of the High Court, submitted that the High Court identified the correct principles concerning bail and applied them. As to the 'interest of the public' criterion contained in s 61, counsel argued that the State had not placed any evidence in support of the notion that the interest of the public would be undermined if bail were granted, such as continuing violence which may occur in the context of 'taxi-wars' – a phenomenon experienced at times in South Africa. There was also no evidence, counsel argued, to show that the administration of justice would be adversely affected by admitting the respondent to bail. There was also no suggestion that the respondent could abscond according to respondent's counsel.

[45] Thirdly, it was submitted that even if the appeal were to be meritorious, it would serve no practical effect should it succeed as the respondent would again apply for bail and it was argued that such an application would invariably succeed. This was, according to counsel, because the State did not allege that the respondent had breached his bail conditions in the period of nearly one year which followed the granting of bail. In support of this contention, counsel cited *Attorney-General, Free State v Ramokhosi*¹ where the Supreme Court of Appeal in South Africa (the SCA) had held that if the bail appeal in that matter succeeded, the respondent would, as a strong probability, be released on bail. The SCA held that, in the event of that appeal succeeding, it would cause inconvenience and expense for the respondent and unduly

¹ *Attorney-General, Free State v Ramokhosi* 1999 (3) SA 588 (SCA).

burden the court and not have any practical effect. Counsel argued that this appeal was on all fours with *Ramokhosi*.

Principles applicable to bail

[46] Chapter 9 of the CPA contains a detailed framework concerning applications for bail and the effect, rules and consequences of bail. The general principles relating to bail and this chapter are succinctly summarised in a recent judgment of the High Court majority in *Nghipunya v Minister of Justice & others*² and do not bear repetition in this judgment. Suffice it to say that in bail proceedings, a court engages in a balancing exercise – by balancing the need to preserve the liberty of individuals presumed to be innocent until proven guilty and the interests of due administration of justice on the other hand. In this latter regard, relevant considerations are the seriousness of the offence and the strength of the State's case as well as whether the accused will stand his or her trial, and the likelihood of interference with the investigation and witnesses and also the likelihood of similar offences being committed by the accused. By engaging in this balancing process, the courts exercise a discretion to decide whether a person in custody awaiting trial should or should not be released on bail pending that trial.³

[47] This balancing exercise boils down to an enquiry whether or not an applicant in the particular circumstances of each case is a worthy candidate for bail. The accused bears the onus to show that and would need to establish that and on a balance of probabilities.

² *Nghipunya v Minister of Justice & others* (HC-MD-CIV-MOT-GEN-2021/00343) [2022] NAHCMD 510 (14 October 2022).

³ *S v Ramgobin & others* 1985 (3) 587 (N) (Full Bench) at 588.

[48] Chapter 9 of the CPA does not prescribe the precise procedure to be followed. The courts have over a considerable period of time developed precedent and principles governing bail applications. The objective of a bail application is not to determine the guilt of an accused but for a court to exercise its discretion in the balancing exercise between the competing considerations of the liberty of an accused and the administration of justice. The question of possible guilt at the stage of bail concerns a court only to the extent that it may bear upon where the interests of justice lie with regard to bail.⁴

[49] 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.⁵ This evidence is usually given through the investigating officer and is what occurred in these proceedings.

The introduction of s 61

[50] Section 61, as it was previously worded at the adoption of the Constitution, effectively permitted the erstwhile Attorney-General (now the position of the Prosecutor-General) to prevent the granting of bail in certain offences. This provision was plainly not compatible with the Constitution. The legislature thereafter passed Act 5 of 1991 repealing that provision and introduced s 61 in its current formulation.

⁴ *S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) para 11.

⁵ *S v Yugin & others* 2005 NR 196 (HC). See also *De Klerk v State* (CC 06/2016) [2017] NAHCMD 67 (9 March 2017).

[51] Section 61 essentially authorises the court to decline bail in instances where a court considers that the interests of the public or the administration of justice justify the refusal of bail. The purpose of its introduction was thus explained at the time by the High Court in *S v Du Plessis & another*:⁶

'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.

...

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 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".

⁶ *S v Du Plessis & another* 1992 NR 74 (HC) 82F-H and 83B-E.

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.'

[52] I agree with these sentiments. Section 61 is to be viewed in its legislative context, thus expanding the range of offences in respect of which the Prosecutor-General could previously effectively deny bail and thereby substitute the considerations of public safety and the maintenance of law and order with the broader concepts of the 'interest of the public' and the 'administration of justice'. To seek to confine s 61 to cases involving violent crime and public safety is thus contrary not only to the offences expressly included within its ambit but also fails to take into account the legislative history and the purpose of its introduction, affording the court wider powers to refuse bail in the context of escalating crime.

[53] The court in *Du Plessis* correctly found that the inclusion of theft where the value exceeds N\$600 thus widened the ambit of the Prosecutor-General's pre-independence power to exclude bail in offences affecting public safety to matters involving economic crime and the devastating impact such crime can have upon the economy of the country and thus adversely affect the interest of the public. The court in *Du Plessis* referred to economic impact of economic offences upon the state as 'economic sabotage'. This approach was trenchantly followed by the full bench in *Nghipunya v State*:⁷

'The days of distinguishing between the seriousness of monetary crimes and violent crimes can no longer be seen to be different in bail applications. Whether the crimes involve public funds or a physical attack on a member of society, if the circumstances permit, the seriousness thereof must be taken into account when considering bail. In

⁷ *Nghipunya v State* (HC-MD-CRI-APP-CAL-2020/00077) [2020] NAHCMD 491 (28 October 2020) para 44 (*Nghipunya I*).

this matter, the misappropriation of public funds affects every individual of the Namibian public and needs to be seen for the detestable crime that it is. This together with the factors outlined above are essentially enough to arouse a court to the view that the administration of justice does not merit the release on bail of an applicant under these circumstances.'

[54] Whilst the concept of the interest of the public is wide and difficult to define, it is clear that it embraces more than considerations of public safety as contended by counsel for the respondent, given the express inclusion of economic crimes within its ambit and the manner in which the provision has been interpreted by the courts since its introduction, given the statutory purpose behind the provision.

Test on appeal

[55] Counsel for the respondent devoted both written and oral argument to contend that the nature of the discretion exercised by the court below was a strict or narrow one as described by this court⁸ in the context of appeals against procedural decisions. It is however not necessary to enter into the debate raised in those matters. That is because one need look no further than the terms of s 65(4) of the CPA itself as to the scope and ambit of an appeal against a decision on bail and how that provision has been interpreted, rather than consider the nature of an appeal against the exercise of a discretion in other contexts.

[56] Section 65(4) reads:

'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

⁸ *Prime Paradise International Ltd v Wilmington Savings Fund Society FSB & others* 2022 (2) NR 359 (SC) para 51; *Rally for Democracy and Progress & others v Electoral Commission for Namibia & others (RDP II)* 2013 (3) NR 664 (SC) para 106.

wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.'

[57] In construing s 65(4), the High Court has over the years⁹ accepted the approach in *S v Barber*¹⁰ dealing with the identical wording of that provision in South Africa:

'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.'

[58] This approach was correctly followed by Miller, AJ in the respondent's bail appeal from the magistrate's court and had also been consistently followed by our courts before that.¹¹

[59] It follows that the powers of this court are limited in the sense of having to be persuaded that Oosthuizen, J exercised his discretion wrongly before upsetting that decision and replaced it with the order which should have been given.

The impugned proceedings

[60] Having referred to the principles governing bail and the test to be applied by a court of appeal concerning a decision made in a bail application, I turn to the present proceedings.

⁹ *Du Plessis* at 78B-D; *S v Timotheus* 1995 NR 109 at 113.

¹⁰ *S v Barber* 1979 (4) SA 218 (D) 220.

¹¹ Para 14 of that judgment.

[61] The application which served before Oosthuizen, J was based upon the listed five new facts. It was not open to the respondent to repeat the same application made before the magistrate whose decision was confirmed by Miller, AJ. Should there be nothing new in the application, the correct course for a court would be not to entertain it.¹²

[62] The CPA does not specifically deal with bail applications based on new facts. Section 65(2) however does so indirectly. It precludes an appeal in respect of new facts which arise or are discovered after the decision against which the appeal is brought. An accused is required to first place those facts before the court against whose decision an appeal is brought. This requires a further application raising new facts. The criminal proceedings against the respondent had in the meantime been transferred to the High Court and the application based on new facts was thus launched in the High Court and served before Ooshuizen, J.

[63] The approach to be followed in applications based on new facts was correctly stated by Ueitele, J in *Shanghala & others v State*¹³ as being facts which did not exist as at the hearing of the earlier bail application and that a court would then consider all the facts which an accused has placed before the court – new and old – and decide on the totality of those facts.¹⁴

[64] The court below was thus required to consider the five new facts brought before it against the totality of all the facts and come to a conclusion. If the new facts did not

¹² *S v Vermaas* 1996 (1) SACR 528 (T) p 531. *S v Petersen* 2008 (2) SACR 355 (C) para 57.

¹³ *Shanghala & others v State* (CC 6/2021) [2022] NAHCMD 164 (1 April 2022).

¹⁴ Para 29. See also *Vermaas* at 531E-G; *Noble v State* CA 2/2014, 31 March 2014; *Samahina v State* (CA 77/2014) [2014] NAHCMD 291 (7 October 2014). *Lichenstrasser v State* (CC 9/2021) [2022] NAHCMD 28 (2 February 2022) (*Lichtenstrasser*).

establish a new perspective or impact upon the old facts, it was not open to the court to admit the respondent to bail.

[65] Only two of the new facts are referred to in the judgment of the court below and then only in very brief terms. They are however not stated to have brought about a changed dimension to the issue of bail. The two which were listed in passing are that the investigation was complete and the prospect of a much longer trial by virtue of the joinder of the two criminal trials. The completion of the investigation was a new fact but this had little or no bearing on the decision to admit the respondent to bail. The magistrate had not refused bail on the grounds of interference by the respondent in the investigation. The other new fact referred to was joining the two criminal trials which meant a longer duration of the proceedings than would have been contemplated at the initial bail application. But this new fact is likewise not referred to as having an impact – whether decisive or otherwise – upon the court in deciding to admit the respondent to bail.

[66] The court below does not explain the impact of these new facts when viewed against the totality of the facts and certainly does not conclude that they impel the court to admit the respondent to bail. It was incumbent upon the court to do so if the court was moved to admit the respondent to bail. The failure to do this would of its own constitute a misdirection and shows that the discretion was wrongly exercised. This failure arose because those new facts viewed against the totality of the facts could not have properly resulted in the court reaching its conclusion to admit the respondent to bail. Neither fact individually or viewed cumulatively together could lead to such a conclusion in the context of the prior decision not to grant bail. The fact that the trial would be more protracted because of the joinder could not of its own (or together with

the completion of the investigation) have had an impact upon the earlier refusal of bail by reason of it being in the interest of the public or administration of justice to decline it. For this reason alone, the order of the High Court falls to be set aside.

[67] The court below made much of the offer of the respondent during his evidence of his willingness to wear a GPS device. This was not one of the new facts upon which the application was brought. Indeed the only ‘fact’ it introduced was the respondent’s mere professed willingness to wear such a device. That was the extent of his offer which was raised with no further accompanying facts. This offer was in any event hopelessly unspecified. No evidence was placed before court concerning the types and nature of such devices and their availability in Namibia, their efficacy, how and in what manner monitoring would be conducted and be effective. There was also no evidence as to the legislative and regulatory framework for such devices. Furthermore, the State did not accept this hopelessly unspecified offer. This weighty factor (of the State’s position) was not properly taken into account by the court below.

[68] The entirely unsatisfactory acceptance of this vague offer is compounded by (and also demonstrated in) the lack of enforceability of the court’s order concerning the device. The release is astonishingly not conditional upon a device being in place. The further portions of the order concerning the device are vague. It was not surprising to be informed during the hearing that a GPS device is not currently being utilised by the respondent.

[69] It is evident from the court’s judgment that the offer to wear such a device was a significant factor for the court in determining to grant bail. The absence of any evidential basis for granting such order – apart from the mere offer to wear a device

not even specified – and the failure to take into account the attitude of the State concerning the offer and how it would be enforced and rendered effective amount to a further misdirection on the part of the court, also establishing that the court had exercised its discretion wrongly.

[70] A further related misdirection on the part of the court below is the failure to take into account the evidence and opinions of the investigating officer.¹⁵ There is only an indirect reference of that evidence where the court below acknowledged that the State had supplied ‘numerous documents’ which it intended to use in the trial. In the next breath, the court states that the respondent ‘was at pains to give a compelling explanation indicating innocence *per se* but then it was not his duty’. Whilst the court is correct that the respondent is not compelled to give evidence at a bail application and not compelled to provide answers which the respondent elected to do so in respect of documentation and statements of Mr Stefánsson linking the respondent to the alleged commission of economic crimes by a syndicate relating to the diversion of public funds for the benefit of the respondent and certain of his co-accused. But the failure on the part of the respondent to answer questions implicating him particularly with reference to documentary evidence can have an impact upon the assessment of whether there is a *prima facie* case against him and as to the strength and seriousness of those charges against him and whether the respondent is able to establish that he is a worthy candidate for bail.¹⁶ The failure on the part of the court below to take into account the evidence of the investigation officer concerning the seriousness and strength of the case against the respondent in the context of the election on the part of the respondent not to answer certain questions is a further manifestation of a misdirection on the part of the court below.

¹⁵ *S v Miquel & others* 2016 (3) NR 732 (HC) para 46.

¹⁶ *C H Botha v State* NmHC Case No CA 70/95 29 October 1995.

[71] There is a yet further misdirection on the part of the court below which also shows that its discretion was wrongly exercised. This concerns the court's approach to s 61. This is over and above misdirecting itself in failing to consider whether the impact of new facts impelled the court to grant bail and the other misdirections already referred.

[72] In seeking to interpret the meaning to be given to 'interest of the public' in s 61, although mostly referred to as 'public interest' in the judgment, the court below found that a court doing so, would consider the common law and the Constitution. The court proceeded to list several provisions in the Constitution which are to be considered, emphasising Art 7 protecting personal liberty but did so without explaining how those provisions and in particular Art 7 were engaged by s 61 enquiry.

[73] This Court has made it clear that the protection of liberty in Art 7 is not absolute and that Art 7 itself expressly authorises the deprivation of liberty 'according to procedures established by law'.¹⁷ One of those procedures established by law is arrest and detention upon a valid warrant under the CPA. The legality of the warrant in this matter is not in issue.

[74] The purpose of s 61 was after all to afford the courts the power to refuse bail even if an accused has shown on a balance of probabilities that he or she will not abscond or interfere with the investigation or witnesses. The court is afforded the power to do so in the interest of the public or administration of justice. The statutory context and purpose in interpreting that phrase is thus the context of a court exercising

¹⁷ *Alexander v Minister of Justice & others* 2010 (1) NR 328 (SC) para 121.

the power to refuse bail even where the court is satisfied that it is unlikely that an accused will abscond or interfere with the investigation.

[75] In *Du Plessis*¹⁸ the court stressed in this context the need for the State to protect the Constitution and its citizens by combating crime by apprehending alleged criminals and taking steps to ensure that they stand trial. It was also emphasised in *S v Gaseb*¹⁹ that s 61 had been enacted as the legislature representing the Namibian public expressing its concern at the escalation of crime and ensuring that accused persons stand trial for serious offences, with the aim of s 61 being to combat crime and ensure the proper administration of justice in respect of serious crimes.

[76] I would go further. The rule of law, a foundational principle of our Constitution and the principle of accountability inherent in our constitutional values require the State to prosecute those who transgress the law without fear or favour in order to uphold and protect the Constitution itself. The interest of the public is served by the State addressing serious crime and the scourge of corruption within the operation of the rule of law.

[77] The courts have over the years found that the interest of the public or administration of justice justify the refusal of bail by invoking s 61 after an enquiry taking into account the seriousness of the charges, the strength of the State's case, the prospect of a severe custodial sentence being imposed, the likelihood of an accused absconding and interfering with the investigation and the likelihood of further offences being committed if granted bail.²⁰

¹⁸ At 81.

¹⁹ *S v Gaseb* 2007 (1) 310 (HC) paras 9-11. See also *S v Gowaseb* 2019 (1) NR 110 (HC) para 13; *S v Noble & another* 2019 (1) NR 206 (HC) para 31.

²⁰ *Nghipunya I* para 44; *S v Gowaseb* 2019 91) NR 110 (HC) paras 13-15; *S v Gaseb* 2007 (1) NR 310 (HC) paras 9-11; Also see *Lichtenstrasser*.

[78] The allegations against the respondent are gravely serious and involve vast sums of money (some N\$150 million) and criminal conduct directed at diverting State resources for the benefit of the respondent and certain co-accused within a syndicate involving ministers of State. A strong *prima facie* case was made out by the appellant through the investigating officer of the respondent's alleged involvement in corrupt and criminal conduct on a massive scale in the context of the Namibian economy.

[79] As was emphasised in *Nghipunya I*, in the context of s 61, criminal conduct on a wide scale involving misappropriation of public funds 'affect every individual of the Namibian public' and is as serious as violent crime for the purpose of s 61. The charges include contraventions of the Anti-Corruption Act and racketeering and money laundering under POCA in addition to fraud and theft which are offences included in s 61. Part IV of Schedule 2 to the CPA has not been amended since s 61 was enacted. The offences for which the respondent has been charged under POCA and the Anti-Corruption Act are regarded by the legislature as very serious in view of the lengthy custodial sentences and high fines envisaged in the penal provisions. Even though these offences (enacted after the amendment to s 61) are not included within the ambit of s 61, the offences of fraud and theft are included and the sum involved in the alleged fraud charge is N\$150 million, as specified in the indictment. The allegations of fraud relate to corrupt conduct of the respondent and co-accused in relation to the Namgomar 'Project'. Alleged fraud or corruption on this scale would affect every member of the public, given the alleged diversion of public funds to the respondent and his fellow accused.

[80] The interest of the public is served by the courts treating serious offences relating economic crime and corruption in a serious manner. After all, corruption undermines the very foundation of the Constitution and the rule of law and the values inherent in the Constitution. As was so eloquently stated by Moseneke DCJ and Cameron J in the South African Constitutional Court:²¹

'There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.'

[81] The Namibian Parliament has ratified the United Nations Convention against Corruption.²² The statement preceding the text, by the then Secretary General of the UN, Mr Kofi Annan cogently refers to the corrosive effect of corruption and the compelling need for states to act decisively against it:

'This evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.'²³

[82] In order to address the scourge of corruption and its corrosive effect, the legislature has passed the Anti-Corruption Act and POCA. The severe punitive

²¹ *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC) at para 166.

²² On 27 April 2004.

²³ Also quoted in *Glenister* para 167.

sanctions and other consequences prescribed on conviction for offences under those laws such as the forfeiture of the spoils of crime demonstrate the serious resolve on the part of the legislature to attack corruption and organised crime in its varying manifestations.

[83] Because corruption undermines the rule of law and accountability and entails the diversion of public funds for the benefit of a few corrupt persons and thus jeopardising development and the delivery of services and invariably compounding inequality, the public is severely prejudicially affected by it and the public has an interest in the State protecting itself from it.

[84] The court below failed to take into account the seriousness of the charges against the respondent and the impact of the criminal activity and its scale for which he has been charged upon the public and the interest of the public being so adversely affected by the alleged commission of those offences as well as the deleterious impact upon the rule of law and accountability in which the public have an interest.

[85] Mr Kanyangela also testified that the interest of the public and the administration of justice is served in denying bail when 'people in higher positions' or the well-connected are held fully to account when they are alleged to have committed serious offences.

[86] The further evidence of Mr Kanyangela before the court below showed that there is a strong *prima facie* case against the respondent in respect of such serious charges. This evidence together with the considerations set out relating to those offences could only have served to reinforce the finding of the magistrate concerning

the interest of the public and the administration of justice justifying the denial of bail and could not conceivably have led to a contrary conclusion.

[87] The discretion exercised by the court below in respect of the criteria of s 61 should in any event not have arisen because the new facts did not result in their reconsideration. If anything, the evidence reinforced the earlier decision in that regard. The discretion exercised with reference to the criteria listed in s 61 was however in any event wrong as it was based on wrong principles.

[88] Given these misdirections, all of which were material, it is clear that the decision of the court below was wrong and falls to be set aside.

Is the appeal moot?

[89] Counsel for the respondent forcefully contended that the appeal is moot even if it did have any merit because it would have no practical effect. As already indicated, reliance was placed upon the approach of the SCA in *Ramokhosi* which held that an appeal against the granting of bail which served before it was moot where the accused would probably have succeeded in applying for bail after the appeal. That judgment is to be considered in the context of its unusual factual setting.

[90] In *Ramokhosi*, the accused was arrested on 21 December 1995 for unlawful gold transactions, housebreaking and theft. A regional magistrate refused bail at an urgent bail hearing on 21-22 December 1995. The accused filed an urgent appeal to the High Court which was granted by the duty judge during recess in early January 1996. The prosecution applied for leave to appeal against this order to the SCA on 10 January 1996. That application was heard on 12 April 1996 and on 25 July 1996 leave

to appeal was granted. The appeal eventually served before the SCA on 15 March 1999, more than three years after the accused's release on bail. In the meantime, the accused had appeared in court on 93 separate days in all. The leading of evidence had been completed and the trial was postponed for argument on 19 April 1999, just over a month after the date of hearing of the appeal. During the appeal hearing, the prosecutor accepted that the respondent in that matter had complied with all of the conditions governing his release on bail.

[91] Counsel for the respondent in *Ramokhosi* took a preliminary point that the appeal would not have any practical effect. The SCA referred to its approach in a different context²⁴ of not being obliged to give decisions on academic questions that have no real bearing on the acquittal or conviction of an accused and held that the same principle would apply to an appeal relating to bail. The SCA noted that the respondent had been released more than three years previously. It was also conceded by the State that he would be entitled to be released again if the SCA allowed the appeal and the State was constrained to concede that the appeal would have no practical effect. The SCA proceeded to decide the preliminary point in favour of the respondent and dismissed the appeal.

[92] I have referred to the facts in *Ramokhosi* in some detail in view of counsel for the respondent's submission that this matter is on all fours with *Ramokhosi*. He referred to the delay of nearly one year (in fact 11 months) between the granting of bail and the hearing of this appeal. He also said that there was no suggestion that the respondent had failed to comply with his bail conditions. He also argued that even if the State were to succeed with this appeal, the respondent could apply for bail again and would probably succeed in being admitted to bail.

²⁴ In *Attorney-General, Transvaal v Flats Millinglo & others* 1959 (3) SA 360 (A) at 370H-372D.

[93] Even a cursory examination of the facts in *Ramokhosi* would however demonstrate that the matter is entirely distinguishable.

[94] In this appeal there was no significant delay of the order encountered in *Ramokhosi*. In this matter, the State applied for leave to appeal timeously but was obliged to wait until 11 March 2022 for that application to be heard. It took the presiding judge a further period in excess of 2 months to hand down his brief ruling on 24 May 2022 refusing leave to appeal. Within weeks of that outcome, the State timeously lodged a petition for leave to appeal with this court on 14 June 2022 and was granted leave to appeal and the matter was set down in the very next term of this court.

[95] The trial in this matter is yet to commence. Upon enquiry by this court, counsel for State informed us that the State is ready to proceed with the trial against the respondent and his fellow accused and would want those proceedings to commence. He informed the court that a date has as yet not been allocated for the trial because the accused have brought an interlocutory application which would first need to be finalised. The length of the trial was estimated by Oosthuizen, J to run for some two to four years. In *Ramokhosi*, on the other hand, the leading of evidence was finalised and the matter was merely postponed for argument on a date a few weeks after the appeal hearing. The reason for the initial refusal of bail was not stated by the court in *Ramokhosi*. A flight risk may have been a significant factor in view of the State's concession that the respondent in that matter would be entitled to his release (on further bail) given his attendance throughout the trial. This is in stark contrast to this matter where the State categorically opposes bail being granted to the respondent and

certainly does not concede that the respondent would be granted bail if the State were to succeed with this appeal and we understood that the State would oppose such an application.

[96] A further distinguishing feature of *Ramokhosi* is the differing statutory context. The respondent in this matter was refused bail by a magistrate invoking s 61, upheld upon appeal by Miller, AJ in the High Court. Bail had not been denied on the basis of the respondent being a flight risk, but rather under s 61. The statutory provisions relating to bail differ in South Africa.

[97] Clearly the appeal in *Ramokhosi* would have had no real practical effect in the light of all the particular circumstances of that case. It is not remotely on all fours with the present appeal and is indeed demonstrably distinguishable. A successful outcome in this appeal on the contrary would have practical effect.

[98] The fact that the respondent had not taken flight in the eleven months following the granting of bail to the hearing of this appeal is neither here nor there in this appeal as bail was not refused by the magistrate on the basis of the respondent being a flight risk but with reference to s 61 on the grounds of being in the interest of the public or the administration of justice. This fact is thus a neutral factor in the determination of this appeal. This court is seized in this appeal with the question as to whether the court *a quo* exercised its discretion to grant bail wrongly or not and the determination of this court is, in accordance with general principle, to be decided according to the facts at the time the decision of the court *a quo* was given and not with reference to new circumstances coming into existence subsequently.²⁵

²⁵ *Ramokhosi* para 8; *R v Verster* 1952 (2) SA 231 (A) 236.

[99] It would of course not be appropriate to express a view on the prospects of success of any further bail application of the respondent. In the event of such an application, that would be a matter for the court considering that application on the basis of new facts put before it viewed against the totality of the facts.

[100] It follows that this appeal is by no means moot.

Conclusion

[101] It further follows that the appeal against the judgment of the High Court succeeds and its order granting the respondent bail is accordingly set aside.

[102] The following order is made:

1. The appeal succeeds.
2. The order of the High Court handed down on 15 December 2021 (and reasons therefor released on 21 December 2021), granting the respondent bail is hereby set aside in its entirety.
3. The respondent is ordered to report to the Windhoek Correctional Facility forthwith and by no later than 17h00 on the date of this order.

MAINGA JA

HOFF JA

APPEARANCES

APPELLANT:

E E Marondedze (with him C K
Lutibezi)

Of the Office of the Prosecutor-General

RESPONDENT:

A Katz, SC (with him T P Brockerhoff)

Instructed by Brockerhoff Associates