



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 34/2016

In the matter between:

MARINA KANDUMBU

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Kandumbu v The State* (CA 34/2016) [2023] NAHCMD 373 (03 July 2023)

Coram: JANUARY J and CLAASEN J

Heard: 02 December 2022

Delivered: 03 July 2023

Flynote: Criminal Procedure – Condonation – Late filing of notice of appeal – Appellant convicted towards end 2014 and appeal out of time with almost seven years – explanations – court found not reasonable and acceptable – No misdirection, error or irregularity – No prospects of success – Condonation dismissed.

Summary: The appellant was employed in the Ministry of Education. She was a beneficiary of a housing subsidy which was subject to certain rules, inter alia, providing that the subsidy ceases the day the property is sold or rented out. The crux of the case herein was that the appellant received rental from the Angolan Consulate for the

relevant period whilst at the same time omitted to inform/declare to her employer that the property was rented out contrary to the public service rules. She deliberately omitted to declare that information in order to continue to receive the monthly subsidy.

The appeal was filed about seven years late. The appellant gave an explanation that the delay was as a result of financial constraints and partly because the transcribed record of proceedings was not received timeously. The explanation was found not to be acceptable and reasonable. In addition, there is no prospects of success on appeal. The application for condonation is dismissed.

Held: The explanation of lack of funds for not filing the notice of appeal on time is not acceptable or reasonable.

Further held: There is no misdirection or irregularity and thus, no prospects of success on appeal.

ORDER

1. The application for condonation is dismissed.
 2. The appeal is struck from the roll and considered finalised.
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APPEAL JUDGMENT

Introduction

[1] The appellant faced 60 charges, however, was convicted of only 55 charges of contravening s 43(1) read with ss 32, 43(2), 43(3), 46, 49 and 51 of the Ant-corruption

Act 8 of 2003 (the Act) i.e. Corruptly using office/position for gratification. The particulars of the charges are:

'In that on or about the date or period mentioned in column 2 of the schedule and/or at or near the place mentioned in column 3 in the district of Rundu the said accused being a public officer, to wit: Principal of Dr. Romanus Kampungu Secondary school did wrongfully, unlawfully, directly or indirectly and corruptly use her office or position in a public body, to wit Principal of Dr. Romanus Kampungu Secondary School (Ministry of Education) to obtain gratification for her own benefit or that of another person, to wit: leasing out her government subsidised house, Erf no. 1452 Rundu to the person(s) mentioned in column 5 for the amount mentioned in column 4 contrary to government housing scheme rules and thus the accused did contravene section 43(1) of Act 8 of 2003.'

[2] The annexed schedule reflects that there are 60 charges in column 1. The dates alleged in column 2 are from May 2005 to April 2010 at the place, Rundu in column 3. The amounts are N\$3 500 respectively for each of the 60 charges in column 4. The subsidised house was allegedly leased out to the Angolan Consulate.

[3] The counts were taken together for the purpose of sentence. The appellant was sentenced to N\$100 000 or five years' imprisonment of which N\$90 000 or four years' imprisonment were suspended for a period of five years on condition that the accused pays the amount of N\$87 887 and she is not convicted of contravening s 43(1) of the Act during the period of suspension.

[4] The appellant is represented by Mr. Brockerhoff and the respondent by Mr. Muhongo. The appeal is against conviction of all 55 counts and it is opposed by the respondent.

Point in limine

[5] The respondent raised a point *in limine*, that the appeal was filed out of time, as it does not comply with the 14 day period as provided for in rule 67(1) of the Magistrates

Court Rules. In support of the contention that the appellant does not have a reasonable explanation to have delayed the appeal, the respondent submitted that the appellant was a Member of Parliament after her resignation from the Ministry of Education at the time. This fact, he said, she did not disclose in her explanation. Nor did she explain, why she failed to approach the Directorate of Legal Aid for legal representation, if she had financial issues.

[6] In order to assess whether there is any merit to that point, I have to turn to the court record. It shows that the appellant was sentenced on 11 November 2014 and filed her notice of appeal on 03 February 2015, about two months late. Subsequently, she withdrew the appeal and it was removed from the roll. Eventually, a second notice of appeal, dated 27 October 2021 was filed on 23 November 2021. It also appears that the application for reinstatement of the appeal was granted before the matter was allocated for hearing. It is clear that almost 7 years passed between the date of sentencing and the date of the most recent appeal.

[7] It is trite law that when a notice of appeal is delayed, the appellant must file an application for condonation satisfying two requirements namely;

- a) a reasonable and acceptable explanation for the failure to note the appeal timeously and;
- b) showing reasonable prospects of success on appeal.¹

[8] Consequently, the appellant filed an application for condonation with a supporting affidavit giving reasons for the delay and stating that she has prospects of success on appeal.

¹ *S v Nakapela and another* 1997 NR 184 (HC).

Reasons for the delay

[9] The appellant confirmed that she appointed a legal representative, at own cost, to represent her at the trial. She also confirmed that at the end of the trial she was informed that an appeal had to be filed within 14 days, failing which, she had to file an application for condonation. Her erstwhile legal representative required further payment for the appeal. The legal cost of the trial depleted her financial resources. In addition, she stated that she resigned from her employer on 01 December 2014.

[10] She further stated that although she intended to appeal immediately after the finalisation of the trial, she was hampered by lack of funds to appoint counsel. She managed to obtain N\$10 000 on 19 December 2014 and additional funds towards the end of January 2015 from family and friends. That enabled her to instruct Sibeya and Partners Legal Practitioners, but at that time, the record of proceedings was not typed yet. The legal practitioner could only draft a notice of appeal once the transcript was completed. It is clear that by early 2015, the issues regarding the court record was sorted out as she stated in her affidavit, that by 02 February 2015 the legal practitioner (as he was then) informed her, inter alia, that he perused the record. She also states that the appeal was later removed from the roll as she could no longer afford to pay the legal fees.

[11] It was only during December 2019 that she approached Mr Brockerhoff who offered to represent the appellant *pro bono*. He subsequently filed an amended notice of appeal and an application for the reinstatement of the appeal. That is the explanation in the affidavit.

[12] In considering the explanation as elucidated by the appellant, two main reasons emerge. Firstly, there is unavailability of the trial transcript at the time that the erstwhile legal practitioners requested the record, which is something for which the appellant cannot be blamed. The fault for that lies at the door of the court administration. As such, the appellant is not at fault for the period during which the record was not available to the appellant and her legal representative(s).

[13] Secondly, the appellant could not instruct a legal practitioner because she had financial difficulties. This reason covers the greater part of the 7 year period. I return to the respondent's submissions on this issue. It was not disputed that the appellant is a university graduate that had been gainfully employed by the Ministry of Education, from where she resigned at the end of December 2014 and afterwards she was a Member of Parliament. Thus, not only was the appellant a salaried employee at the time of being sentenced, but at some point in time thereafter, the appellant again earned a salary. That being the case, the explanation of being stranded without financial resources for several years, does not amount to a frank and true explanation.

[14] Furthermore, the affidavit lacks certain other details. The affidavit is silent as to what prevented the appellant from applying to the Directorate of Legal Aid for a legal representative to assist her in pursuing the appeal, if indeed she was financially indigent at the time. Had the trial transcript been the only explanation and had it been for the full seven year period, it would have placed the court in a position to find it an acceptable explanation. I have already pointed out that based on the information in the condonation affidavit the court record was available by February 2015. As for the remainder of the period of delay, the explanation is patently unsatisfactory. That explanation is also dented by the failure to have approached the institution whose mandate it is to avail legal representation to indigent persons in Namibia. All in all, it does not constitute an acceptable or reasonable explanation.

Prospects of success

[15] In order to adjudicate on the prospects of success, the first port of call is to consider the grounds of appeal and the court *a quo's* reasons.

[16] The grounds of appeal are stated as follows:

'1. The court erred in law by applying the repealed definition and/or interpretation of the term corruptly as per section 32 of Act 8 of 2003.

2. The court further erred in law and/or in fact by finding that the appellant's conduct of leasing out her home whilst transferred to a different duty station amounted to an unlawful and/or corrupt activity.

3. The court erred in law by applying the Anti-Corruption Act to the case at hand where the contract entered into between the Angolan Consulate and the appellant preceded the enactment date of the Anti-Corruption Act, thus its application was retrospective and thus unconstitutional.'

The Magistrate's judgment

[17] The magistrate warned herself from the outset that the burden of proof rests with the prosecution to prove its case beyond a reasonable doubt and there is no onus on the appellant to prove her innocence. This court will not rehash the whole judgment but focus on the salient parts for purposes of this appeal. One of the central questions was whether or not the appellant dealt in the housing subsidy scheme. The presiding magistrate found overwhelming evidence that the appellant indeed participated in the housing scheme, as the appellant's payslips reflected the receipt of monthly payments for a housing subsidy.

[18] Based on the evidence, the magistrate found that the State proved, beyond reasonable doubt, that the appellant received an amount of N\$3 500 per month for the period from 2005 to 2009 from the Angolan Consulate.

[19] In the evaluation of the defence's case the magistrate referred to quite a few contradictions therein. She found appellant was inconsistent with her claim of the pursuit of a PhD degree, as she was never admitted for it. She denied having received a subsidy but referred to it as a housing allowance. Further, the magistrate considered the lease agreement and made certain inferences with reference to *R v Blom*². She concluded that from the proven facts, the only reasonable inference in the circumstances is that the N\$3 500 received was for the rental of the property. The magistrate concluded that the appellant was untruthful when she testified that the

² *R v Blom* 1939 AD 188.

money was for assistance with her studies for the PhD degree whilst on the contrary she was never admitted for that degree and rejected it as beyond any reasonable doubt false.

[20] The magistrate further considered the terms 'corruptly', 'gratification', 'public officer' and 'public body' in relation to the definitions in the Act. She accepted the definition of corruption as contained in the Act as 'corruptly means in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to-

- (a) any employment relationship;
- (b) any agreement; or
- (c) the performance of any function in whatever capacity.

[21] She found that the conduct of the appellant falls within the said definitions.

[22] At the same time she had regard to the housing subsidy rules, amongst others, rule 4.1.2 (g)(dd) and 4.5(e) which respectively provide, that the subsidy ceases the day the property is sold, rented out, or participation in the housing scheme is terminated as provided for in paragraph 4.5(e), prohibiting a staff member from receiving both the rental and the subsidy. More to the point, she found that the appellant was paid a subsidy until December 2009 and that she consequently double gained in the process.

Arguments by counsel

[23] Counsel for the appellant argued that there are prospects of success as the contravention herein is not criminal in nature but rather the breach of an administrative rule in the public service. He emphasised that the rule in question, allows for a property on which the employee receives a subsidy to be leased, and that the employee merely has to report that the property is rented out and that will trigger the subsidy to be stopped. Even if the court finds the act an unlawful and criminal act, it has preceded the commencement date of the legislation. He also pointed out that the definition to which

the court *a quo* referred to in her judgment, has been struck down and as such the court could not rely on that.

[24] Counsel for the respondent drew attention to the insufficiency of the condonation affidavit as far as the prospects of success is concerned. In support of that, counsel cited *S v Cloete*³ wherein it is stated that the appellant is supposed to say why she stand to succeed. He is not wrong as the same sentiments was expressed in *Sagarias v S*.⁴

[25] Insofar as the last ground of appeal is concerned, he stated that the criminal conduct was not leasing per say but the receipt of money, which commenced when the legislation was operational. In respect of the other grounds of appeal he conceded that the appellant was not prohibited to lease out the property, but she deliberately omitted to declare that information in order to continue to gain the benefit of receiving the subsidy. As such, she acted dishonestly and wickedly and benefitted from a government subsidy in circumstances wherein she was not supposed to have benefitted.

Reasons for judgment by the court *a quo*.

[26] All that remains is for this court to consider whether the court *a quo* erred in convicting the appellant. Having perused the record, the magistrate was fortified in her findings about the monthly deposits of money into the appellants account for the relevant period and that the appellant was receiving a housing subsidy from her employer as well. The same can be said about her credibility findings about the appellant, whose version was demonstrably false. She denied having rented out her house, but eventually positively identified a lease agreement, concluded between her and the Angolan Consulate. The lease agreement would have been effective from April 2005 to December 2005 for an amount of N\$ 3 500. According to her, Judith was the Angolan Embassy. She, however, cannot say if Judith, her relative, signed the lease agreement in her personal capacity or on behalf of the Angolan Embassy.

³ *S v Cloete* (CA 49-2015)[2015] NAHCMD 248 14 October 2015.

⁴ *Sagarias v State* (HC-MD-CRI-APP-CAL-2022/00038)[2023] NAHCMD 257 (12 May 2023).

[27] Her version was also that upon her return from completion of the Master's degree she was advised to complete her PhD degree. Her supervisor wrote a recommendation which she used to obtain funding at various institutions, including the Angolan Consulate. The Consulate advised her to apply for a loan at a bank because they could not assist with a lump sum at the University of Stellenbosch, where she was going to study. The Angolan Consulate assisted her with a monthly amount of N\$3 500. According to her, this agreement was only verbally with Judith, a relative of hers, and who was employed by the Angolan Consulate. Strangely, she was never admitted to study for a PhD degree.

[28] At some stage the story changed and she testified that the funding from the Angolan Consulate was not because of the letter to pursue the doctorate degree, but rather that she received the N\$3 500 monthly to pay off a bank loan. Her version changed that it was a loan for her master's degree. Her explanation that the Angolan Embassy assisted her to complete her PhD degree is, not only fanciful, but so improbable to be rejected as false and was correctly so rejected by the court *a quo*.

[29] Even the appellant's own witness contradicted the claims that the appellant made in her statement that there was a man living at the house and also about the alleged presence of a security company at some stage at the house. The magistrate did not deal with all the material contradictions but they are obvious on perusal of the evidence. It is evident that the appellant was not only evasive, but materially inconsistent and tailored her evidence as the trial progressed. We do not find any misdirection justifying this court to interfere with the factual findings of the court *a quo*. Besides, the grounds of appeal essentially revolve around legal issues.

Was the action of the accused illegal/unlawful and of retrospective effect?

[30] In respect of the first ground of appeal the appellant took issue with the conviction on the basis that the definition of 'corruptly' in the Act was struck down and declared unconstitutional.⁵ For purposes of this discussion, ground 1 and ground 2 are related and will be dealt with together. At the outset, it has to be said that the magistrate misdirected herself when she accepted the definition of 'corruptly' as defined in the Act. This definition was indeed struck down. The question arises as to whether or not in the context of this case, that misdirection by the magistrate is fatal for the conviction? We are of the view that it is not, because the definition of 'gratification' was, however, not struck down or declared unconstitutional.⁶ In the *Lameck* matter, the court stated as follows in this regard:

[93] Turning to the challenge upon s 33, 36, 42(2) and 46, it would not in my view follow that these sections would necessarily need to be struck down because they use the term 'corruptly' in them. That term would need to be interpreted by the courts. In doing so, the courts would have regard as to how the term is understood including its dictionary definition, its definitions in international instruments and how it has been interpreted by this or other courts in giving content to that concept. As to the latter, the South African High Court set out a widely accepted understanding of the term 'corruptly' contained in that country's Corruption Act of 1992 as follows:

"Then finally, it remains to make clear that such giving is done corruptly if it is done with the intention of persuading or influencing the recipient to act other than in impartial or proper discharge of his or her prescribed duties to the advantage of the donor or some other indicated person. As part of this requirement, the giving of the benefits or offer to give it must be unlawful, which means it is of a nature not sanctioned by society's perception of what is just or acceptably proper, and it is this requirement that excludes from the ambit of corruption under the Act the giving of tips such as a reward for some service done well enough to deserve some recognition, or lunches or entertainment facilities for clients or customers that are a common practice among business activities, though that may depend on the nature and extent of the benefit. . . ."

⁵ *Lameck and another v President of the Republic of Namibia and others* 2012 (1) NR 255 (HC).

⁶ *Ibid.*

[31] In *S v Goabab and another*⁷, the Supreme Court considered and agreed with the striking down of the definition of the common law interpretation of corruptly but stated as follows:

'[16] The *Lameck* matter was decided after the court below had delivered its judgment discharging the respondents on the main counts. We have been informed that that judgment has not been appealed against and in the current proceedings the state has expressly accepted that the decision of the high court finding, that the definition of the word 'corruptly' in the Act was overbroad, is correct. The Act being relatively new, the law in this field should be allowed to evolve. The court below should be given amplitude to develop this important and nascent piece of legislation. It suffices for the purposes of this judgment to hold that the word 'corruption', at its lowest threshold when used in the context of the public service, includes the abuse of a public office or position (including the powers and resources associated with it) for personal gain. The synonyms of 'corruptly' include 'immorally, wickedly, dissolutely and dishonestly'.

[32] To that end, this court needs to adjudicate on the facts and interpret the term 'corruptly' to determine if the conviction is justified. It is to be noted that the term 'corruptly' was not struck down as unconstitutional but only the definition as contained in s 32 of the Act. That much is clear from the *Lameck* judgment when it was stated that the term 'corrupt' or 'corruptly' contained in s 33, 36, 42(2) and s 46 of the Act, 'that term would need to be interpreted by the courts. In doing so, the courts would have regard as to how the term is understood including its dictionary definition, its definitions in international instruments and how it has been interpreted by this or other courts in giving context to that concept.

[33] This court had to interpret the term in *S v Hanse-Himarwa*⁸. We endorse what Liebenberg J stated:

'[106] It is trite that the definition of 'corruptly' in the ACA has been struck down by the High Court in *Lameck and Another v President of the Republic of Namibia*. The Supreme Court

⁷ *S v Goabab and another* 2013 (3) NR 603 (SC).

⁸ *S v Hanse-Himarwa* (CC 05/2018) [2019] NAHCMD 229 (08 July 2019) at paragraph 106.

in the *Goabab* matter (supra at 612C-E) stated that the courts should be allowed to develop the law as regards the statutory offence of corruption. As decided in the *Lameck* case the meaning of 'corruptly' should bear its ordinary meaning. In *Goabab* the court further held that the word 'corruption', when used in the context of the public service, would include the abuse of a public office or position. The general meaning of the word 'corruptly' is 'to act knowingly and dishonestly with the specific intent to subvert or undermine the integrity of something while the meaning of 'corrupt' is 'to be willing to act dishonestly in return for money or personal gain'. It would appear to me that the accused's actions squarely falls within the ambit of the former meaning of corruptly when she knowingly and dishonestly acted with intent to subvert and undermine the vetting process and integrity of the selection committee's findings.'

[34] As stated above, the accused was charged with 60 counts of contravening s 43(1) read with sections 32, 43(2), 43(3), 46, 49, and 51 of the Anti-Corruption Act. Section 43(1) and (2) of the Act reads as follows:

'(1) A public officer commits an offence who, directly or indirectly, corruptly uses his or her office or position in a public body to obtain any gratification, whether for the benefit of himself or herself or any other person.' (My emphasis)

[35] Subsection (2) is a deeming provision and reads:

'(2) For the purposes of subsection (1), proof that a public officer in a public body has made a decision or taken action in relation to any matter in which the public officer, or any relative or associate of his or hers has an interest, whether directly or indirectly, is, in the absence of evidence to the contrary which raises reasonable doubt, sufficient evidence that the public officer has corruptly used his or her office or position in the public body in order to obtain a gratification.' (My emphasis)

[36] In the matter at hand, the appellant acted or made a decision to rent out her property and obtained a benefit contrary to the public service's housing scheme rules. There is no doubt that she was a public servant in the Ministry of Education, which is a public body and it was not by mere coincidence that she benefitted monthly with the same amount as stipulated in the lease agreement.

[37] I turn to the argument by counsel for the appellant that such an employee is not prohibited from leasing out such property. That may be so, but that is not the end of the matter. The subsidy was subject to certain provisions, namely the rules pertaining to Home Owners' Scheme for staff members and particularly Chapter D VII part IV 4.1.2(g), (dd) which stipulates that the subsidy ceases, amongst others, the day the property is sold, rented out or participation in the housing scheme is terminated as provided for in paragraph 5.4.3(f). We concur with counsel for the respondent that it was not the leasing per se that constituted a dishonest intent, but the omission to report it, as was required, which silence the appellant kept, in order to continue receiving the payment of the subsidy, in addition to the rental. The appellant was well aware that once she reports it, the effect of the rule is triggered and the housing subsidy will cease. She kept silent for that period even though she was also receiving the monthly rental of N\$3 500 for the relevant period. The appellant knew that when she rented out the property, the subsidy was supposed to cease, but dishonestly and corruptly continued to receive benefits under the housing scheme. Thus the appellant had acted deceitfully in order to obtain money for personal gain, which falls within the range of contravening s 43(1) of the Act.

[38] Finally, I turn to the contention that the appellant submitted that the accused was convicted retrospectively for criminal conduct that preceded the criminalisation of her conduct. That is because the Act came into force on 15 April 2005 whereas, the lease agreement was effective from 01 April 2005 to 30 November 2005. Counsel for the respondent was correct in his submission that the accused was not charged for entering into the lease agreement but for corruptly receiving a gratification or benefit in addition to the subsidy for which she qualified by virtue of her position as a public official. She received the pecuniary benefits from May 2005 until April 2010 whereas, the Act came into force as from 15 April 2005. In light of that, there is no merit in the last ground of appeal.

[39] In conclusion, this court held that the term of corruption takes many shapes and forms. It should be interpreted with its dictionary meaning, its definition in international

instruments and how it has been interpreted by this or other courts in giving context to the concept. The offence was now considered broad in its reach and scope.⁹ When the principles that crystallised in the abovementioned cases are applied to the facts of this case, it is inescapable that the actions of the accused fall squarely within the ambit of contravening s 43(1) of the Act. Therefore, the appellant does not have prospects of success on appeal.

[39] In the result:

1. The application for condonation is dismissed.
2. The appeal is struck from the roll and considered finalised.

H C JANUARY
JUDGE

C CLAASEN
JUDGE

⁹ *Lameck and another v President of the Republic of Namibia and others* 2012 (1) NR 255 (HC); *s v Goabab and another* 2013 (3) NR 603 (SC).

APPEARANCES

APPELLANT: T Brockerhoff
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RESPONDENT: M Muhongo
Of the Office of the Prosecutor- General, Windhoek.