**REPUBLIC OF NAMIBIA**

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**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**LEAVE TO APPEAL**

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| **Case Title:***Lupandu Hofeni v The State* | **Case No:**HC-MD-CRI-APP-CAL-2022/00093 |
| **Ruling on Application for leave to Appeal** | **Division of Court:**Main Division |
| **Heard before:**Liebenberg J et January J  | **Delivered on:**04 December 2023 |
| **Neutral citation:** *S v Hofeni* (HC-MD-CRI-APP-CAL-2022/00093) [2023] NAHCMD 783 (04 December 2023) |
| **The order:*** 1. The condonation application is refused.
	2. The matter is struck from the roll.
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| **Reasons for decision:** |
| JANUARY J (LIEBENBERG J concurring) 1. The applicant in this matter was convicted in the Katima Mulilo Regional Court on two counts of rape in contravention of s 2(1)(*a*) read with s 1,2(2), 2(3), 4, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 after he pleaded not guilty and evidence was heard. He was sentenced on 14 September 2021 to 15 years’ imprisonment on each count.
2. Discontented with the outcome of the trial, he lodged an appeal to this court within the prescribed time limit against conviction and sentence. On 15 May 2023, his appeal against conviction on both counts was dismissed while the appeal against sentence partly succeeded with the addition of an order in terms of s 280(2) of the Criminal Procedure Act 51 of 1977, as amended (the CPA), in that 10 years’ imprisonment imposed on count two are to be served concurrently with the sentence imposed on count one.
3. Still dissatisfied, he filed an application for leave to appeal on 14 June 2023. Whereas, the application is out of time with about eight days, the applicant, through his legal representative filed a condonation application almost simultaneously with his notice for leave to appeal.
4. The applicant stated in the supporting affidavit to the application for condonation that the delay was due to his own fault. He stated that he was simply too overwhelmed and acutely despondent to give meaningful instructions to his legal representative to file the application on time. He alleged that the despondency rendered him in such an ambivalent and hopeless state which contributed to the late filing of the application. In addition, he stated that he felt condemned by the sentence of 30 years’ imprisonment imposed in the court a quo and, having lodged the appeal, he was confident that he had strong prospects of success on appeal. He claims that this hope was crushed on 15 May 2023 when the appeal succeeded only partially.
5. The applicant stated that his legal representative informed him of his right to appeal at the time. He, however, only on 22 May 2015 instructed his counsel to apply for leave to appeal and was informed that it would have been attended to on 23 May 2023. On that date the applicant informed counsel that he no longer wished to continue with the application. His explanation is that he was simply tired, despondent, overwhelmed and fatigued.
6. He further states that he only gained strength and hope on 13 June 2023 where after he instructed his counsel to proceed with the application for leave to appeal, which was eventually filed on 14 June 2023.
7. In relation to prospects of success, the applicant states that he has good prospects thereto in the Supreme Court. He premised this stance on the reasoning of this court in the appeal, criticising the presiding magistrate’s remissness and neglect to give full reasons for his judgment. The applicant submitted that the failure to give full reasons renders the trial nugatory and that the court of appeal should not and could not have re-evaluated the evidence because the court could not gauge the demeanour and candour of the witnesses.

His counsel developed this reasoning further during oral argument when submitting that the court of appeal committed a misdirection to re-valuate the evidence. Counsel submitted that, because the appeal court could not determine if there was any misdirection from the terse reasons, it was wrong to interfere without finding a misdirection; hence, there was a miscarriage of justice. It was further submitted that the case is analogous to a situation where no record of proceedings is available and therefore, struck at the core of the principles to a fair trial. 1. Counsel referred the court to *Both v S[[1]](#footnote-1)* where this court said the following:

‘. . . .if it is apparent that the magistrate has misdirected him or herself and that that misdirection materially impacted on the conclusion he or she arrived at on the guilt or innocence of the accused, this Court is charged with the duty to reassess the evidence and at liberty to make its own findings on the facts.’He then submitted that the court can only interfere with findings of a trial court if there is a misdirection, impacting the conclusion reached by the magistrate. Further, ‘where no findings have been made and where no reasons have been provided, the accused should be released as there are no reasons to begin with’. Counsel furthermore reasoned that, with reference to *Stellenbosch Farmers’ Winery Group Ltd & Another v Martell ET Cie and Others,[[2]](#footnote-2)* this court ‘misapplied the evidential evaluation approach’. Also, that the High Court (the court of appeal) did not make any credibility findings and failed to acknowledge that it did not have the ability to gauge the demeanor, candor, caliber and cogency of witnesses. It was argued that this undermined the court of appeal’s findings when rejecting the version of the accused and that of his wife. 1. Lastly, the applicant relied on the opinion of the presiding magistrate describing the *modus operandi* of the applicant as that of a paedophile. He reasoned that it was a personal belief of the magistrate and a gross misdirection which vitiates the entire trial. He submitted that this court committed a further misdirection by not finding that the magistrate’s remark or observation (what he termed as ‘a personal belief of the magistrate’), vitiated trial proceedings. Therefore, he submitted that another court may come to a different conclusion.
2. Regarding sentence, it was submitted that this court failed to give reasons why the entire sentence on count two should not be ordered to run concurrently with the sentence imposed on count one. Counsel argued that the appellant has a right to know why. Further, it was submitted that the sentence remains alarmingly disproportionate and is shockingly severe.
3. The respondent raised a point *in limine* and opposed both the application for condonation and the application for leave to appeal. It is therefore, incumbent for this court to first deal with the preliminary issue of condonation.
4. It is trite principles that an applicant has to satisfy two pertinent requirements, firstly, that he has to provide a reasonable and acceptable explanation for the late filing of the main application (for leave to appeal); secondly, applicant has to show that he has prospects of success on appeal. In addition, the courts have elucidated certain principles as regards condonation applications which, *inter alia*, are the following:
	1. Where the explanation proffered is not reasonable but an applicant enjoys prospects of success on appeal, a court *may* condone the non-compliance.[[3]](#footnote-3)
	2. Where the applicant’s non-compliance is found to be a flagrant disregard of the rules of court, a court need *not* consider the prospects of success on appeal.
	3. If prospects of success on appeal are non-existent, it matters not whether there is a reasonable explanation or not, the application will be *refused*.[[4]](#footnote-4)

 [13] Mr Kumalo*,* counsel for the respondent, in opposition, argued that the reasons advanced by the applicant are not reasonable, nor acceptable. He argued that in all probability, all accused who are sentenced to imprisonment experience the same feelings of disappointment when their appeals are unsuccessful. He argued that the applicant merely stated that he felt deflated, but failed to explain what made him feel despondent. Further, he submitted that it is apparent that the applicant was indecisive. No reasons or explanation were given of why and what caused him to end the indecisiveness. In this regard, he referred the court to *Iyambo v S*[[5]](#footnote-5)where Smuts J (as he then was) commented on an explanation without necessary particulars as follows:‘The only reason given for the delay is that the appellant suffers from asthma. No dates or any specific issues are however set out as to when this arose, what treatment has been given and how this could have precluded a notice being filed timeously.’[14] Counsel submitted that on the second leg of the enquiry the applicant has no prospects of success on appeal. He referred the court to *S v Nowaseb[[6]](#footnote-6)* where it was held that ‘the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal but there must be a sound rational basis for the conclusion that there are prospects of success on appeal’. He argued that the appellant did not realistically convince this court that there are prospects of success in the matter.  [15] The applicant was represented in the appeal by experienced counsel. He (the applicant) conceded that his rights to appeal were explained after the unsuccessful appeal. Counsel in all probability explained to him his chances of success in bringing an application for leave to appeal at the time, as experienced as he is. The applicant’s explanation that he belatedly changed his mind and only thereafter instructed his legal representative to bring an application for leave to appeal, in the circumstances, creates the impression that when learning that his appeal was unsuccessful, he accepted the outcome. We find that the applicant merely demonstrated a vague hope or the mere possibility of another court coming to a different conclusion. This falls significantly short of laying a sound and rational basis – the onus resting on the applicant – for the conclusion that there are prospects of success on appeal. [16] Disabusing our minds from the judgment in the appeal, we had the complete record of proceedings inclusive of the evidence led at the trial and the court *a quo’s* judgment, although brief, to determine whether the magistrate committed any misdirection or irregularity in those proceedings. This court applied the approach enunciated in *S v Shikunga and another [[7]](#footnote-7)* as stated at paragraph 6 and 7 of the judgment. We found that the terse judgment *per se* constituted an irregularity, but not to the extent that it resulted in vitiating the entire proceedings. Counsel for the applicant, correctly in our view, conceded to this. It is surprising that he is now turning back on his concession. Further, although terse, the magistrate in his judgment reached certain conclusions and made findings from which this court could adjudicate whether or not these conclusions were supported by established facts.[17] We reminded ourselves that no judgment can ever be all-embracing and the fact that something was not specifically mentioned does not necessarily mean that it was not considered.[[8]](#footnote-8)[18] The court of appeal, having found that the magistrate was remiss by neglecting to provide and prepare a full and reasoned judgment (as he was required to do), followed the approach laid down in *Shikunga* and re-evaluated the evidence. The submission that a court of appeal may *only* re-evaluate the evidence if there is a misdirection is, with respect, misplaced and without merit. This court has for instance found it necessary to evaluate evidence where there are terse reasons provided but riddled with ‘indistinct’, making it impossible to discern what the magistrate stated in the reasons.[[9]](#footnote-9) Sight should not be lost of the fact that this court, sitting as court of appeal, did not find that the court *a quo* committed an irregularity in its assessment of the evidence, but rather took issue with the terse *ex tempore* judgment delivered, without furnishing reasons for the conclusions reached. The applicant misinterpreted *Both v S* (supra) as authority that a court of appeal can only re-evaluate evidence where full reasons are available. That is but one of the reasons to re-evaluate.[19] This court considered the approach where the court is faced with two mutually destructive version with reference to *Stellenbosch Farmers’ Winery Group Ltd & Another v Martell ET Cie and Others[[10]](#footnote-10)* at paragraph 42 of the judgment. It is not clear how this court misapplied the approach. The applicant is wrong where he submitted that this court did not make credibility findings during its own assessment of the evidence. This court clearly dealt with the issue of credibility in paragraph 43 of the judgment and need not be rehashed. Further, the demeanor, candor, caliber and cogency of performance are but *some* of the factors to consider in the consideration of credibility and not the all-encompassing considerations. Where it is required, this court is empowered to re-evaluate evidence, as it has done in numerous cases in the past, without having the opportunity to see witnesses. It is settled that a court *a quo’s* credibility findings will not necessarily or easily be overturned on appeal where no irregularities or misdirections are proved or is apparent from the record’.[[11]](#footnote-11)[20] This court found the remark of the magistrate on the *modus operandi* of the applicant to be uncalled for. The remark does not mean that the magistrate branded the accused as a pedophile – therefore he is guilty – but rather that applicant’s actions reflected (to be similar) to that of a pedophile. We agree with the respondent that it is not uncommon that actions of an accused committing indecent or a sexual act with children are often referred to as ‘pedophilic actions’. There is no indication that the magistrate’s view influenced the proceedings to such an extent that it vitiates the proceedings in its entirety. We are not convinced that another court would consider the remark as a significant misdirection, *per se,* vitiating the outcome of the trial.[21] We find that the grounds of appeal against conviction are sweeping allegations and without merit. [22] The appeal against sentence is yet another sweeping allegation. The court gave reasons in paragraphs 50 to 53. In relation to sentence the court had a discretion which it judicially exercised. The sentence is not inappropriate, harsh or excessive in the circumstances. [23] Having considered the grounds of appeal, submissions by both counsel and this court’s detailed appeal judgment, we find no prospects of success that another court will come to a different conclusion. [24] Accordingly, the explanation given by the applicant is found to be unreasonable and therefore unacceptable; neither has the applicant shown prospects of success on appeal. [25] In the result it is ordered:* 1. The condonation application is refused.
	2. The matter is struck from the roll.
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| **NOTE TO THE PARTIES****The reason(s) hereby provided should be lodged together with any Petition made to the Chief Justice of the Supreme Court** |  |
| **H C JANUARY****JUDGE** |
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| **J C LIEBENBERG****JUDGE** |

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| **Counsel:** |
| **Appellant** | **Respondent** |
| N EnkaliOf Kadhila Amoomo Legal Practitioners, Windhoek | Mr P Kumalo Of Office of the Prosecutor-General, Windhoek |

1. *Both v S* (CA 83/2016) [2018] NAHCMD 239 (10 August 2018). [↑](#footnote-ref-1)
2. *Stellenbosch Farmers’ Winery Group Ltd & Another v Martell ET Cie and Others* 2003(1) SA 11 (SCA). [↑](#footnote-ref-2)
3. *S v Nakale* 2011 (2) NR 599 (SC) at page 603. [↑](#footnote-ref-3)
4. *S v Gowaseb* 2019 (1) NR 110 (HC) at page 112. [↑](#footnote-ref-4)
5. *The State v Iyambo (CA 25/2013) [2013] NAHCNLD 42 (2 May 2013)*. [↑](#footnote-ref-5)
6. *S v Nowaseb* 2007 (2) NR 640 (HC). [↑](#footnote-ref-6)
7. *S v Shikunga* 1997 NR 156 (SC). [↑](#footnote-ref-7)
8. See: *Paulus Nepembe v The State* Case no. CA 114/2003. [↑](#footnote-ref-8)
9. *Garoes v The State* (HD-MD-CRI-APP-CAL-2022/00047) [2023] NAHCMD 191 (14 April 2023). [↑](#footnote-ref-9)
10. *Stellenbosch Farmers’ Winery Group Ltd & Another v Martell ET Cie and Others* 2003(1) SA 11 (SCA). [↑](#footnote-ref-10)
11. *See: S v Slinger* 1994 NR 9 (HC). [↑](#footnote-ref-11)