REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA

CASE NO: CA 112/2002

In the matter between:

THE STATE **APPLICANT**

and

KAREL MARTHINUS THERON **RESPONDENT**

CORAM: Shivute, JP

SET DOWN ON: 30 April 2004

DELIVERED ON: January 2012

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

SHIVUTE, JP:

[1] This is an application for leave to appeal in terms of section 310(1) read with section 310(2)(a) of the Criminal Procedure Act, 1977 (No. 51 of 1977). The respondent was charged with receiving or purchasing unpolished diamonds, valued at N$160 527-15, without a licence or permit in contravention of section 32(1) of the Diamond Act, 1999 (No. 13 of 1999) and was found not guilty and acquitted at the end of the trial in the Regional Court on 13 September 2002.

[2] Subsections (1) and (2)(a) of section 310 of the Criminal Procedure Act, 1977 as amended provide as follows:

> **"Appeal from lower court by Prosecutor-General or other prosecutor**
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> (1) The Prosecutor-General or, if a body or a person other than the Prosecutor-General or his or her representative, was the prosecutor in the proceedings, then such other prosecutor, may appeal against any decision given in favour of an accused in a criminal case in a lower court, including-
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> (a) any resultant sentence imposed or order made by such court;
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> (b) any order made under section 85(2) by such court, to the High Court, provided that an application for leave to appeal has been granted by a single judge of that court in chambers.
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> (2) (a) A written notice of an application referred to in subsection (1) shall be lodged with the registrar of the High Court by the Prosecutor-General or other prosecutor, within a period of 30 days of the decision, sentence or order of the lower court, as the case may be, or within such extended period as may on application on good cause be allowed.
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> (b) …"

[3] The facts of the case are common cause and the only dispute between the parties during the trial concerned the question whether or not the respondent had the intention to commit the offence. It is necessary to restate the facts and they may be summarised as follows: The respondent, a senior and experienced police officer based at Katima Mulilo at the time, was caught in an undercover police operation at the town. His predicament started when he was first approached by a man, who unbeknown to the respondent was a police informant. In their first encounter, the man had offered to sell elephant tusks to the respondent, which offer the respondent seemingly declined. The two met again on 9 December 2000 when the respondent was introduced to a supposed illegal seller of diamonds. This man showed the respondent 12 unpolished diamonds which he had offered for sale. The respondent declined to buy intimating that the diamonds were far too small in size and that he could buy if the number had increased. No price for the diamonds was discussed at this meeting and the three men parted company without any proposal or agreement on when to meet next. On 22 December 2000, the respondent was again approached by the informant and with his assistance, the supposed illicit seller of diamonds who was in real life a police officer attached to the Protected Resources Unit (PRU) of the Namibian Police Force and the respondent met on that date. They first met at 16h25 and the seller produced 20 objects that turned out to be State diamonds which he had all offered for sale at N$39 000,00. As already pointed out, their market value was over N$160 000,00. The respondent looked at the diamonds with his naked eyes and handed them back to the “seller”. He then left the room saying that he was going to make a telephone call outside. He returned shortly after 17h00 and informed the

seller that he could not gather enough money to pay him in full. Instead, he offered to give him N$500,00 (five hundred Namibia Dollars) as a deposit with the balance to be collected later in return for the 20 diamonds. The seller immediately agreed to this proposal and handed over the diamonds in exchange for N$500,00. The diamonds were re-counted at the insistence of the respondent after which the two men left the building where the transaction was concluded. The exit from the building side by side apparently constituted a signal that a deal had been struck and so the respondent was promptly arrested by other officers who were hiding nearby. The diamonds were retrieved from him and he was charged with the offence.

[4] The State called a single witness, the policeman who pretended to be the seller of the diamonds and whose evidence as to what had transpired prior to and during the trap was not disputed. The respondent also testified and called no witnesses. His defence, in summary, was that he had no intention to purchase the diamonds. His intention was throughout to report the seller to the PRU and to facilitate his arrest, if necessary in an undercover operation, as he had allegedly successfully done on two previous occasions. When he was contacted by the informant for the second time at about 11h00, he delayed the appointment until in the afternoon to telephone the PRU in Windhoek. He had wanted to speak to an Inspector Routh or any other senior officer to relate the approach to him and to obtain instructions on how to proceed. Neither Inspector Routh nor any other senior officer was available so the respondent only managed to speak to a lady who had answered the telephone, leaving behind his name and number and the message for Inspector Routh to contact him. It emerged from the evidence that Inspector Routh was part of

the police contingent that had travelled from Windhoek to Katima Mulilo to participate in the police operation which led to the arrest of the respondent. The respondent continued with the narrative that he did not tell any other police officer at Katima Mulilo about the approach by the informant. He explained that the atmosphere at the station at the time was tense due to certain events that took place in the Region and the officers were distrustful of one another. He was aware that there was a PRU office at Tsumeb but that he had had a nasty experience with that office that made him lose faith in the professional abilities of the office to undertake a successful undercover operation. When he met the purported seller on 9 December 2000, he deliberately delayed the conclusion of the deal to buy time to get in touch with Inspector Routh. He adopted a similar stance when on 22 December 2000, he arrived late at the place he had agreed to meet who turned out to be the informant because he was trying to speak to senior PRU officers in Windhoek; he left the building to make a telephone call as part of a deliberate attempt at delaying the conclusion of the deal, and ultimately offered the seller a small amount as deposit in the expectation that the offer would be rejected thereby giving him more time to contact Inspector Routh or any other senior officer in Windhoek. To his surprise, the offer was readily accepted. He had, in any event, intended to register the diamonds in the police registers and hoped to catch the seller when he would have returned to collect the balance of the money.

[5] The trial court found that although the respondent's version at first brush may appear unconvincing, it could not be said in all probabilities that it was false. On the contrary and applying the well-known principle that there is no obligation on the accused, where the State bears the onus, to convince the court of the truth of his

explanation, the learned magistrate concluded that the respondent's version was reasonably possibly true and that he was therefore entitled to an acquittal even though his explanation may be improbable. The court reasoned that considerations such the respondent seemingly trying to delay the conclusion of the deal; the fact that he had offered a token (in relation to both the market value and the asking price) deposit and that he did not use any instrument such a diamond tester, to ascertain whether the stones were authentic or not all pointed to an answer in the negative to the question whether or not the respondent's conduct manifested an intention to unlawfully receive or purchase the diamonds.

[6] The applicant seeks leave to appeal against the acquittal of the respondent on grounds advanced in the notice of appeal filed of record. It is not necessary to restate herein the grounds of appeal save to state that these are based on the findings made and conclusions drawn by the trial court as summarised above and that it is contended on behalf of the applicant that the trial court had erred in arriving at those findings and conclusions.

[7] As is evident from the provisions of section 310 quoted above, subsection (2) (a) thereof requires the notice of the application for leave to appeal to be lodged within 30 days of the decision or within any other extended period that may on good cause be allowed. It is trite law that if the notice is filed out of time, the applicant should bring a condonation application for the late filing of such notice. Such an application must be accompanied by an affidavit, setting out the reasons for the delay or the failure to file the notice of the application within the prescribed period. The

affidavit must provide the court firstly with an acceptable explanation and must further deal with the prospects of success on appeal, on the merits of the case. The court has the discretion whether to condone such non-compliance or not.

[8] The courts have over the years applied these principles and have laid down guidelines which are to be followed in this regard. In the case of *Darries v Sherriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40I-41D, the South African Supreme Court of Appeal stated that an application for condonation for non-compliance with the law is not a mere formality but an application which should be accompanied with an acceptable explanation, not only, for example, the delay in noting an appeal but also any delay in seeking condonation. The court went on to state further that in applications of this nature, the applicant's prospect of success is in general an important though not a decisive consideration. When application is made for condonation, it is advisable that the applicant should set forth briefly and succinctly such essential information as may enable the court to assess the applicant's prospects of success. The applicant's prospect of success is one relevant factor to the exercise of the court's discretion unless the cumulative effects of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. The test in determining whether there are prospects of success in this type of application is whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal. In other words, whether there is a reasonable prospect that the court of appeal may take a different view. However, the mere possibility that another court might come to a different conclusion is not sufficient to justify the granting of leave to appeal.

[9] The applicant filed their notice of appeal on 18 November 2002, more than 7 weeks after the respondent was acquitted. One Leonie Dunn, who was employed as a legal officer by the office of the Prosecutor-General, deposed to a 3-page affidavit on behalf of the applicant. The total sum of her explanation for the delay reads as follows:

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> The matter came to the attention of this office on 17 October 2002 when the record was received via mail from the Regional Court Prosecutor, Otjiwarongo, Mr. M Karuaihe.
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> The cassettes used in the recording of the proceedings were handed to Global Click on 18 October 2002 in order to have the record transcribed and of which the transcribed record was received by this office on 8 November 2002.
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> The matter was received by me, Leonie Dunn, on 12 November 2002.
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> After perusal of the record, I realized that there may be grounds of appeal and thus reasonable prospects of success on appeal.
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> It is respectfully submitted that no fault exists on the part of the applicant."

[10] The duty is on the applicant is to persuade the court that there is reasonable explanation for the non-compliance with the time limits and that it was not due to the fault of the applicant. In the present case, the notice of appeal was filed more than a month late, and the longer period puts more pressure on the applicant to come up

with a convincing explanation to satisfy the court. It was stated in *S v Ntskoane* 1976 (2) SA 401 (head note)[1] that if failure to file a notice timeously extends over a period of time and the applicant presents events to explain his failure and these events were scattered throughout the entire period, he or she will be expected to provide the dates of these events in the notice. The applicant provided the dates such as when the record had been received from the Regional Court Prosecutor, when the recording tapes had been sent for transcription and when the transcribed record had been received, but there is no explanation why the notice of the application could not be lodged within the prescribed period when the applicant was (of course) represented at the trial by the Regional Court Public Prosecutor. It is a fair assumption that the Regional Court Public Prosecutor had intimate knowledge of what happened to the matter during the period between the acquittal of the respondent and the transmission of the record to the offices of the Prosecutor General yet he did not depose to any affidavit to explain. Ms Dunn's explanation is not of much assistance to the applicant since it does not deal at all with the crucial question why the notice of the application could not be filed on the prescribed time. It merely sets out the sequence of events, offers a tentative contention about prospects of success and makes a bold assertion that no fault lies with the applicant. Consequently, I am not persuaded that there is a reasonable explanation as to the non-compliance with the time limits.

[11] Another important consideration in an application for condonation is, of course, reasonable prospect of success on appeal. In determining the prospect of success, a court is required to examine the merits of the appeal as part of the application for

[1] See also *S v Ngombe* 1990 NR 165 (HC) at 166I-J.

condonation. It is a well founded principle that an appeal court does not lightly interfere with the findings of fact by the trial court unless there are well-recognised grounds for interference. It is to be emphasized that the applicant does not even allege that there is a reasonable prospect of success on appeal. On the contrary, the contention advanced in this regard appears to be tentative in that it was stated that "there may be grounds of appeal and thus reasonable prospects of success on appeal". Having considered the record of proceedings in the trial court including the learned magistrate's reasons for judgment, I am unable to see that there are reasonable prospects of success on appeal. I am of the view that the trial court's findings and conclusions appear unassailable.

[12] In the premise, the following order is made:

(a) The application for condonation is refused.

(b) The application for leave to appeal is refused.

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SHIVUTE, JP