REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA

Case No.: CA 53/2003

In the matter between:

HEROLD UENJADJOZA MUTJAVIKUA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: Shivute, JP

Heard on: 03/11/2003

Delivered on: **16 MARCH 2012**

APPEAL JUDGMENT

SHIVUTE, JP:

[1] The appellant was charged with theft of a motor vehicle in the Regional Court and at the end of the trial during which he was legally represented, was convicted and sentenced to five (5) years imprisonment. He now appeals against both conviction and sentence and furthermore applies for condonation pursuant to section 309(2) of the Criminal Procedure Act, 1977 for the late filling of his notice of appeal. Arguments were heard both in respect of the condonation application as well as the merits. Rule 67(1) of the Magistrates Court Rules *inter alia* requires that a person convicted of an offence or crime and who desires to appeal must do so within 14 days after the date of conviction or sentence. It is trite law that if an appeal is not noted within the time limits, condonation for the late noting of the appeal must be applied for. The appellant was sentence on 31 October 2002. It is not apparent from the record when the notice of appeal was filed but the condonation application was filed only on 12 May 2003, nearly 7 months after conviction and sentence. The appellant deposed to an affidavit wherein he sought to explain the delay for the lodging of the notice of appeal. The explanation appears in the following paragraphs of his affidavit:

> ”2 I am presently in custody at the Windhoek Central Prison pursuant to my conviction and sentence for the theft of a motor ... on 31 October 2012.
>
> 4 I approached Dammert & Hinda Incorporated Legal Practitioners on 28 November 2002 to advise me on the prospects of success on appeal against the judgment and sentence and to note and prosecute an appeal once satisfied on the prospects of success.
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> 5. I was advised by Mr Hinda of Dammert & Hinda Incorporated Legal Practitioners, whose advice I verily belief, that:

5.1 The prescribed term (days) for noting an appeal had already expired; and

5.2 He needed to have the record of the proceedings transcribed in order to give me meaningful advice on the prospects of success.

6. I am advised further by Mr Hinda, whose advise I verily believe that:

6.1 Dammert & Hinda Inc. addressed a letter to the Clerk of the Court at Katutura, requesting to be furnished with the record of the proceedings to have same transcribed. A copy of the letter is annexed hereto marked ‘A’.

6.2 On 7 January 2003 my Legal Practitioners addressed a letter to Messrs. Global Click and requested them to transcribe the record of the proceedings. Messrs Global Click furnished their offices with a transcribed record of the proceedings on 18 February 2003. Copies of the said letters are annexed hereto marked ‘B’ and ‘C’ respectively.

6.3 It was impossible and impractical to have advice on the prospects of success and also to file and prosecute an appeal against both conviction and sentence, in the absence of the transcribed record of the proceedings.

6.4 I have prospects of success on the basis as set out more fully from the Notice of Appeal, a copy of which is annexed hereto, marked ‘D’.

7. It is my humble submission that the delay in the noting of my appeal was caused by the fact that I was not aware of the fourteen (14) days within which I had to file the notice of appeal. I did not have money to instruct legal practitioners and relied heavily on my family members to assist me financially, which they did. I then approached my legal practitioners to advice me on the prospects and to prosecute the appeal.

8. I submit that my explanation constitutes good cause as it is not wilfully, deliberate and/or malicious.”

[2] Counsel for the appellant, Mr Hinda, who is not the same counsel who represented the appellant at the trial filed an affidavit confirming the correctness of the contents of the appellant's affidavit in so far as they related to him.

[3] Ms Kishi, who appeared on behalf of the respondent, in effect argued that the there was no reasonable and acceptable explanation for the failure to lodge the notice of appeal within the prescribed time and that the appellant had not shown that he had good prospects of success on the merits. Counsel relied on this Court's matter of *S v Nakapela* 1997 NR 184 at 185E-H where Gibson J stated that the requirements had to be satisfied in turn and in the absence of a reasonable explanation, the appeal should be struck from the roll.

[4] In granting an application for condonation, the Court exercises its discretion judicially depending on the circumstances of each case. The Courts have over the years determined certain factors as guiding principles in granting condonation applications for the non-observance of Court Rules. In *Melanie v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D Holmes JA made the following seminal observations:

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an

> objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for the prospects of success which are not so strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay…"

[5] The above exposition of the law has been adopted and applied by our Courts over the years.[1] The Supreme Court in *Immigration Selection Board v Frank* 2001 NR 107(SC) at 109A-E further pointed out that one factor is not decisive in granting an application for condonation and that other factors, such as the importance of the case may be strong enough for a court to consider the merits of the case. The real issue in the application for condonation is therefore whether the explanation given is reasonable and satisfactory to grant condonation and in the context of an appeal, whether there are reasonable prospects of success on appeal.

[6] The essential thrust of the appellant's explanation for the failure to note the appeal within the prescribed time was the allegation that he was unaware of the time limits and that he had no money to approach a lawyer for assistance. As mentioned before, the appellant was represented by legal practitioner at the trial. It is not apparent from the record whether the appellant's rights of appeal were explained to him by the presiding officer, but it should be observed that the trial took place at the time when the practice that where the accused was legally represented, the magistrate was not obliged to explain the accused's rights to legal representation prevailed; the assumption then being that counsel would explain to a dissatisfied client the possibility of an appeal

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See also *S v Mohlathe* 2000 (2) SACR 530 at 535G-I.

[1]See, for example, *Swanepoel v Marais* 1992 NR 1 (HC) at 4A-B

and the process that had to be followed should a decision be taken to appeal. It is against this background that the explanation should be considered. As is apparent from the appellant's affidavit, when he approached the legal practitioners of record on 28 November 2002, the 14 day period had already lapsed and that in spite of the late brief to counsel, the record was furnished by 18 February 2003. It has already been noted that the actual condonation application was only filed on 12 May 2003. In the case of *Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135(A) at 138E*-H, the court pointed out that the explanation must not only include the reasons for the delay in noting the appeal but also the delay in seeking condonation. It is therefore required that as soon as the appellant realizes that he or she has not complied with a rule of court, he or she must apply for condonation without delay. In the present matter, no explanation has been offered why the condonation application had been filed only on 12 May 2003.

[7] However, as previously observed, the reasons for and the degree of lateness should not be the only factors to be considered. An equally important factor, namely the prospects of success, should also be taken into account in determining whether or not to grant condonation and deal with the appeal. It is to this aspect of the enquiry that I turn next.

Prospects of success

[8] The test of reasonable prospect of success has the effect that a court will refuse an application for leave to appeal in those cases where absolutely no chance of a successful appeal exists, or where the court is certain beyond reasonable doubt that the

appeal will fail. The question to be decided is whether, on the grounds of appeal raised and arguments advanced by the applicant, there is a reasonable prospect of success on appeal. A mere possibility that another court may come to a different conclusion is not sufficient to justify the granting of leave to appeal.[2] Therefore, the only way to determine whether there is a reasonable prospect of success on appeal would be to consider the merits of the appeal.

The merits of the appeal

[9] It was not seriously disputed during the trial that the Toyota Raider 4-wheel drive, white in colour with engine number 22R4206684, chassis number AHT31RN670000844 and belonging to the complainant, Mr Vincent Kandjimi Mberema, was stolen from outside his house in Windhoek on 12 September 2001. On 24 September 2001, 12 days after Mr Mberema's vehicle was stolen, the Okakarara Police, acting on a tip-off, travelled to Omaihi village where they found two Toyota delivery pick-up trucks, one parked under a tree and the other at the back of the farmstead. The two vehicles had no engines in them and at least in the case of the pick-up found parked under the tree it had no gear box either. The white Toyota found parked under a tree had a registration number plate affixed to it at the front only bearing registration number N49305W. Two Toyota engine blocks were found in one of the houses on the farmstead. One bore engine number 2L0837341 and the other 0865663. The white Toyota pick-up (the pick-up) was taken to Okakarara Police Station where Detective Sergeant (D/Sgt) Morgan, a member of the Police's Motor Vehicle Theft Unit, subsequently examined it fully. He found *inter alia* that the chassis and the information plates as well as the job plate were

[2] *S v Ceaser* 1977 (2) SA 348 (A) at 350E.

missing from the firewall where they were affixed. The numbers that are normally etched on vehicle windows were also scratched off. According to D/Sgt Morgan, a pick-up such as the type found parked under a tree would normally have six concealed places on the body of the cab and the cargo box where the vehicle's chassis number would be written. He searched for the numbers and found that the numbers had been scratched off at five places. On the sixth place, being the left door of the cab, however, the number was simply painted over and when the paint was removed with acetone, the number AHT31RN6700008444 appeared. As mentioned before, this is the cargo box and cab of the complainant's vehicle. A clearance certificate disc was found on the pick-up but the chassis number thereon was totally different from the particulars found on the body of the pick-up. Following the discovery of the loading box and cab of Mr Mberema's vehicle, he was called to Okakarara Police Station where the pick-up was shown to him and which he identified as his vehicle, on the basis of various marks both inside and outside the cab and on the cargo box. The complainant testified that the vehicle's body had been re-sprayed but it seems poorly so, because the word "Raider" originally written on the body of the vehicle was still visible under the paint. My understanding of the evidence is that the identification of the pick up by the complainant was not in dispute during the trial. What was in dispute was whether what the complainant had identified was a 4x4 or 2x4 vehicle, an aspect which will be dealt with below.

[10] Although the complainant had positively identified the cab and the cargo box, the chassis on which those parts were mounted had numbers different from those of the complainant's vehicle. This means that the complainant's cab and cargo box had been mounted on someone else's chassis. Furthermore, whereas the complainant's vehicle

was said to have been a four-wheel drive, it was not certain whether the vehicle identified by the complainant was a 4x4 vehicle. Although the complainant insisted that the body was that of a four-wheel vehicle, D/Sgt Morgan who I take it is an expert at least in the identification of motor vehicles, indicated that since the vehicle had no engine or gear box in it, it was difficult to classify as 4x4 or 2x4. The chassis on which the complainant's vehicle was mounted was traced to a vehicle belonging to Namibia Breweries, which was initially stolen but after its recovery was sold by public auction. The computer print-out obtained from the vehicle registering authority shows that the Namibia Breweries vehicle in question was a Toyota Hilux 2.4, diesel, short wheel base. However, according to D/Sgt Morgan, it was difficult to tell from this description alone whether this vehicle was a 4x4 or 2x4. In any event, so D/Sgt Morgan testified (if I understand his evince correctly), the complainant's cab and cargo box could neatly fit on both a 4x4 and 2x4 chassis. On the date the Okakarara Police had impounded the white Toyota pick-up, they had also arrested a woman who was found at the farmstead where the pick-up and other parts were discovered. The woman told the police that she did not know who had taken the pick-up and the engines there, but she was nevertheless arrested and subsequently charged jointly with the appellant. She was acquitted at the end of the trial.

[11] Prior to his arrest, the appellant in the company of his lawyer, had approached the investigating officer, D/Sgt Morgan, and informed him that the pick-up and other vehicle parts found at the farmstead were his property and that his then co-accused had nothing to do with them. In an attempt to convince the investigating officer that the pick-

up was his, the appellant produced two documents, one being a sales agreement and the other a statement allegedly written by a police officer at Otjiwarongo Police Station. The sales agreement, dated 25 September 1996, purports to show that a white Toyota Hilux, 2x4 pick-up, with chassis number LN40-02216208 and engine number 4Y-2021868 was sold by one Toney Tuff Strauss to one Job Kakurupa. The defence led the evidence of the appellant who testified that he bought the Toyota pick-up from Job Kakurupa in 1998, that Kakurupa did not give him any written document evidencing the transaction but that he promised to do so once the appellant had finished paying for the pick-up. While he was still waiting for the papers from Kakurupa, he registered the motor vehicle in the name of his brother, Lourens. He described the vehicle he had allegedly bought from Kakurupa as a 2x4 White Toyota pick-up with registration number N4930W. The appellant did not provide any explanation for the possession of the engines maintaining that the engines were not his. When questioned on how the chassis number on what he contends was his car matched that of the vehicle of Namibian Breweries, the appellant was insistent that the chassis on the pick-up belonged to the vehicle he had bought from Job Kakurupa; that he was not aware that the pick-up had a Namibian Breweries chassis, and that no other person had owned the vehicle since 1998. Kakurupa was not available to testify to the alleged sale of the vehicle to the appellant; he had allegedly died by the time of the trial.

[12] The statement by the Otjiwarongo Police addressed “To whom it may concern” informs that a vehicle, a Toyota 2.7 white in colour with the chassis as well as engine numbers similar to those of the vehicle allegedly sold to Kakurupa by Toney Tuff Strauss

was impounded by Otjiwarongo Police for investigation and etching and that the vehicle was etched three times but no ownership could be determined. Consequently, a case was withdrawn against the accused, one Ndomena Mutjavikua, on 20 September 2000 and the vehicle was handed over to Ndomena on the same day. The chassis number recorded in the sales agreement and the statement by Otjiwarongo Police is totally different from the chassis number of the pick-up identified by the complainant. Moreover, since the sales agreement was supposedly entered into in 1996 – some 5 years before the complainant's vehicle was stolen – it seems plain that the documents presented to the police bore little resemblance to the complainant's vehicle. It was therefore not surprising that the appellant could convince neither the investigating officer nor persuade the trial court that the pick-up identified by the complainant was the appellant's property, hence the conviction and sentence aforesaid.

[13] Several grounds of appeal were advanced but these may be condensed into three main grounds, namely that the trial court erred in finding that the State had proved the case against the appellant beyond reasonable doubt; that that court erred in rejecting the version of the appellant particularly when he testified about the documents purporting to show ownership of the vehicle identified by the complainant, and that that court misdirected itself when it observed in its judgment that car thieves had developed a system to dismantle stolen vehicles and swop their parts to make it difficult for stolen vehicles to be identified. Although the many grounds of appeal had not been expressly abandoned, Mr Hinda who argued the appeal on behalf of the appellant confined himself to the above broad grounds. Mr Hinda premised the argument regarding the

alleged non-proof of the case on the definition of “motor vehicle” in section 1 of the Motor Vehicle Act, 1999 (No. 12 of 1999) (the Act) and submitted that the parts found in possession of the appellant did not constitute a motor vehicle as defined in the Act. As to the trial court’s remarks about the swapping of parts of stolen vehicles, Mr Hinda contended that the learned Regional Court Magistrate was not entitled to make that finding in the absence of evidence on record to that effect.

[14] I turn now to consider the contentions advanced on behalf of the appellant, starting with the question whether or not the motor vehicle parts constituting the pick-up appellant admitted to have been in possession of constituted a “motor vehicle”. Section 1 of the Act defines “motor vehicle” as follows:

> "'motor vehicle' means any self-propelled vehicle, and includes-
>
> (a)...
>
> (b)...
>
> (c)...
>
> (d)...
>
> (e)...
>
> (f) a vehicle the tare of which exceeds 30 kilograms and having pedals and an engine or an electric motor as an integral part thereof or attached thereto and that can be propelled by means of such pedals, engine or motor, or both such pedals and engine or motor, but does not include-
>
> (i) a pedestrian-controlled vehicle propelled by electrical power derived from storage batteries; or

(ii) a vehicle the tare of which is less than 230 kilograms and which is specially designed and constructed, and not merely adapted, for the use of a person suffering from a physical defect or disability and is used solely by such person."

"Vehicle" is defined as meaning:

"a device designed or adapted principally to travel on wheels or crawler tracks, but does not include a device designed to move exclusively on rails."

[15] The definition of "motor vehicle above" envisages the notion that to be a motor vehicle, a vehicle in question must be self-propelled and must have as an integral part of its equipment an engine which provides motive power. It also means that the engine must be its sole and only motive power. In the absence of these two conditions, it would be incorrect to say that a vehicle is self-propelled.[3] The evidence on record is that the pick-up is a vehicle as it has evidently been designed or adapted to travel on wheels. The evidence was further that apart from the engine, the gear box and the rear left wheel, no other part was stated in the evidence to be missing from the vehicle. The photographs produced as part of the respondent's case also give insight into the pick-up. They show that the vehicle had many other parts found in the engine compartment of a motor vehicle. The external appearance shows it as a complete vehicle except for the rear left wheel that was missing. Both parties described the vehicle as a "motor vehicle" throughout the trial. Cross-examination by counsel for the appellant in the court below proceeded on this basis. As has already been noted, two engines were found in the vicinity of the vehicle. There was no allegation or evidence during the trial that the vehicle's engine had been removed permanently for it to cease to be a motor vehicle.[4]

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[3] *R v Fletterman* 1953 (4) SA 163 (T) at 164; *Mathie v Yorkshire Insurance Co Ltd* 1954 (4) SA 731 (AD) at 735. See also Cooper *Motor Law* Vol.1 at p.49.

[4] Cf. *S v Sitlu* 1971 (2) SA 238 (N)

On the contrary, all the evidence points to the vehicle being presented not only as vehicle, but also as a road worthy motor vehicle. When it was found by the police on 24 September 2001, it had a clearance certificate (belonging to a different motor vehicle) displayed on the front screen. A cursory examination of the clearance certificate shows that the certificate would have expired on 30 September 2001, thus giving a false impression to all and sundry that the vehicle was road worthy. It will be recollected that it also had a (false) registration number affixed to the rear. My own view is that a vehicle does not cease to be a motor vehicle merely because the engine, the gear box and one of the wheels is missing in the absence of credible evidence that these parts have been permanently removed and the vehicle in question has permanently lost its means of propulsion.[5] I do not understand counsel for the appellant arguing that the vehicle had lost the characteristics of a motor vehicle just because the cab and the cargo box had been mounted on a chassis from another vehicle. Such a contention would in my view clearly be untenable. I have therefore come to the conclusion that the pick-up was a motor vehicle and that the trial court was correct in making a finding to that effect. As to the contention that the trial magistrate erred in remarking that a pattern had developed of car thieves in theft of motor vehicle cases that are called before her disguising stolen vehicles by mixing them with parts from different vehicles, I cannot agree that the finding was erroneous. The finding is based on the very evidence in the case before the learned magistrate: that the cab and the loading box of Mr Mberema's vehicle had been mounted on a vehicle previously belonging to Namibian Breweries to constitute what the appellant had insisted (falsely) throughout the trial was his vehicle. It is trite that a court

[5] In *S v Essa* 1969 (1) SA 238 (N), it was held that although a vehicle was purchased for scrap it does not thereby cease to be a motor vehicle. It should, however, be observed that there was no allegation in the appeal matter that the pick-up was meant for scrap.

is also entitled to take judicial notice of specific matters that are notorious within the locality of the court.

[16] As regards sentence, the sentence to be imposed on conviction of theft of a motor vehicle is provided for in section 15(1)(c)(i) of the Act, which reads as follows:

> "(b) in the case of an offence referred to in section 2 where such offence relates to a motor vehicle notwithstanding anything to the contrary in any other law contained-
>
> (i) on a first conviction, to imprisonment for a period of not less than five years without the option of a fine."

In *S v Tjiho* 1991 NR 361 at 366A-B, Levy J pointed out that the appeal court may interfere with the sentence if:

> "(i) the trial court misdirected itself on the facts or on the law;
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> (ii) an irregularity which was material occurred during the sentence proceedings;
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> (iii) the trial court failed to take into account material facts or over emphasised the importance of other facts;
>
> (iv) the sentence imposed is startlingly inappropriate, induced a sense of shock and there is a strikingly disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal."

I am of the opinion that none of those circumstances is present here and that the sentence will not be interfered with.

[17] Having dealt with the merits of the appeal, I return briefly to consider further the application for condonation in relation to the prospects of success. It has already been mentioned that the appellant was represented at the trial by counsel. I may add that counsel is well-experienced as he appears to specialize in criminal matters. It seems also that the appellant was not ignorant in his rights as a suspect or accused. It will be recalled that when he had heard that the police had seized the pick-up, he approached the investigating officer through his lawyer. His lawyer had accompanied him to the offices of the investigating officer where the appellant effectively handed himself over to the police and sought to have the then co-accused released. When asked to make a warning statement, he made it clear to the investigating officer that he was not prepared to do so on the advice of his lawyer. I am making these observations not to show that the appellant's rights were explained to him by his counsel at the trial (for the record is silent on that score) but to show that at the very least the appellant had access to the best possible legal advice available and that he had the opportunity to ask issues relating to the appeal since it was clear that he did not accept his conviction and sentence right from the start. In any event, as I have endeavoured to demonstrate, the prospect of success on the merits is bad. The application for condonation should therefore be refused and the appeal be dismissed.

[18] Before I conclude, I must mention that the appeal was heard by two judges. The late Honourable Justice Manyarara, AJ, who sat with me unfortunately passed on before the judgment could be finalised. The legal position in such a situation is governed by section 14(2) of the High Court Act, 1990 (No 16 of 1990) which provides as follows:

> "(2) If at any stage during the hearing of any matter by a full court or by a court consisting of two or more judges, any judge of such court dies or retires or becomes otherwise incapable of acting or is absent, the hearing shall, if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such remaining judges and if such remaining judges do not constitute such a majority, or if only one judge remains, the hearing shall be commenced *de novo*, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of such remaining judges or of such one remaining judge, as the case may be, as the decision of the court."

[19] The parties to the proceedings have agreed unconditionally in writing to accept the decision of the remaining judge as the decision of the court.

[20] In the premises, it is ordered that:

1. The application for condonation is refused;

2. The appeal is dismissed.

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SHIVUTE JP

COUNSEL ON BEHALF OF THE APPELLANT: MR. G. Hinda

Instructed by: Dammert & Hinda Inc.

COUNSEL ON BEHALF OF THE RESPONDENT: Ms. F. Kishi

Instructed by: Prosecutor-General