

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Ignatius Shidumifa Kelly Nghixulifa v The State</i>	Case No: CC 02/2014
Ruling on Application for leave to Appeal	Division of Court: Main Division
Heard before: Mr Justice Liebenberg	Delivered on: 27 May 2019
Neutral citation: <i>S v Nghixulifa</i> (CC 02/2014) [2018] NAHCMD 168 (27 May 2019)	
The order: <ul style="list-style-type: none">a) The application for condonation is refused.b) The matter is struck from the roll.	
Reasons for decision:	
<p>LIEBENBERG J</p> <p>[1] This is an application for leave to appeal against the Court's ruling delivered on 17 October 2018 refusing an application by accused no's 1 – 3 made in terms of ss 85 and 86 of the Criminal Procedure Act 51 of 1977 for the quashing of charges set out in counts 1, 2, 5, 6, 7, 9, 10 and 11, preferred against the accused persons. The present application is brought solely by accused no 1 (hereinafter 'the applicant').</p> <p>[2] The application for leave to appeal was however filed out of time. The applicant subsequently filed a condonation application. The State (hereinafter 'the respondent'), submitted that the explanation proffered explaining the delay was satisfactory in filing the application for leave to appeal. However, the respondent maintains that the application for leave to appeal has no prospects of success on appeal. The court thus reserved its ruling on the condonation application.</p> <p>[3] In applications of this nature the test is whether the applicant has shown on a balance of probabilities that, on the strength of the grounds of appeal raised, there is a reasonable prospect of</p>	

success on appeal. The mere possibility that another Court might come to a different conclusion is insufficient to justify the granting of leave to appeal (*S v Ceasar* 1977 (2) SA 348 (AD) at 350E; *S v Nowaseb* 2007 (2) NR 640 (HC)).

- [4] The grounds on which the application is are enumerated in applicant's application and address the same issues raised in the main application to quash the charges. Whereas the court already extensively discussed and decided the issues raised in the judgment, there is no need to rehash what has been stated or the court's reasoning and findings made.
- [5] Applicant's contention that the Court rejected the approach laid down in *S v Nathaniel*¹ is not consistent with the Court's finding that the facts of *Nathaniel* are clearly distinguishable from the present. In that case the court concluded that, based on the charge and the constitution of the organisation (SWAPO) which the State provided as further particulars to the charge, the State was bound by such particulars, amplifying the charge. From a reading of the organisation's constitution it was clear to the court that the interests of the organisation and its objectives, essentially invalidates the charge under s 2 of Act 22 of 1981. As a result thereof, the charge did not disclose an offence and the charge was quashed. I respectfully associate myself with the court's finding.
- [6] The thrust of the present application is that the Court misdirected itself by failing to adopt a 'narrow approach', as was done in *Nathaniel*, and rather took the approach as was done in *S v Conradie & Another*². The applicant further contended that the Court was to concern itself only with the indictment and the memorandum of association in order to ascertain whether the Road Contractor Company (RCC) was a public body as expressly defined in s 32 of the Anti-Corruption Act 8 of 2003 (ACA). Whereas the meaning of public body is defined to include '*exercising a public power or performing a public function in terms of any law or the common law*' (underlining provided) counsel contended that the RCC is neither a creation of law or common law; but is created by the memorandum of association provided for in terms of s 2(3) of the Roads Contractor Company Act 14 of 1999. It was further submitted that there was accordingly no need for the Court to find that evidence need to be led to

¹ 1987 (2) SA 225 (SWA).

² 2016 (2) NR 438 (HC).

decide what the ambit of the terms 'public body' and 'public officer' is.

[7] The Respondent's argument, however, is that the RCC is a public body as defined in s 32 of the ACA because it is a creature of statute as the memorandum of association and article trace their legitimacy from the RCC Act itself.

[8] For the reasons set out in paragraph 19 of the judgement, the memorandum of association was unilaterally handed up during argument and found not to be properly before the Court for purposes of deciding the question at hand. Had the Court been wrong in disallowing the memorandum of association in support of the application, it is my considered opinion that the applicant's position remains unchanged, given the wide ambit of the definition of a public body set out in the ACA, and the memorandum of association deriving from powers given under the RCC Act.

[9] In order to decide whether or not the RCC exercises a public power or performing a public function and guided by what was said by the Supreme Court in the case of *Permanent Secretary of the Ministry of Finance and Others v Ward*³ (paras 20-21 of the judgment), this court came to the conclusion that this vexed question could only be decided once evidence has been led as regards the factors identified in the *Chirwa* case (See para 20 of the judgement). I respectfully maintain this view and I am not satisfied that the applicant has shown on a balance of probabilities that there are prospects of success on appeal on this ground.

[10] With regards to s 332(5) of Act 51 of 1977 the argument advanced by the applicant in support of this application is merely a repetition of earlier submissions which have been discussed and considered in the main application. Nonetheless the Court once more is of the view that the word director has a 'wide' meaning which would include persons who manage or control the corporate body. Whereas applicant was employed as the Chief Executive Officer of the RCC and accused no 2 a nominee shareholder on behalf of the applicant in a company called /Ae / / gams Engineering PTY Ltd over which applicant had direct/indirect control, and it being alleged that the accused persons having acted with common purpose, it is the respondent's prerogative to cast the net as wide as possible in this

³2009 (1) NR 314 (SC).

circumstances. In addition, the Court is of the view that the applicant would not be prejudiced if the charge remains on the indictment in its current form.

[11] As a result, the applicant failed to prove on a balance of probabilities that he has prospects of success on appeal.

[12] Consequently the condonation application is refused and the matter is struck from the roll.

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

J C LIEBENBERG
JUDGE