



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 09/2008

In the matter between:

PAULUS ILONGA KAPIA	1st ACCUSED
INES GASES	2nd ACCUSED
OTNIEL PODWEWILTZ	3rd ACCUSED
SHARON LYNETTE BLAAUW	4th ACCUSED
RALPH PATRICK BLAAUW	5th ACCUSED
MATHIAS SHIWEDA	6th ACCUSED
NICOLAAS CORNELIUS JOSEA	APPLICANT

and

THE STATE	RESPONDENT
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Neutral citation: *The State v Kapia* (CC 09/2008) [2020] NAHCMD 74
(02 March 2020)

Coram: LIEBENBERG, J
Heard: 19 February 2020
Delivered: 02 March 2020

Flynote: Criminal Procedure – Leave to Appeal – Condonation Application – Applicant filing contradictory affidavits explaining reason for delay – Consequence is that explanation not reasonable and satisfactory – Prospects of success on grounds raised – Applicant failed to show any prospects – Condonation refused.

ORDER

1. The condonation application is refused.
 2. The matter is struck from the roll.
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JUDGMENT

(Application for Leave to Appeal)

LIEBENBERG, J.

[1] The case before the court has a long history in that the matter took more than 5 years to be finalised. It involved the disappearance of N\$30 million dollars invested by the Social Security Commission (SSC) with an investment company known as Avid Investment Corporation (Pty) Ltd (Avid). As a result seven accused persons were indicted by the state to answer on several charges including fraud and contraventions of the now repealed Companies Act 61 of 1973 (the Act).

[2] The trial commenced and on 11 May 2018 the court convicted the applicant on the alternative count of theft by conversion of N\$29,5 million and on count 2 for a contravention of section 424(3) of the Act.

[3] On 5 July 2018 the applicant was sentenced to 17 years' imprisonment on count 1 and on count 2 to two years' imprisonment. These sentences were ordered to run concurrently in terms of section 280(2) of the Criminal Procedure Act 51 of 1977.

[4] Consequential thereto applicant on 11 April 2019 lodged an application for leave to appeal against both the conviction and sentence in respect of count 1 only. The application is thus out of time by eight months.

[5] The grounds of appeal, in summary, amount to the following: With regards to the 1st and 2nd grounds of appeal these are identical in that the applicant avers that the evidence adduced during the trial shows that for purposes of investment there was no relationship between the applicant, SSC and/or Avid from which an instruction for investment of the funds could have emanated and thus the court erred when:

- (a) finding that the offence of theft by conversion was proven beyond a reasonable doubt, and;
- (b) finding that there was placement of funds and instructions to invest, after which the applicant embezzled the funds.

The third ground of appeal is premised on the amount which the court found the applicant to have embezzled. The applicant avers that the court erred in finding that an amount of N\$29,5 million was stolen from the SSC, whereas the evidence adduced showed that the actual loss suffered by the SSC was only N\$14,9 million. The fourth ground turns on the court's rejection of the applicant's evidence which, it is said, was not rebutted in any way. Lastly, the fifth ground of appeal is the court's finding that the applicant and the late Mr Kandara colluded to steal the SSC funds invested with Avid whereas there was no evidence presented to that effect.

[6] With regards to the sentence imposed by the court, the applicant alluded that the sentence was shockingly inappropriate in the circumstances when considering that the applicant only appropriated funds totaling N\$14,9 million and not N\$ 29,5 as found by the court.

[7] Mr. *Brockhoff*, counsel for the applicant from the onset indicated that they abandon grounds one, two, four and five, but would persist with the third ground of appeal against conviction as well as the appeal against sentence.

[8] Section 316 of the Criminal Procedure Act (the CPA) 51 of 1977 provides that an accused person wishing to apply for leave to appeal, is required to do so within a period of 14 days after sentence, which the applicant failed to comply with.

[9] As required, the applicant filed a condonation application wherein he explained the reasons as to his delay, but omitted to indicate whether there are any prospects of success on appeal. This much was conceded by his counsel. In support of the condonation application he additionally filed two confirmatory affidavits namely, that of Mrs. Sylvester and his former legal representative Mr. Makando.

[10] The respondent opposes both the condonation application and the application for leave to appeal. As for the condonation application the respondent contends that the explanation proffered had material discrepancies and is therefore not satisfactory. Furthermore, the applicant did not deal with his prospects of success on appeal; a material shortcoming in the application.

Condonation Application

[11] The applicant in his affidavit avers that on the date of his sentence he received an assurance from his sister-in-law, Mrs Letitia Sylvester, that family members would try and acquire a privately instructed legal practitioner in order to appeal the conviction and sentence. Unfortunately that never materialised, due to the family's inability to raise the required funds. This only came to the applicant's knowledge seven months later. In support of the applicant's explanation, Mrs. Letitia Sylvester deposed to a confirmatory

affidavit in which she confirmed the arrangement as regards the raising of funds to assist the applicant.

[12] In addition, his former legal practitioner, Mr. Slysken Makando, deposed to a confirmatory affidavit in which is stated that immediately after the trial was finalized he was instructed by the applicant to lodge an appeal against conviction and sentence. Mr Makando for this purpose made an application to the Legal Aid Directorate for assistance which according to him was refused. What is absent from the confirmatory affidavit is the dates when the application for legal aid was made and when refused.

[13] It is trite that in order for the applicant to succeed in a condonation application, the applicant must provide a reasonable explanation for not filing the notice of appeal within the prescribed time limit. Furthermore, the appellant must show that he or she has reasonable prospects of success on appeal. In this regard the Supreme Court, when dealing with a condonation application stated as follows in *Disciplinary Committee for Legal Practitioners v Murorua and Another*¹

' . . .Where condonation is sought for delay, the explanation must cover the entire period of the delay. . . .Although prospects of success are ordinarily a relevant consideration in the determination of an application for condonation, where there has been flagrant non-compliance with the rules, the court is not obliged to consider prospects of success.

(Emphasis provided)

[14] Furthermore, in regards to the second leg, namely prospects of success on appeal, this court in *S v Gowaseb*² stated that an applicant is not absolved from the second requirement regardless of whether there is reasonable explanation given or not. The court further held that the prospects of success is imperative, thus if the applicant has not dealt with the prospects of success then the application should fail.³

¹ 2016 (2) NR 374 (SC) 384G.

² 2019 (1) NR 110.

³ Ibid at p 112.

[15] In respect of the first requirement, the explanation for non-compliance must be reasonable and acceptable. However, from the affidavits filed in support of the application, as will be shown below, it is evident that there are material discrepancies in the explanations advanced by the deponents.

[16] In Mrs Sylvester's confirmatory affidavit she states that the reason for the delay was because the family could not acquire funds to get a privately instructed legal practitioner. Despite the applicant's assertion that this information was only communicated to him seven months later upon enquiry, Mrs Sylvester is silent as to when the applicant was informed that the family was unable to raise the necessary funds. Conversely, in Mr. Makando's affidavit he states that upon the handing down of sentence the applicant requested him to initiate the process of appealing against the conviction and sentence. He then made an application to the Legal Aid Directorate for re-appointment for purposes of noting the appeal, but which, according to him, was refused. This unfortunate situation was further aggravated by Mr. Brockerhoff's assertion during oral submission that legal aid did not refused the application as contended by Mr. Makando.

[17] From the afore-going it is apparent that the evidence is contradictory in that the applicant on the one hand is saying that his family would place a private legal practitioner in funds to conduct the appeal, whilst on the other hand, Mr. Makando says he unsuccessfully applied for legal aid. More importantly, the applicant has failed to state in his affidavit why he also instructed Mr. Makando to seek financial assistance from the Directorate Legal Aid. Moreover, the applicant and deponents to the confirmatory affidavits failed to specifically set out the following:

- i. When Mr. Makando applied for legal Aid.
- ii. What applicant has done during the seven months when waiting for the response from his family.
- iii. When was the legal aid the application refused.

For purposes of the condonation application these dates are material, moreover in light of the conflicting evidence in support of the application. It further lays bare that the applicant has not been candid with this court by not revealing the details disclosed by his former legal representative with regards to his instructions and subsequent application for legal aid. The effect of these shortcomings in the application is that the applicant has not explained why it took him nine months to file his application, albeit in person. Did he file a second application for legal aid and if so, when? How did it come that he is currently represented by legal aid instructed counsel and how did it impact on his delay in filing the application, if at all? It is settled law that condonation cannot be granted just for the mere asking. When seeking the indulgence of the court, an applicant has to be absolute sincere when bringing the application.⁴

[2] When applying the law to the present facts, it seems inevitable to find that the applicant failed to give a full and detailed account of delaying the launching of the application for leave to appeal, thus failing to satisfy the first requirement. To be decided next are the prospects of success on appeal.

Prospects of success

[19] The court when dealing with second requirement for condonation stated in *S v Nowaseb*⁵ as follows:

‘Thus, an application for leave to appeal should not be granted if it appears to the judge that there is no reasonable prospects of success.... But it must be remembered, the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal.’

Therefore the mere possibility that another court might come to a different conclusion is not in itself sufficient to justify the grant of the application. The applicant should satisfy the court that he has reasonable prospects of success.

⁴ *S v Abraham Ruhumba*, (unreported) Case No. CA 103/2003 delivered on 20 February 2004.

⁵ 2007 (2) NR 640.

[20] Having taken the decision to abandon all other grounds of appeal except for the third ground pertaining to the amount the applicant was convicted of, it was argued on behalf of the respondent that even if that were to be the case, then that in itself falls short of establishing prospects of success on appeal against conviction.

[21] As set out above, the third ground of appeal, as per the Notice of Appeal, relates to the actual loss suffered by the SSC (N\$14,9 million), opposed to the applicant having been convicted of theft of the full amount (29,5 million) transferred to applicant's company for investment. However, in the heads of argument applicant shifted the goalposts and argued that the applicant should only have been convicted of the amount of N\$10,4 million which the court had found the applicant to have misappropriated after rejecting the applicant's evidence. It was submitted that the applicant invested the funds received as per the instructions of the late Kandara and upon recall, the amount of N\$14,9 million was returned of which the applicant misappropriated N\$10,4 million. The difference of N\$4,5 million represent moneys paid out to the late Kandara for which the applicant could not have been held accountable.

[22] The extent to which the applicant was found to have been involved in the commission of the indicted offences was extensively discussed and considered in paragraphs 123 to 143 of the judgment and there is no need for purposes of this application to repeat what has been stated therein. At para 141 it was said that the evidence established that the applicant, the late Kandara and Mr. Alan Rosenberg worked together and with common purpose when assuming ownership of the money invested with Avid and/or Namangol. This they did with the sole intention to deprive Avid (and in effect the SSC) of the sum of N\$29,5 million. Having joined forces with the late Kandara, the investment made with Namangol and further investments made elsewhere was nothing but a smoke screen. Namangol was used as conduit to facilitate so-called investments which were shortly thereafter recalled and the funds channelled into the private account of the applicant. Applicant was accordingly

convicted of the amount stolen (N\$29,5 million) as supported by the evidence adduced and not what he personally benefitted from. Neither was he convicted of theft for the actual loss suffered by the SSC after his sequestration and the liquidation of Namangol, the proceeds of which were paid over to the SSC.

[23] In light of the aforesaid, I am not persuaded that applicant has any prospects of success on the single ground relied upon in the main application. For purposes of the condonation application the second requirement of the prospects of success has equally not been satisfied as far as the conviction is concerned.

Sentence

[24] The applicant, as alluded to above, did not only appeal against his conviction, but also against his sentence. In his notice the applicant raised a number of grounds which may be summarised as follows:

- a) The sentence was shockingly inappropriate.
- b) The trial court over-emphasised the seriousness of the offence.
- c) The sentence meted out was inconsistent with similar placed cases.
- d) The court failed to take into account that the accused was a first offender.
- e) The court did not take into account the 13 years that the State postponed the case and therefore the trial not being finalised within a reasonable time.

Counsel for the applicant, however did not advance or develop the grounds of appeal as set out in the notice of appeal by the applicant in his heads of argument or oral submissions.

[25] Conversely, Mr. *Brockerhoff* for purposes of sentence rather pegged his appeal against sentence on the argument that if he succeeds on the third ground of appeal against conviction, then the appeal against sentence should equally succeed. As shown above, the applicant failed with regards to the

third ground of appeal, hence the appeal on sentence on that basis should equally fail.

[26] With regards to the ground that the sentence of 17 years' imprisonment is inconsistent with other sentences meted out for the same offence, the court in its judgment on sentence particularly dealt with applicant's blameworthiness (paras 32 – 35) with regards to the moneys stolen and which were considered to be aggravating, impacting severely on his sentence. Also, the fact that the applicant personally benefitted substantially from the crime committed. Although the SSC recovered an amount of approximately N\$11 million from the liquidation of Namangol Investments and the applicant's personal assets, this did not come about as a result of the applicant's doing. With regard to other cases referred to, these cases are clearly distinguishable from the present facts, moreover where this case involved theft of public funds to the sum of N\$29,5 million.

[27] For the aforesaid reasons, I am not persuaded that applicant has any prospects of success on appeal against the sentence imposed on count 1.

Conclusion

[28] After due consideration of the grounds raised on which the applicant seeks leave to appeal; the submissions by counsel and the court's reasons stated in the conviction and sentence judgments respectively, applicant has failed to show any prospects of success on appeal. The application for condonation therefore does not meet the two requisites of good cause, allowing the applicant to proceed with the application for leave to appeal.

[29] In the result, it is ordered:

1. The condonation application is refused.
2. The matter is struck from the roll.

J C LIEBENBERG
JUDGE

APPEARANCES

APPLICANT

T Brokerhoff (instructed by Legal Aid)

Brokerhoff and Associates

Windhoek

RESPONDENT

E Maronedze

Of the Office of the Prosecutor-General,

Windhoek