

IN THE HIGH COURT OF NAMIBIA

LEAVE TO APPEAL

Case Title: <i>Peter Tyran Kohler v The State</i>	Case No: CC 21/2016
Ruling on Application for leave to Appeal	Division of Court: Main Division
Heard before: Mr Justice Liebenberg	Delivered on: 16 March 2020
Neutral citation: <i>S v Kohler</i> (CC 21/2017) [2020] NAHCMD 96 (16 March 2020)	
The order: <ul style="list-style-type: none">a) The condonation application is refused.b) The matter is struck from the roll.c) Copies of this judgment to be served on the Director: Legal Aid and the Director of the Law Society.	
Reasons for decision:	
<p>LIEBENBERG J</p> <p>[1] The applicant in this matter was convicted on 218 counts of fraud on account of tendering pleas of guilty. He was thereafter sentenced on 07 March 2017 to 15 years' imprisonment of which 5 years were suspended for a period of 5 years on condition the applicant was not convicted of the offence of fraud.</p> <p>[2] Disgruntled with the court's sentence, he lodged an application for leave to appeal dated 05 December 2018. Whereas the application is out of time with 1 year and 9 months, applicant in person filed a condonation application simultaneously with his notice for leave to appeal.</p> <p>[3] In the condonation application the applicant stated that he was unable to lodge the application for leave to appeal timeously due to financial constraints; furthermore, that the court did not inform him of his</p>	

right to appeal after he was sentenced.

[4] The respondent opposed both the condonation application and the application for leave to appeal. It is thus imperative for this court to first deal with the preliminary issue of condonation.

[5] It is trite 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:

- a) Where the explanation proffered is not reasonable but an applicant enjoys prospects of success on appeal, a court *may* condone the non-compliance.¹
- b) 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.
- c) 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*.²

[6] To this end, Mr *litula*, counsel for the respondent, argued that the reasons advanced by the applicant are not reasonable, nor acceptable, considering the lengthy period of delay in bringing the main application. Furthermore, he argues that the applicant cannot complain of not being informed of his right to appeal because he, at all times, was represented by a legal practitioner at the trial. The respondent was confident that the condonation application does not satisfy the first requirement and did not advance any argument as to the prospects of success.

[7] On the other hand, Ms *Siyomonji*, counsel for the applicant did not advance any argument pertaining to the condonation application and submitted, on a question by the court why the condonation application had not been addressed in their heads of argument, that the heads were drawn by her colleague for whom she merely stood in of the day of the hearing. She was thus invited by the court to make submissions on the issue, however, she indicated that she will stand by her heads and could not take

¹ *S v Nakale* 2011 (2) NR 599 (SC) at page 603.

² *S v Gowaseb* 2019 (1) NR 110 (HC) at page 112.

the matter any further. Similarly, she also indicated that she has not read the respondent's heads and could therefore not reply to the respondent's submissions.

- [8] On the strength of the documents filed by the applicant and his legal representative it is evident that no attempt has been made by either the applicant or his counsel to address the prospects of success on appeal in the condonation application.
- [9] The applicant stated on oath that he applied with the Directorate of Legal Aid for assistance, but fails to state when the application was made, what the outcome was and the date on which the instruction was issued to have a legal practitioner appointed. In his affidavit of 05 December 2018 applicant only stated that by that date he had not received any reply from Legal Aid and decided to prepare the application in person with the hope of a lawyer being appointed in the meantime. Mr *Siyomunji* was thereafter instructed. On condonation the court in *Elton Jossop v The State*³ at para 6 said that 'An application for condonation must be lodged without delay, and must provide a full, detailed and accurate explanation for the entire period of the delay including the timing of the application for condonation.'⁴ This requirement had not been satisfied by either the applicant in the condonation application, neither by his lawyer when preparing the heads of argument. This is a flagrant disregard of duty on the part of counsel not to have realised the shortcoming in the condonation application and initiate process to supplement the applicant's affidavit. This applies to both the advancing of a reasonable and acceptable explanation for the late noting of the main application, as well as the prospects of success of appeal.
- [10] Turning to the applicant's contention that the court did not inform him of the right to appeal, this is correct. However, this duty on the court only applies when an accused person is unrepresented, which the applicant was not. The applicant omitted to mention that he was legally represented by Mr *Tjituri* at the time and whether or not he obtained advice from his counsel on lodging an application for leave to appeal. He is also silent as to whether he gave any instructions in that regard as might be expected of a person in his position, moreover where in para 2 of applicant's notice he states that 'I always had the intention to appeal since the receiving of my sentence'. From this assertion it can safely be deduced

³ Case No. SA 44/2016 (unreported) delivered on 30 August 2017.

⁴ See *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5; *Primedia Outdoor Namibia (Pty) Ltd v Kauluma* (LCA 95-2011) [2-14] NALCMD 41 (17 October 2014).

that

the delay in lodging the application was not brought about by ignorance on the part of the applicant about his right to bring an application for leave to appeal. There is thus, for the reasons relied upon, no justification for the applicant's failure to lodge the application on time.

[11] Coming to the second requirement, namely prospects of success on appeal, I already alluded to the fact that neither the applicant nor his legal representative advanced anything on that aspect of the application. Though this shortcoming in the condonation application should be fatal (as pointed out in *Gowaseb*) the court, notwithstanding, would still consider whether prospects of success on appeal exist in light of the *dictum* set out in *S v Arubertus*⁵

[12] The applicant's qualm lies therein that the court, in his view, imposed a harsh sentence compared to sentences imposed in other cases of similar nature and relied on *S v Majiedt*⁶; *S v Serfontein*⁷; and *S v Van Rensburg*⁸ as support for his contention. Counsel for the respondent did also not deal with the prospects of success on appeal in his heads of argument, so the court invited him to make submissions in that regard. Counsel stated that the applicant does not enjoy prospects of success on appeal because he embezzled a large sum of money to wit N\$5 856 075.90. Furthermore he argues that the sentences meted out in those judgments were proportional to the amounts embezzled by the accused persons and made reference to the *Madjiedt* and *Serfontein* matters. This court is in agreement with the respondent's submission as regards the proportionality between the amount embezzled and the sentence meted out. It should be noted that at the time of sentencing in this matter, the *Madjiedt* case was the high-water mark for fraud cases in this jurisdiction and an instance where the apex had been reached in the proportionality between the amount embezzled and the sentence imposed. Furthermore, whereas the applicant's case had been finalized prior to that of *Serfontein* and *Van Rensburg*, the sentences imposed therein cannot be used as authorities for the applicant's

⁵ 2011 (1) NR 157 at 160A-B.

⁶ (CC 11/2013) [2015] NAHCMD 289 (01 December 2015), the accused was convicted of 396 counts of fraud involving the amount of N\$56 million and was sentenced to 25 years' imprisonment of which 8 years was suspended.

⁷ CC 07/2019, the accused was convicted of 34 counts of fraud involving an amount of roughly N\$4 million and she was sentenced to 13 years' imprisonment of which 5 years were suspended.

⁸ (CC 24/2012) [2018] NAHCMD 244 (16 August 2018), the accused persons were convicted of 256 counts of fraud and other charges which involved the amount of N\$11.5 million. The first accused in that matter was sentenced to an effective term of 6 years imprisonment.

argument that the court misdirected itself at the time of sentencing the applicant.

[13] From a reading of the judgment on sentence delivered on 07 March 2017, it is evident that the court gave due consideration to all mitigating factors favorable to the applicant as well as the aggravating circumstances and concluded in para 18 that the latter would have a substantial impact on the sentence to be imposed. Besides the large sum involved, the applicant on 218 occasions over a period of five years defrauded his employer; his *modus operandi* was such that the crimes could not be easily detected; that the applicant abused his position and trust which his employer had in him; the loss suffered by the company as a result of the applicant was substantial, and that he personally gained from the crime.

[14] While courts at sentencing should endeavor to give effect to the principle of uniformity, the principle of individualization must equally find application and accorded the necessary weight, depending on the specific personal particulars and circumstances of the person before court. Those facts and circumstances highlighted by the applicant in his notice were each discussed and considered in the judgment and applicant's bold assertion that the court misdirected itself by giving insufficient weight thereto, is unsubstantiated. These factors are not considered in isolation but against all the factors present in the circumstances of the case, inclusive of those favorable to the applicant but also those weighing against him, the crime and the interests of society. The fact that the applicant was a first offender and, in particular, having pleaded guilty, weighed heavily in his favor and culminated in a significant part of the sentence being suspended (5 years). In view thereof, the court maintains its position that the sentence imposed in the circumstances of the case is neither shocking, nor inappropriate. Therefore, the applicant does not enjoy any prospects of success on appeal and his application should accordingly fail.

[15] Lastly, I deem it necessary to make a few remarks on the manner in which counsel for the applicant failed in his duty to provide his client, the applicant, with the quality of service he was deserving of and for which counsel would be remunerated by the Directorate of Legal Aid. Besides filing heads of argument which fell significantly short of addressing the issues at hand, Mr *Siyomunji* was not available on the day of the hearing and sent his colleague, Ms *Siyomunji*, instead, with the instruction to abide by the heads filed with no need to make any submissions in furtherance of the grounds raised in the

notice

or otherwise. In fact, counsel was apparently merely required to show up and place herself on record. This is a serious dereliction of duty of an officer of the court and should not be left unsanctioned.

[16] In the result it is order:

- a) The condonation application is refused.
- b) The matter is struck from the roll.
- c) Copies of this judgment to be served on the Director: Legal Aid and the Director of the Law Society.

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