REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, HELD AT WINDHOEK

RULING

Case Title: Grant Noble — First Applicant Dinath Azhar — Second Applicant and The State — Respondent	**Case No:** CC 10/2020 **Division of Court:** Main Division **Heard on:** 27 March 2023
Heard before: Mr. Justice Sibeya, J	**Delivered:** 13 April 2023

Neutral citation: *S v Noble and Another* (CC 10/2020) [2023] NAHCMD 184 (13 April 2023)

Order:

1. The first applicant's application for condonation for late filing of the application for leave to appeal is granted.
2. The first applicant's application for leave to appeal to the Supreme Court is dismissed.
3. The second applicant's application for condonation for late filing of the application for leave to appeal is refused.
4. The matter is regarded as finalised and removed from the roll.

Reasons for order:

SIBEYA, J:

Introduction

[1] The court is seized with an application for leave to appeal to the Supreme Court against the applicants' conviction of the offence of dealing in dangerous dependence-producing substances in contravention of s 2*(c)* read with ss 1, 2(i) and or 2(ii), 8, 10, 14 and Part II of the Schedule of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 ("the Drugs Act") and further read with s 332(5) of the Criminal Procedure Act 51 of 1977 ("the CPA").

[2] The first and second applicants were the first and second accused respectively, during their criminal trial which resulted in the guilty verdict on the above-mentioned offence delivered against them on 25 August 2022. They were each subsequently sentenced, on 6 October 2022, to 12 years' imprisonment of which five years are suspended for a period of five years on condition that they are not convicted of a similar offence committed during the period of suspension. No leave to appeal is sought against the sentence.

[3] The application for leave to appeal against conviction is opposed by the state.

The law

[4] A person who intends to appeal to the Supreme Court against a judgment of the High Court in a criminal matter cannot appeal as of right. He is required to firstly apply for leave to appeal.

[5] Section 316 of the CPA provides that:

'316(1) An accused convicted of an offence before the High Court of Namibia may, within a period of fourteen days of the passing of any sentence as a result of such conviction or within such extended period as may on application (in this section referred to as an application for condonation) on good cause be allowed, apply to the judge who presided at the trial or, if that judge is not available, to any other judge of that court for leave to appeal against his or her conviction or against any sentence or order following thereon (in this section referred to as an application for leave to appeal), and an accused convicted of any offence before any such court on a plea of guilty may, within the same period, apply for leave to appeal against any sentence or any order following thereon.

(2) Every application for leave to appeal shall set forth clearly and specifically the grounds upon which

the accused desires to appeal: Provided that if the accused applies verbally for such leave immediately after the passing of the sentence, he shall state such grounds and they shall be taken down in writing and form part of the record.'

[6] In *Shilongo v Vector Logistics*[1] the court stated as follows regarding the test for an application for leave to appeal:

'[4] It was observed in *S v Nowaseb*[2] that –

"[2] (Thus) an application for leave to appeal should not be granted if it appears to the Judge that there is no reasonable prospect of success. And it has been said that in the exercise of his or her power, the trial Judge (or, as in the present case, the appellate Judge) must disabuse his or her mind of the fact that he or she has not reasonable doubt as to the guilt of the accused."'

[7] Mainga JA in the Supreme Court matter of *S v Ningisa*[3] referred to the aforesaid test as set out in *S v Ackerman en 'n Ander*[4] and *R v Boya,*[5] as follows:

'A reasonable prospect of success means that the judge who has to deal with an application for leave to appeal must be satisfied that, on the findings or conclusions of law involved, the Court of Appeal may well take a different view from that arrived at by the jury or by himself and arrive at a different conclusion.'

Condonation

[8] On 26 October 2022, and about six days out of the prescribed period of time within which to launch an application for leave to appeal, the first applicant filed an application for leave to appeal against conviction, accompanied by an application for condonation for such late filing. He states, in the application for condonation, that he was unable to file the application for leave to appeal in time due to the unavailability of his legal representative.

[9] The respondent did not oppose the first applicant's application for condonation.

[1] *Shilongo v Vector Logistics* (LCA 27/2021) [2014] NALCMD 33 (7 August 2014).
[2] *S v Nowaseb* 2007 (2) NR 640 (HC).
[3] *S v Ningisa* 2013 (2) NR 504 SC para 6.
[4] *S v Ackerman en 'n Ander* 1973 (1) SA 765 at 766H quoting from *R v Boya* 1952 (3) SA 574 (C) at 577B-C.
[5] *R v Boya* 1952 (3) SA 574 (C) at 577B-C.

Condonation will be granted.

[10] The second applicant, on the other hand, filed his application for leave to appeal on 22 February 2023, after a period in excess of four months had lapsed. The second applicant, in an affidavit deposed to in support of his condonation application, states that it took time for him to recover from the shock resulting from his conviction and sentence. He further states that he applied for legal aid for a lawyer to assist him the application for leave to appeal. The legal aid application which is still pending is said to have delayed the second applicant to launch this application. The second applicant's condonation application is opposed by the state.

[11] Mr Namandje agreed at the commencement of the hearing of this application to represent the second applicant as well in these proceedings despite not being involved in drafting his papers.

[12] It is settled law that an applicant who seeks condonation bears the onus to satisfy the court that there is sufficient cause to grant condonation and to bring the application for condonation without delay. In *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC and Others*,[6] the Supreme Court cited with approval the following passage from *Petrus v Roman Catholic Archdiocese*[7]:

> '[9] It is trite that a litigant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. Moreover, it is also clear that a litigant should launch a condonation application without delay. In a recent judgment of this court, *Beukes and Another v SWABOU and Others*, case no 14/2010, the principles governing condonation were once again set out. Langa AJA noted that "an application for condonation is not a mere formality" (at para12) and that it must be launched as soon as a litigant becomes aware that there has been a failure to comply with the rules (at para 72). The affidavit accompanying the condonation application must set out a "full, detailed and accurate" (at para 13) explanation for the failure to comply with the rules.
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> [10] In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's prospects of success on the merits, save in cases of "flagrant" non-compliance with the rules which demonstrate a "glaring and inexplicable disregard" for the processes of the court (Beukes at para 20).'

[13] It is clear from the above authority that an application for condonation is not a mere

[6] *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC and Others* SA 79/2016 delivered on 31 August 2018 para 20.
[7] *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC).

formality and it must be timeously launched. The applicant is further compelled to provide a full, detailed and accurate explanation of the period of the delay, and should also satisfy the court that he has reasonable prospects of success on appeal.

[14] The second applicant did not inform the court as to the exact period when he was under a state of shock for being convicted and sentenced. He further failed to file medical proof of such shock nor an affidavit from a medical practitioner or psychologist to confirm the alleged shock. He also failed to inform the court of the date when he applied for legal aid and the date when he received a response from legal aid (if any). The second applicant further failed to provide documentary proof that he applied for legal aid.

[15] The aforesaid reasons advanced by the second applicant in support of the application for condonation, in my considered view, do not account for the four months period that lapsed before the application for condonation was launched. I find that the explanation provided by the second applicant is inadequate to cover the non-compliance with rule 316 of the CPA for failing to launch the application for leave on time. It is well-established law that the inadequate explanation tendered for the delay in an application for condonation, it may be cured by the presence of good prospects of success.[8]

[16] In addressing whether the second applicant enjoys reasonable of success or not, and in view of the fact that the second applicant did not clearly set out the grounds of his application for leave, I will conjunctively consider the grounds on which the application for the first applicant are based.

Analysis of grounds

[17] The applicants argue that the court did not properly consider the application of s 332(5) of the CPA to their circumstances. The applicants contend that since no evidence was led from the witnesses in Brazil where the container was allegedly packed, and where the cocaine (if proven to be so) was loaded in the container and considering that there was no evidence that the applicants had knowledge of the presence of cocaine in the container, the applicants should have been acquitted.

[8] *S v Nakale* 2011 (2) NR 599 (SC) at 603.

[18] It is correct that no evidence was led about the occurrences in Brazil where the cocaine is said to have originated from. There was further no direct evidence that the applicants were aware of the presence of cocaine in the container. The circumstantial evidence, however, revealed that the applicants improperly used Zeeki Trading CC to import the content of the container from Brazil. As a result, the court found that the applicants cannot be excluded by the provisions of s 332(5) of the CPA from the activities of Zeeki Trading CC on the basis that Zeeki Trading CC is a separate legal entity. Personal liability of the applicants for the importation of the container is, in my view, unavoidable in this matter.

[19] The second ground raised is that the court erred in not finding that the members of the Namibian police abused the judicial process and their power to obtain a warrant of search and seizure by fraud and manipulation, and that their evidence should be excluded. The court, in the ruling on the application for discharge brought in terms of s 174 of the CPA, found that the allegations made by Warrant Officer Nghishindimbwa in an attempt to comply with s 21 of the CPA revealed an element of misrepresentation, dishonesty and fraud. The court condemned this action for constituting serious misrepresentation and invited the Inspector-General to investigate the misrepresentation by W/O Nghishindimbwa and take appropriate action. On this basis, *inter alia*, the court found that the search warrant constituted a nullity for not being obtained according to law.

[20] The third ground is that the court erred when it found that the Customs and Excise Officials utilised their powers to gain access to the contents of the container in the absence of evidence to that effect when the evidence was that the police entered, searched the container and seized the items. The applicants contend further that the evidence established that the search of the container was directed by the police. They further contend that Mr Shangula was not designated as a controller by the Commissioner as per the Customs and Excise Act 20 of 1998 and if he was so designated by Ms Hambira, Ms Hambira (who was purportedly appointed by the Permanent Secretary was not appointed by the Minster as required by the law) was never appointed as a Commissioner, and therefore the inspection conducted under the Customs and Excise Act was invalid.

[21] The court found, in the main judgment, that the inspection of the container was a joint exercise between the police officers and Customs and Excise officials. This finding is supported by, *inter alia*, Mr Shangula and Mr Niingo who testified that they were assisted by the police during the search.

[22] It was further found in the main judgment, at the backdrop of *S v Shikunga*[9] that even if it is established that Mr Shangula did not comply with the Customs and Excise Act to the latter, the irregularity committed does not constitute a failure of justice and fairness required that such evidence be considered.

[23] The fourth ground is that the state failed to prove that the substance obtained from the container was cocaine, in view of the contradictory and unreliable evidence of Ms Christine Kamukwanyama, which did not meet the evidence of an expert. The applicants further allege that the evidence of Dr Ludik destroyed that of Ms Kamukwanyama.

[24] Although, as stated in the main judgment, Ms Kamukwanyama's evidence had a few flaws, her analysis was, however, clear and she testified as per her finding contained in her expert report which was received into evidence. Her evidence is that the substance analysed contained cocaine and this was not destroyed by Dr Ludik as alleged.

[25] The fifth and sixth grounds are that the court erred in the summary of the established evidence under paragraph 115(a) to (g) of the main judgment as some of the findings were not supported by established evidence. The applicants state further that the court did not properly consider that no investigation was carried out in Brazil and that no witnesses were called to testify from the supplier in Brazil as well as from persons who were involved in the packing and transhipment of the container. The court is further alleged to have ignored the concession by the lead investigator that there was a big gap in the state's case after the police failed to carry out investigation in Brazil where the container was packed and shipped from. The applicants further contend that the court ignored the email correspondences and the importation documents.

[26] In order to address the said grounds, I find it appropriate to quote the whole summary of the established evidence referred to and it is as follows:

> '[115] The evidence established the following:
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> (a) That accused 1 and 2 created ZEEKI Trading CC where accused 1 was the sole member at the initiation of accused 2 and financed by accused 2 and owned by both accused 1 and 2;
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> (b) That there is no documentary proof for the allegations that accused 2 owes a lot of people money and that he is listed on ITC;

[9] *S v Shikunga* 1997 NR 156 (HC).

(c) That ZEEKI Trading CC rented a warehouse (a business premises) for a period of one year and paid rental amount of about N$137 000 without carrying out any business at the warehouse;

(d) That ZEEKI Trading CC was created to make profit yet it paid rentals causing a loss of N$137 000 which accused 2 called a stupid decision;

(e) That ZEEKI Trading CC procured printing paper from Brazil where, upon resale, it was going to generate profit to an amount of N$90 000, yet it paid an amount of N$137 000 in monthly rental fees;

(f) That ZEEKI Trading CC ordered printing paper from Brazil while printing papers are readily available locally;

(g) That two people stood to benefit from the consignment in the container and they are accused 1 and 2;

(h) That accused 1, despite being an expert in the import and export field, he hired another person to clear the container without a cogent reason, thus indicative of distancing himself from the container;

(i) That accused 1's insistence to Mr Niingo that the container be taken to their private warehouse and inspected there, even after being informed that the container had been stopped by customs and his assurance tendered that customs can send their most trusted men to carry out such inspection is misleading, to say the least;

(j) That this was the first time that ZEEKI Trading CC imported anything into Namibia;

(k) That no proof was produced by accused 2 that his brother-in-law gave him money, that his brother-in-law is deceased, that Mr Suliman subleased the warehouse rented by ZEEKI Trading CC from January to April 2018 and no proof of the evidence that Mr Suliman is deceased hence he cannot come to court to testify;

(l) That It was put to the state witnesses that the warehouse was utilized now and then and this was confirmed by accused 2 in evidence but he turned around and said that Mr Suliman rented the warehouse continuously and not periodically;

(m) That accused 2 was given N$200 000 by his brother-in-law as payment for the debt of N$650 000 which he owed to accused 2, but then accused 2 went on to state that he was due to pay him back the money so that his brother-in-law could pay his creditors and when questioned further accused 2 said that his brother-in-law ran a business of an art gallery and he could pay his creditors from his business;

(n) That accused 1 said he was forced by Sgt Kaleb to go to the container on 15 June 2018 yet when he telephoned accused 2 he only said to him that he was going to the port to open the container and accused 2 should come to assist;

(o) That ZEEKI Trading CC ordered 480 boxes of copy paper and in the container there were indeed 480 boxes of which 460 boxes contained copy paper while 20 boxes contained cocaine;

(p) That the boxes of copy paper were written 10 rims of paper on the side;

(q) That no other items on the container were destined elsewhere, but the bill of lading showed that the contents of the container were ordered by ZEEKI Trading CC and destined to ZEEKI Trading CC.'

[27] It is indeed correct that the lead investigator testified that there is a gap in the state's case since the police failed to travel to Brazil to carry out an investigation there due to financial constraints. It should, however, be laid bare that notwithstanding the averment made by a witness, when all is said and done, the court retains a duty to assess the totality of the evidence led, and make a determination.

[28] The summary of the established findings referred to above are based on evidence appearing on record. The applicants did not specifically point out a particular finding which they contend that it is not supported by evidence. This makes it difficult to fully appreciate these grounds. It must be pointed out that in the assessment of evidence, the court found that the explanations proffered by the applicants are not reasonably possibly true and were rejected as false. The court further found that the state proved the guilt of the applicants beyond reasonable doubt.

[29] It should be stated that the presence of the email and the importation documents including the bill of lading supports the finding that the cocaine was imported as copy paper. The explanation by the applicants were rejected as false and they were found, on the overwhelming circumstantial evidence, to have used Zeeki Trading CC as a front to import cocaine. The emails and the importation documents were, therefore, used in the furtherance of the importation of cocaine.

[30] In ground seven, the applicants contend that the evidence of Mr Hafeni Ndeshilile and Mr Linekela Hilundwa is damaging to the state's case which ought to have been used to their benefit, as there appear to have been persons who were aware of the content of the container other than the applicants.

[31] The court made a credibility finding against both Mr Ndeshilile and Mr Hilundwa and found them not to be credible witnesses. They were found not to have testified in a forthright manner and differed greatly on material aspects. Their evidence was marred with contradictions. This court is alive to the fact that the appellate court will be slow to interfere with credibility findings of the trial court.

[32] The applicants further raised possible interference with the container when it was transhipped in South Africa before arriving at its destination in Walvis Bay and the fact that a further seal identical to the one used to seal the container was found inside the container

suggesting that the container may have been tampered with. The evidence revealed that the container was transhipped in South Africa. Transhipment is the unloading of a cargo from one vessel to another. There was no evidence led that such container and content was tampered with or even opened while in South Africa, nor were there circumstances available on record on which such an inference could be drawn. The unexplained presence of a similar seal in the container, in my view, does not add or subtract anything of material value to the findings and conclusions reached above.

Conclusion

[33] The grounds on which the applicants' application for leave to appeal are based are unmeritorious for reasons set out herein above. Without regurgitating the judgment complained of, most of the concerns raised by the applicants were, in my view, adequately addressed in the said judgment. I am not persuaded that the applicants have succeeded to demonstrate on a balance of probabilities that they enjoy reasonable prospects of success on appeal.

[34] The first applicant's application for leave to appeal, therefore, falls to be dismissed. The second applicant's application for condonation for late filing of the application for leave to appeal falls to be refused.

Order

[35] As a result, I make the following order:

1. The first applicant's application for condonation for late filing of the application for leave to appeal is granted.
2. The first applicant's application for leave to appeal to the Supreme Court is dismissed.
3. The second applicant's application for condonation for late filing of the application for leave to appeal is refused.
4. The matter is regarded as finalised and removed from the roll.

	Note to the parties:
O Sibeya Judge	The reasons provided herein should be lodged together with any Petition made to the Chief

	Justice of the Supreme Court
Counsel:	
The Applicants:	**The State**:
S Namandje Of Sisa Namandje & Co Inc., Windhoek	T Iitula Of the Office of the Prosecutor-General, Windhoek