REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

LEAVE TO APPEAL JUDGMENT

PRACTICE DIRECTION 61

Case Title: Hendrik Nowoseb v S	**Case No:** CC 06/2017
Coram: Liebenberg J	**Division of Court:** High Court, Main Division
Heard: 13 November 2023	**Delivered:** 21 November 2023
Neutral citation: *Nowoseb v S* (CC 06/2016) [2023] NAHCMD 754 (21 November 2023)	
ORDER: 1. The application for condonation is refused. 2. The matter is struck from the roll.	

REASONS FOR ORDERS:

Liebenberg J:

[1] On 21 August 2017, the applicant was sentenced to 40 years' imprisonment on a charge of murder (count 1) and eight years for attempted murder (count 2). Half of the sentence on count 2 was ordered to be served concurrently with that imposed on count 1, passing an effective term of 44 years' imprisonment. The applicant seeks leave to appeal only against the sentence imposed on count 1 on the following grounds:

a) That the term of 40 years is shockingly inappropriate.

b) That the sentence is out of proportion with the totality of the accepted facts in mitigation.

c) That the sentence disregards all the steps taken by the applicant in his mitigation.

d) That the court erred in over-emphasising the seriousness of the offence and the deterrent effect of the sentence and, in doing so, it ignored the mitigating features of the applicant's case.

[2] At this stage it needs to be pointed out that the applicant in his application for condonation, under the prospects of success on appeal, added a further ground in para 3.4.1 when stating that he is of the view that the Supreme Court may impose a different sentence, based on the judgment delivered in *S v Gaingob and Others.*[1] Hence, the respondent does not oppose the applications for condonation and leave to appeal.

[3] It is settled that the applicant had to file his notice of appeal within 14 days of his sentence as per s 316 of the Criminal Procedure Act 51 of 1977. In the present matter, the applicant was sentenced on 21 August 2017 and only filed his application for leave to appeal on 21 July 2023, more than six years after his sentence. His notice of appeal is clearly filed out of time.

[1] *S v Gaingob and Others* 2018 (1) NR 211 SC.

[4] On 21 July 2023, the applicant also filed a condonation application for the late filing of his leave to appeal application. The court will therefore first deal with the question whether or not the applicant has made out a case for condonation of the late filing of his leave to appeal, failing which, the application would have lapsed.

[5] In an application for condonation, the factors that the court must consider are trite. In *Balzer v Vries*[2] the Supreme Court summarised the principles applicable to condonation applications as follows:

'[20] It is well settled that an application for condonation is required to meet two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.

[21] This court recently usefully summarised the jurisprudence of this court on the subject of condonation applications in the following way:[3]

"[5] The application for condonation must thus be lodged without delay, and must provide a full, detailed and accurate explanation for it.[4] This court has also recently considered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include –
the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice".[5]
These factors are not individually determinative, but must be weighed, one against the other. Nor

[2] *Balzer v Vries* 2015 (2) NR 547 (SC) at 551-553 para 20 -21.
[3] *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at 189 -190 para 5.
[4] *Beukes and Another v South West Africa Building Society (SWABOU) and Others* (SA10/2006) [2010] NASC 14 (5 November 2010) para 13.
[5] See *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2013 (3) NR 664 (SC) para 68.

will all the factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been glaring, flagrant and inexplicable.'[6]

[6] There are also times where a slight delay and a good explanation may help to compensate for the prospects of success which are not strong or the importance of the issue and strong prospects of success may tend to compensate for a long delay.[7] There would also be cases where the prospects of success, a reasonable and acceptable explanation for the delay and the importance of the issues raised, may compensate for a long delay.[8]

[7] I now turn to deal with both legs for condonation separately. As regards a reasonable explanation, the applicant states that he was shocked by the outcome and that for several years he struggled to formulate and draft his leave to appeal in the English language. This explanation, in my view, does not constitute a reasonable explanation for the following reasons. Firstly, the applicant does not explain the nature, severity and duration of the alleged shock so as to enable this court to assess how the alleged shock disabled him to prosecute his appeal for a period of six years. Furthermore, he does not set out the steps he took to formulate the notice in English and steps taken to try and note the appeal during the entire period of delay. At best, the explanation amounts to a bare allegation. Therefore, the condonation application is bound to fail on this leg alone.

[8] As regards prospects of success, the applicant submits that the sentence is shockingly inappropriate and, as stated, that the Supreme Court may impose a different sentence in light of the *Geingob* judgment (*supra*) which dealt with the constitutionality of lengthy sentences exceeding life expectancy of an accused.

[9] In the Supreme Court case of *Hyanith James Ningisa and Others v The State*[9] Mainga JA referred to the test as set out in *S v Ackerman en 'n Ander*[10] and *R v Boya*[11]

[6] See *Beukes*, cited above fn 3. para 20; See also *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) para 9.

[7] See *Melane v Santam Insurance* Co Ltd 1962 (4) SA 531 (A)

[8] See *South African Poultry Association and Others v Minister of Trade and Industry and* Others 2018 (1) NR 1 (SC).

as follows:

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

[10] When considering the prospects of success on appeal, primarily based on the *dictum* enunciated in *Gaingob,* it is my considered view that a court, faced with an application as the present, should not follow a blanket approach by finding prospects based solely on the *dictum* at 229A-B of the judgment where Frank AJA stated:

'As life imprisonment is the most severe sentence that can be imposed, any sentence that seeks to circumvent this approach by imposing fixed term sentences longer than 37 and a half years is materially misdirected and can be rightly described as inordinately long and is thus liable to be set aside.' (Emphasis provided)

[11] In the present instance, the applicant takes issue with the sentence of 40 years' imprisonment imposed on count 1 which, *prima facie*, falls within the category of cases referred to above as 'inordinately long'. In coming to this conclusion, the Supreme Court's reasoning was that, where fixed terms of imprisonment[12] in excess of 37 and a half years are imposed and the offender only becomes eligible for parole after serving two thirds of his sentence, such sentence would be harsher than life imprisonment where the prisoner becomes eligible for parole after having served 25 years.

[12] When employing the subject of parole as the criteria in deciding whether a determined sentence in excess of 37 and a half years is harsher than a sentence of life imprisonment, regard must also be had to the extent of the sentence regarding that period of the sentence *after* the prisoner's release, as he or she would still be serving his/her sentence during that period. Regulation 281 of the Namibian Correctional Service

[9] *Hyanith James Ningisa and Others v The State* 2013 (2) NR 504 SC at para 6 (SA 03/2009) [2012] NASC 10 (13 August 2012).
[10] *S v Ackerman en 'n Ander* 1973 (1) SA 765 at 766 H quoting from *R v Boya.*
[11] *R v Boya* 1952 (3) SA 574 (C) at 577 B-C.
[12] Also referred to as 'determined sentences'.

Regulations (issued under the Correctional Service Act 9 of 2012) (the Act) governs the release on full parole or probation of offenders sentenced to life imprisonment and provides that:

'281. (1) Subject to subregulation (2), an offender who has been sentenced to life imprisonment is eligible to be considered for release on full parole or probation pursuant to section 117 of the Act after serving at least 25 years in a correctional facility without committing and being convicted of any crime or offence during that period.

(2) The counting of the period referred to in subregulation (1) is restarted whenever the offender is, after being sentenced to life imprisonment, convicted of any crime or offence committed after such sentencing.' (Emphasis provided)

[13] Contrary thereto, s 107 of the Act provides for remission of sentence and the relevant subsections read:

'107. (1) Subject to subsections (2) and (4), an offender sentenced to a term or terms of imprisonment may, by reason of meritorious conduct and industry, during such period of imprisonment earn remission of part of such term, equivalent to one third of the total of the term of imprisonment in question.

(2). . .

(5) An offender who earns the one third remission referred to in subsection (1) must be released from the correctional facility and such offender continues, while outside the correctional facility, to serve his or her term of imprisonment until its expiration on such conditions of release as the Commissioner-General may, on the recommendation of the officer in charge, decide, and such offender must remain under supervision as determined by the Commissioner-General.

(6) When an offender who is released under subsection (5) contravenes any condition of release or when the Commissioner-General is satisfied that it is necessary and reasonable to suspend the offender's release in order to prevent the contravention of any condition thereof or to protect society, the Commissioner-General may, by warrant, - (a) suspend the offender's release; …'

[14] Under s 107 of the Act, the offender will serve his/her sentence *in full* whilst outside the facility if no release condition has been breached. Thus, any further offences committed thereafter would have no bearing on the offender's release.

[15] On the contrary, an offender sentenced to life imprisonment is at risk of having the period of 25 years imprisonment *restarted* upon the commission of further offences. That explains why it is referred to as a sentence of *life imprisonment.*

[16] Based on the foregoing, it is my considered view that a sentence of 40 years' imprisonment would not be harsher than life imprisonment. In the present instance the applicant becomes eligible for release after serving two thirds of the total sentence of 44 years ie 29 years and 4 months. Once he has served the term of imprisonment until its expiration, he is not at risk of being hauled back to prison as would be the case when life imprisonment is imposed. I am therefore unable to see how a sentence of 44 years' imprisonment imposed on the applicant would be harsher than life imprisonment. However, the position of offenders sentenced to 64 and 67 years' imprisonment as in *Gaingob* is distinguishable.

[17] As borne out by the court's judgment on sentence, the principles applicable to sentence have been considered and applied to the facts of the case. The court in the end found the sentences imposed to be proper and justified in the circumstances. Despite the applicant and respondent's views to the contrary, I am not persuaded that applicant's reliance on the *Gaingob* judgment, *per se,* establishes prospects of success on appeal.

[18] Having come to this conclusion, the applicant's explanation for the delay in lodging his leave to appeal is not only unreasonable and unacceptable but also, the grounds of appeal enjoy no prospects of success. The requirements for condonation have thus not been satisfied by the applicant.

[19] In the result, it is ordered:

1. The application for condonation is refused.

2. The matter is struck from the roll.

J C LIEBENBERG	

JUDGE	