

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**APPEAL JUDGMENT**

Case no: HC-MD-CRI-APP-CAL-2023/00004

In the matter between:

**SIMON HAIBEB**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Haibeb v S* (HC-MD-CRI-APP-CAL-2023/00004) [2023] NAHCMD  
38 (9 February 2024)

**Coram:** JANUARY J et CHRISTIAAN J

**Heard:** 6 November 2023

**Delivered:** 9 February 2024

**Flynote:** Criminal Appeal – Procedure – Late filing of the Notice of Appeal –  
Condonation application – No reasonable and acceptable explanation for delay –  
Prospects of success not sufficiently dealt with – Appeal struck from the roll.

**Summary:** The appellant was convicted of rape in the Otjiwarongo Regional Court and sentenced to 15 years imprisonment. Dissatisfied with the conviction and sentence, appellant filed a notice to appeal. Requirements for a successful application for condonation revisited. Held that, it should be borne in mind that condonation applications should be an exceptional practice which should only be resorted to by a litigant whose failure to comply is genuine and not a practice where litigants neglect their duties with a settled mind that they will be excused as long as they file an application for condonation. Held, prospects of success, as a requirement, must be directly addressed as it carries substantial weight in the decision to either grant or refuse an application for condonation. It is not one that an applicant for condonation must pay lip service to or one which it may deal with laconically or with some element of reluctance. It is an important cog in the entire enquiry. Application for condonation refused.

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### **ORDER**

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The application for condonation is refused and the matter is struck from the roll and regarded as finalised.

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### **JUDGMENT**

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JANUARY J (CHRISTIAAN J concurring):

#### Introduction

[1] On 30 November 2020, the appellant was convicted in the Otjiwarongo Regional Court on one count of rape, committed under coercive circumstances in contravention of s 2(1)(a) of the Combating of Rape Act 8 of 2000, as amended. The appellant was subsequently sentenced to 15 years imprisonment. Ms Katjimune represented the appellant during his trial, whereas, Mr Tjveze, represented the State. It is however evident from the record that, Mr Kalipi also assisted the State at some point.

[2] The appellant was charged with two counts in the Otjiwarongo Magistrates Court to wit; count one, rape in contravention of s 2(1)(a), read with sections 1, 2(2)(d), 3, 4, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000 and count two assault with intent to do grievous bodily harm. Both counts were in relation to a complainant, Cecilie Lamperth.

[3] The appellant pleaded not guilty to the offences and denied all allegations, urging the State to prove all essential elements of the purported offences he is charged with. After the close of the State`s case, the appellant proceeded to testify in his own defence and called one Lucas Haibeb, the appellant`s brother, to testify on his behalf. Upon finalization of the trial, the appellant was convicted and accordingly sentenced.

[4] Dissatisfied with the outcome, the appellant filed a notice of appeal against both conviction and sentence together with an application for condonation on 29 November 2022, almost 2 years from the date of sentencing. It is important to note that, the application for condonation bears no date or date stamp, whereas, the application for leave to appeal is dated 30 September 2022, whilst the date stamp from the clerk of court reflected on said application reads 29 November 2022.

#### Application for condonation/ Reasons for delay and prospects of success

[5] In his initial application for condonation, the appellant attributed the late filing of his notice of appeal, to a lack of knowledge and experience in the compilation of the notice of appeal. The appellant further averred that, he sought assistance to draft the notice for several months before ultimately finding someone to assist him in that regard. The appellant further stated that, the notice dated 30 November 2022 was not the first notice of appeal he drafted, but that he already drafted one on 25 October 2021, which was given to the records office at the Windhoek Correctional Facility on 27 October 2021, for purposes of forwarding same to the clerk of court. The appellant was however later informed that the documents got lost and that he

had to draft a new notice. The appellant accordingly filed said new notice on 29 November 2022.

[6] On 15 August 2023, the appellant's legal representative, Mr Kanyemba filed an amended notice of appeal as well as an amended condonation application and affidavit in support of the condonation application, which in essence amplified what was already mentioned in the appellant's initial affidavit. In the amended affidavit, the appellant states that, in addition to the reasons alluded to in the previous application for condonation, he similarly had financial constraints in acquiring assistance from a private lawyer, forcing him to file the initial notice of appeal in his personal capacity on 27 October 2021. The appellant thereafter opted to apply for legal aid, which application was granted after a reasonably long time. Mr Kanyemba was appointed to represent the appellant. The appellant further indicated that it took a long time for him to consult with his legal practitioner, mainly due to the failure of the correctional facility officers to take him to his legal practitioner, but also attempted phone calls clashed with the lawyers schedule and as such a considerable period of time had lapsed before the amended notice and application for condonation was filed.

[7] As far as prospects of success are concerned, the appellant merely made reference to the grounds set out in his notice of appeal and indicated that he enjoys prospects of success.

#### Point in limine

[8] Ms Amukugo, counsel for the State, raised a point *in limine* in respect of the late filing of the appellant's notice of appeal. She submitted that the appellant was sentenced on 30 September 2020, but the notice of appeal was only filed with the clerk of court in Otjiwarongo on 17 August 2022, which is out of time by almost 7 months, in clear contradiction of rule 67(1) of the Magistrate's Court rules. Counsel further submitted that, the explanation advanced by the appellant for the delay is not reasonable and that no proper grounds were established by the appellant for the late noting of his appeal.

[9] With reference to the prospects of success, Ms Amukugo submitted that, the learned magistrate considered the evidence in totality from both the State and defence case in convicting the appellant. She submitted further that, the learned magistrate also considered the legal principles applicable in sentencing and that there are no substantial and compelling circumstances and as such, the magistrate did not commit any misdirection. Thus, there are no prospects of success on appeal. Counsel concluded that the appeal should be struck from the roll on that basis.

[10] At the hearing, Ms Amukugo highlighted that the explanation of the appellant not having funds to appoint a private lawyer is devoid of substance, as he had the option to apply to Legal Aid for assistance. She argued that, the appellant made no effort in that regard.

[11] In response to the point *in limine* raised, Mr Kanyemba reiterated the contents of the appellant's condonation affidavit. He argued that the appellant filed an initial notice of appeal on 27 October 2021 already, granted said notice was also out of time, the State is not correct in their contention that the notice of appeal was only filed in 2022. Counsel proceeded to submit that the initial notice of appeal was lost by the correctional facility, prompting the appellant to file another notice on 21 September 2022. Counsel further submitted that the matter was set down after the subsequent notice of appeal was filed. Counsel continued by submitting that the appellant did apply to legal aid and that he was then appointed.

[12] Counsel indicated that, he advised the appellant that an amended notice of appeal had to be filed, however, consultation with the appellant for purposes of drafting the amended notice of appeal was difficult as there are always "hiccups" at the prison, prolonging the filing of the amended notice. With regard to the appellant having been represented during the trial in the court *a quo*, counsel submitted that, the legal practitioners mandate ends at sentencing and it was thus impossible for the appellant to adequately consult with the lawyer in prison. As such, the appellant remained a lay person. Counsel concluded by submitting that the explanation provided was reasonable, that the court should not merely accept the respondent's submissions and that the appellant should be heard. He stated further that rules

should be bent where possible and asked the court to condone the appellant's non-compliance.

[13] On the prospects of success, counsel submitted that the grounds are set out in the affidavit. He submitted that a case has been made out that the appellant has good prospects of success on appeal and has valid grounds.

[14] Following the parties' submissions in respect of the point *in limine*, judgment on condonation was reserved.

### Discussion

[15] For an application for condonation to succeed, said application must satisfy two requirements. Firstly, an appellant must provide a reasonable and acceptable explanation for the delay, and secondly, he must satisfy the court that there are reasonable prospects of success on appeal. Counsel made reference to several cases highlighting these requirements.<sup>1</sup>

[16] In *Balzer v Vries*<sup>2</sup> the Supreme Court pronounced itself on this matter and held:

[20] It is well settled that an application for condonation is required to meet the 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.'

[17] The granting of condonation is not just for the asking. The rules of court and court orders are to be observed to facilitate strict compliance with them to ensure efficient administration of justice.<sup>3</sup> We shall accordingly adopt and apply them in the instant case.

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<sup>1</sup> See: *Nakale v S* 2011 (2) NR 599 (SC); *S v Valedo and Others* 1990 NR 81 (HC); *S v Itembu* 2010 NR 160; *S v Nakapela and Another* 1997 NR 184 (HC).

<sup>2</sup> *Balzer v Vries* 2015 (2) NR 547 (SC) at 661 J – 552 F.

<sup>3</sup> *S v Kakolo* 2004 N 7 at 10 E- C.

[18] The court consequently has to determine whether the appellant provided a reasonable and acceptable explanation for his delay in filing the notice of appeal and whether the appellant has sufficiently dealt with prospects of success on appeal.

#### The explanation for the delay

[19] Without restating the reasons for delay already dealt with in the preceding paragraphs of this judgment, we will attempt to highlight the key reasons advanced by the appellant. According to the appellant, he filed a notice of appeal on 27 October 2021 already, which notice was lost, prompting him to file a subsequent notice in September 2022. The appellant did not have the financial means forthwith to pursue the services of a private lawyer, that he was a lay person with no knowledge and experience in drafting the notice and although he applied for legal aid assistance, such application took a long time to be processed and approved before Mr Kanyemba was ultimately appointed to represent him in this matter.

[20] The appellant was convicted and sentenced on 30 November 2020. In the event that this court accepts that the appellant did in fact file a notice of appeal on 27 October 2021, even in the absence of evidence to that effect, said application was nonetheless filed outside the prescribed period. The appellant fails to account for the period between his sentence and the alleged initial notice of appeal. From the facts before court, the notice of appeal dated 30 September 2022, was only filed at the clerk of court on 29 November 2022 (evidenced by the date stamp reflected on the notice). As such, the appeal was filed almost 2 years after the date of sentencing of the appellant. Upon consideration of the submissions and the facts of this matter, we are of the considered view that the explanation for delay provided above, is neither reasonable nor acceptable in the circumstances.

[21] In *Metropolitan Namibia v Nangolo*<sup>4</sup> the court held that:

‘Applications for condonation for non-compliance with the rules coming before these courts are now too common, to an extent that they have now become fashionable. It should be borne in mind that it should be an exceptional practice which should only be resorted to by a litigant whose failure to comply is genuine and not a practice where litigants neglect their duties with a settled mind that they will be excused as long as they file an application for condonation. This should not be the case.’

[22] We associate ourselves with the sentiments expressed above. The reasons for the delay outlined by the appellant cannot be classified as exceptional circumstances warranting the granting of condonation.

[23] We will now proceed to deal with the second requirement of condonation applications, namely, prospects of success.

#### Prospects of success

[24] The second requirement for consideration in condonation applications is whether the appellant has shown that he enjoys reasonable prospects of success on appeal. In an endeavour to answer this question, it is imperative to revert to the appellant’s affidavit. In the present circumstances, the appellant’s affidavit fails to adequately discuss the prospects of success on appeal, which creates the impression that this requirement was treated as a mere afterthought. Reference was made to the prospects of success in one short paragraph at para 15, as follows;

‘In as far as it may be necessary to deal with the merits and prospects of success on appeal, I pray that the grounds which are raised in my Amended Notice of Appeal be read as if expressly set out herein. The grounds of appeal as set out below will be extensively argued in the appeal suffice it to say that they enjoy prospects of success.’

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*Metropolitan Namibia v Nangolo* (CA 03/2015) [2017] NAHCNLD 02 (30 January 2017).



[25] Prospects of success, as a requirement, must be directly addressed as it carries substantial weight in the decision to either grant or refuse an application for condonation. It is not one that an applicant for condonation must pay lip service to or one which it may deal with laconically or with some element of reluctance. It is an important cog in the entire enquiry.<sup>5</sup>

[26] Mainga JA in the Supreme Court matter of *S v Ningisa*<sup>6</sup> referred to the aforesaid test as set out in *S v Ackerman en 'n Ander*<sup>7</sup> and *R v Boya*,<sup>8</sup> 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.'

[27] In light of the above, an appellant must extensively discuss and establish the prospects of success on appeal in its papers so as to place the Court of Appeal in the best possible position to make the decision whether or not condonation should be granted. It is accordingly unacceptable to merely refer to the notice of appeal and expect the Court to fill in the blanks. The burden falls upon the appellant to show whether there exists good prospects of success, which burden presupposes condonation being granted.

[28] The grounds of appeal have their place and it is not ordinarily in the application for leave, but primarily during the hearing of the appeal. A party who takes a short-cut in this regard and does not fully address the reasons why it claims it has prospects of success, does so only to its peril. Reasons should be advanced in the papers on the prospects of success which may include addressing some of the grounds of appeal together with reasons why it is claimed that the prospects of success are extant.<sup>9</sup>

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<sup>5</sup> *Korupanda v S* (HC-MD-CRI-APP-CAL-2023/00014) [2023] NAHCMD 788 (04 December 2023).

<sup>6</sup> *S v Ningisa* 2013 (2) NR 504 SC at para 6.

<sup>7</sup> *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.

<sup>8</sup> *R v Boya* 1952 (3) SA 574 (C) at 577B-C.

<sup>9</sup> *Supra*

[29] In light of the foregoing, it is clear that, the appellant failed to establish that he has good prospects of success on appeal, by neglecting to adequately discuss the requirement and not affording it the significance it deserves. We cannot, in the circumstances find that this is a proper case in which to grant condonation, for lack of effort and necessary information and pertinent allegations. It is thus, our contention that, one of the necessary requirements has not been sufficiently dealt with or satisfied by the appellant herein.

[32] In the premises, the application for condonation is refused and the matter is struck from the roll and regarded as finalised.

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HC JANUARY  
JUDGE

I concur.

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P CHRISTIAAN  
JUDGE

## APPEARANCES

APPELLANT

Mr S. Kanyemba  
Of Salomon Kanyemba Incorporated, Windhoek

RESPONDENT

Ms Amukugo  
Of the Office of the Prosecutor-General, Windhoek