REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA 26/2011

In the matter between:

PAULUS SHIPUATA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Shipuata v The State* (CA 26/2011) [2013] NAHCNLD 02 (23 January 2013)

Coram: LIEBENBERG J and TOMMASI J
Heard: 21 January 2013
Delivered: 23 January 2013

Flynote: **Criminal Procedure** – Application to lead further evidence on appeal – Court of appeal has power to order the hearing of such evidence either under s 19 of the High Court Act, 16 of 1990 or the Criminal Procedure Act, 51 of 1977 (CPA) – In terms of the CPA the court of appeal hears further evidence either in terms of s 304(2)(*b*) or remits the case under s 304(2)(*c*)(v)

of the CPA to the court *a quo* with instruction to hear such evidence – The appeal court will grant leave only in exceptional circumstances – Applicant preferably to lodge a substantive application – Judgments in other jurisdictions considered and applied with approval – Applicant to satisfy the prerequisites set out in *JCL Civils Namibia (Pty) Ltd v Steenkamp* 2007(1) NR 1 (SC) – Compare *S v De Jager,* 1965 (2) SA 612 (A).

Summary: Applicant on appeal from the regional court against his conviction and sentence simultaneously applied to lead further evidence. No formal application was made to lead further evidence on appeal and the issue was raised for the first time in counsel for the applicant's heads of the appeal. The application is based on the witness statement of one of the State witnesses who did not testify at the trial as he could not be traced. The prerequisites for a successful application are that: (a) there should be a reasonable and acceptable explanation why the evidence was not tendered at the trial; (b) the evidence must be essential for the case at hand; and (c) the evidence must be of such a nature that it may probably have the effect of influencing the result of the case (*JCL Civils supra*). Compare: prerequisites as set out in *De Jager supra* which are in principle the same. Although apparent from the record why the evidence was not adduced at the trial ie the witness could not be traced, there is no explanation as to the present whereabouts and availability of the witness; neither is there any explanation satisfying the second and third prerequisites. Applicant realising the shortcomings in his application withdrew same on the day of the hearing.

JUDGMENT

LIEBENBERG J (TOMMASI J concurring):

[1] This is an application to adduce further evidence and derives from the applicant/appellant's appeal (hereinafter referred to as the applicant) against his conviction and sentence in the regional court, sitting at Tsumeb.

[2] Applicant's application came before us by way of his legal representative's heads of argument, in which leave is sought to adduce further evidence on appeal. This evidence, according to par 2.1 of counsel's heads, turns on the witness statement of one Hilarius Valombo (the then boyfriend of the complainant and a State witness), who could not be traced during the trial in order to give evidence. The witness statement was subsequently filed in support of the application.

[3] When the matter came before us I enquired from Mr *Shakumu,* applicant's legal representative, whether he persists in bringing the application as part of his heads; and whether he intends filing a substantive application. He then informed the court that, whereas he had not made a substantive application, he would not continue with the application to lead further evidence and withdraws the application. This notwithstanding, it seems to me necessary to provide guidance to prospective applicants when approaching the appeal court for permission to lead further evidence.

[4] In support of the application counsel in his heads of argument contended that this court was granted wide powers to receive evidence on appeal, provided that such powers are exercised sparingly and only when certain prerequisites were complied with as set out in *JCL Civils Namibia (Pty) Ltd v Steenkamp*[1] at para 27. It should be noted that these remarks were made in the context of a civil case and with specific reference to s 19 (a) of the Supreme Court Act 15 of 1990. This section however does not find application to the matter at hand as the present appeal arises from the lower court.

[5] There is however a similar provision in the High Court Act 16 of 1990 in that s 19 grants the same powers to this court, which reads:

> '**Powers of High Court on hearing of appeals**
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> (1) The High Court shall have power-
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> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the court, or to remit the case to the court

[1] *JCL Civils Namibia (Pty) Ltd v Steenkamp,* 2007 (1) NR 1 (SC)

of first instance or the court whose judgment is the subject of the appeal, for further hearing, with such instructions relating to the taking of further evidence or any other matter as the High Court may deem necessary;' (My emphasis)

[6] This section empowers the High Court to receive further evidence orally or by deposition, before a person specifically appointed by the court; but the court of appeal may also remit the case to the trial court for the further hearing of evidence as directed by the court. The appeal court would equally exercise these powers sparingly and only where certain prerequisites are complied with. The nature and extent of these prerequisites will be looked at later.

[7] Besides the powers granted to the High Court under s 19 of the High Court Act, the Criminal Procedure Act 51 of 1977 (CPA), by virtue of s 304(2)(*b*), which was made applicable to appeals by s 309(3), also provides that further evidence may be adduced on appeal. Section 304(2)(*b*) reads:

'(b) Such court [High Court] may at any sitting thereof hear any evidence and for that purpose summon any person to appear and to give evidence or to produce any document or other article.' (My emphasis)

Section 304(2)(*c*)(v) furthermore provides for *remittal* to the trial court with the instruction (from the appeal court) to hear further evidence. The subsection reads:

'(c) Such court, whether or not it has heard evidence, may, subject to the provisions section 312-

(i) . . .

(ii) . . .

(v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial division may think fit;'

[8] Although s 304 mainly relates to criminal proceedings sent on review in terms of s 302 of the CPA, the provisions of the afore-mentioned subsections equally apply to appeal proceedings (s 309(3)). In terms of this section a

review or appeal court would thus be entitled to hear any evidence, or remit the matter to the court *a quo* with the instruction to hear further evidence.

[9] It seems clear from the above-mentioned that this court, sitting as a court of appeal in criminal cases, has the power to allow further evidence to be adduced either in terms of the High Court Act or the CPA. The provisions of both Acts are identical in nature, except that the High Court Act also provides for the receiving of evidence by deposition before a person appointed by the court.

[10] A reading of the cases shows that the court may act *mero motu* – albeit in exceptional cases – and order the hearing of further evidence without an application being made by either the State or the appellant (*S v Stevens*[2]).

[11] It is interesting to note that, unlike in this jurisdiction, the CPA has been amended by the South African legislature by the insertion of s 309B. This section not only provides for leave to appeal to be granted by the trial court (which is the lower court), but simultaneously under s 309B(5) prescribes the procedure to be followed, and the prerequisites that have to be met. According to ss (5)(*b*) of that section the application must be supported by an affidavit stating (i) that further evidence which would presumably be accepted as true, is available; (ii) if accepted, the evidence could reasonably lead to a different decision or order; and (iii) there is a reasonable acceptable explanation for the failure to produce the evidence before the close of the trial. The section makes plain the requirements the applicant must satisfy if he/she wants to lead further evidence and if successful, the court granting the application, receives that evidence (and evidence in rebuttal) and must record its findings and views with regard thereto; including the cogency, sufficiency of the evidence and the demeanour and credibility of any witness. Any evidence received under ss (5) shall for purposes of the appeal be deemed to be evidence taken, or admitted at the trial (ss (6)). Regarding cases finalised in the High Court in that jurisdiction, s 316 similarly provides for further evidence

[2] *S v Stevens,* 1983 (3) SA 649 (A).

to be heard by the trial court on application; stating the same requirements as set out in s 309B of the CPA.

[12] It seems to me that the benefit of these sections lie therein that the application to lead further evidence is considered by the same court that conducted the trial, evaluated the evidence and which, generally speaking, would be in a much better position to adjudge the grounds on which the application is founded against the evidence adduced, as it is steeped in the atmosphere of the case; opposed to where the appeal court is merely a court of record.

[13] Returning now to the application at hand. As conceded by counsel, there is no affidavit before the court in support thereof in which applicant explains why the evidence was not tendered at the trial; that the evidence is essential to his case; and that it may probably affect the outcome of the case (*JCL Civils supra*).

[14] Although the court of appeal in terms of s 304(2)(*b*) of the CPA is entitled to hear further evidence, the section does not prescribe any procedure to a prospective applicant as to how this should be brought about – besides the court having the power to act *mero motu*. From a reading of the cases is has been said that, where possible, there *should* be a substantive application made to the appeal court to grant leave to lead further evidence, either in that court, or to remit the matter to the trial court for that purpose. In *S v Stevens*[3] the court required the application to be done on a *formal basis* 'so that the Court of appeal can be apprised of the circumstances under which the evidence came to be omitted at the trial for only then can the Court give proper consideration to the principles stated in the *Mokgeledi* case[4]'. I agree, and fully endorse the *dictum* enunciated in that judgment.

[15] The court in *S v Smit*[5] was of the view that the correct procedure would be to bring a *substantive application* with a formal request to the court of

[3] *S v Stevens,* 1983 (3) 649 (AD) at 661E-F.
[4] *S v Mokgeledi,* 1968 (4) SA 335 (A) at 338H-339B.
[5] *S v Smit,* 1966 (1) SA 638 (O) at 641D-E.

appeal to hear further evidence and that notice of such application should be given to the applicant's adversary to enable him/her to attend and when necessary, to give or lead rebutting evidence. This court in *S v Ngavonduueza*[6] as per O'Linn J found that, in an application made in terms of s 316(3) of the CPA for the hearing of further evidence on appeal, the State had the *right* to file opposing affidavits which could shed light on the proposed evidence. Similarly, in *S v N*[7] affidavits of four more witnesses which the appellant sought to rely on in his application to lead further evidence, were annexed to the application.

[16] It seems clear that the courts, through the years, required from an applicant to bring a substantive application in which the reasons are clearly set out why the court should grant the application and where necessary, to support the application by annexing the witness statements of those witnesses he intends calling or re-call. The granting of leave by the court of appeal to a party to lead further evidence is not merely for the asking. It is a well established principle that such leave will only be granted in exceptional circumstances and where special circumstances exist before the court will exercise its discretion to allow the leading of further evidence (*S v Hanuman)*[8]. An application to lead further evidence after the finalisation of a case, causes tension between, on the one hand, the demands of justice that innocent people are not punished, and on the other, that it is a matter of public interest that there be finality to litigation, even in criminal cases (*Hiemstra's Criminal Procedure* Issue 1at 130-46). In *S v Stevens supra* at 661C-D the following was said regarding public interest and the interests of justice:

'Fundamental to the approach of the Courts in such cases is a recognition of the truths that, while it is in the interests of justice and in the public interest that those who are guilty of an offence ought to be convicted, it is also in the interests of justice that finality should be reached in criminal cases and that they should not be allowed to drag on indefinitely (see S v Roux 1974 (2) SA 452 (N) at 455A).'

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[6] *S v Ngavonduueza,* 1993 NR 360 (HC)
[7] *S v N,* 1988 (3) SA 450 (AD).
[8] *S v Hanuman* [1998] 1 All SA 254 (A).

[17] The court, as per Corbett JA, in *S v N supra* and with reference to the court's power to remit the case to the court *a quo* for the taking of further evidence, said the following at 458D-459A:

> 'It is a power which the Court exercises only in exceptional cases for:
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> > "It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be reopened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty." (Per Holmes JA in *S v De Jager* 1965 (2) SA 612 (A) at 613B.)
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> The possibility of the fabrication of testimony after conviction is an ever present danger in such matters (see *R v Van Heerden and Another* 1956 (1) SA 366 (A) at 372H - 373A; *S v Nkala* 1964 (1) SA 493 (A) at 497H; *S v Zondi* 1968 (2) SA 653 (A) at 655F). For these reasons this Court has in a long series of decisions laid down certain basic requirements which must be satisfied before an application for the re-opening of a case and its remittal for the hearing of further evidence can succeed. These were summarized by Holmes JA in *De Jager's* case supra (at 613C - D) as follows:
>
> > "(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
> > (b) There should be a prima facie likelihood of the truth of the evidence.
> > (c) The evidence should be materially relevant to the outcome of the trial."
>
> In an appropriate case this Court has the power to relax strict compliance with the requisite of a 'reasonably sufficient explanation' (see (a) above), but it is only in rare instances that this power will be exercised (*S v Njaba* 1966 (3) SA 140 (A) at 143H).
> A study of the reported decisions of this Court on the subject over the past 40 years shows that in the vast majority of cases relief has been refused: and that where relief has been granted the evidence in question has related to a single critical issue in the case (as to which see eg *R v Carr* 1949 (2) SA 693 (A); *R v Jantjies* 1958 (2) SA 273 (A); *S v Nkala* (supra) and *S v Njaba* (supra).' (My emphasis)

[18] The court thereafter concluded that it appeared that the application contemplated a re-canvassing of the entire case and 'that this factor can only

serve to multiply the dangers and disadvantages to the proper administration of justice which has been referred to in the cases', and accordingly refused the application. Where the evidence sought to be led on appeal is of *formal* or *technical character* the courts are more inclined to grant the application and in *S v Mokgeledi supra* it was said that:

'Normally, remittal for the hearing of further evidence will only be ordered where the desired evidence is of a merely formal or technical character or is such as would prove the case without delay and without real dispute; where it has been omitted at the trial, not deliberately, but by oversight (*R v Mpoea*, 1954 (1) SA 570 (O); *R v Moosa*, 1954 (4) SA 384 (T)), and where, in addition, a satisfactory explanation is furnished as to why the desired evidence had not been adduced in the first instance. (*R v Letuli and Another*, 1953 (4) SA 241 (T)).' (My emphasis)

[19] When applying the law, as set out in the above-mentioned cases, to the application at hand, it is obvious that it falls far short from the requirements of a substantive application. Mere reference in the heads by applicant's counsel to the prerequisites, as set out in *JCL Civils supra* and which have to be satisfied, is simply insufficient. There was simply nothing on which the application could have been considered; except for what appears from the record of proceedings regarding the State's failure to call the witness the applicant now seeks to lead the evidence of. The reason why this particular witness did not testify at the trial is because he could not be traced and there is nothing on record showing otherwise. It was neither contended that the further evidence applicant wanted to lead is of formal or technical nature.

[20] Against this background the applicant should have stated on oath that this person, after the finalisation of the case, was successfully traced and that he is now available to give evidence. Not only did the applicant fail to bring a substantive application, there is nothing showing as to the availability of the person whose evidence it sought to lead. Reference was made of the witness' statement and that allegations contained therein forms the basis of his application. It seems obvious that without the said witness' availability, there is no basis on which the application could stand.

[21] The witness statement by itself has no probative value and cannot be relied on as evidence, not even to the extent where it was irregularly used by applicant's counsel during cross-examination of the complainant in order to discredit her as a witness.[9] It therefore seems clear that the sole purpose of this exercise was to attack the complainant's veracity; and if leave were to be granted to lead further evidence, it would require a reassessment of the complainant's evidence to determine her veracity and the effect thereof in relation to the rest of the evidence.

[22] Though it is clear why the evidence which applicant sought to lead was not led at the trial, the court cannot be left in the dark as to the availability of the witness at this stage. Secondly, applicant had to show that there was a *prima facie* likelihood of the truth of the evidence he wished to rely on; and thirdly, that the evidence would have been materially relevant to the outcome of his trial.

[23] Unfortunately for the applicant he did not satisfy any of the afore-mentioned requirements and the decision of his counsel to withdraw the application in court was correctly made.

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JC LIEBENBERG

JUDGE

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MA TOMMASI

JUDGE

APPEARANCES

[9] See p 34 of the appeal record.

APPLICANT	S Shakumu Shakumu and Associates Inc, Oshakati,
RESPONDENT	N Wamambo Of the Office of the Prosecutor-General, Oshakati