**REPUBLIC OF NAMIBIA** NOT REPORTABLE

**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**APPLICATION FOR CONDONATION IN TERMS OF S310(2)(a)**

Case no: CA 27/2011

In the matter between:

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| **THE STATE** | **APPLICANT/APPELLANT** |
| and | |
| **NOKOKURE HAIMBERUNJO HERUNGA** | **1ST RESPONDENT** |
| **JACKSON INOVANDU UANDARI** | **2ND RESPONDENT** |
| **FARES KAURIMANA UNDARI** | **3RD RESPONDENT** |
| **UATJUNGIRUE TJITUEZA** | **4TH RESPONDENT** |

**Neutral citation:** *The State v Herunga* (CA 67/2012) [2013] NAHCNLD 32 (24 May 2013)

**Coram:** TOMMASI J
**Heard**: **15 April 2013**
**Delivered**: **24 May 2013**

**Flynote:** Criminal Procedure — Application for condonation by Prosecutor-General for lodging application for leave to appeal outside the time limit prescribed by s310 of the Criminal Procedure Act, 51 of 1977 as amended – Court may grant condonation on good cause – Representative of Prosecutor-General in court when sentence was passed – her subsequent resignation no bar to provide an explanation

for not informing the office of the Prosecutor-General of shockingly lenient sentence – court found that there was a lack of due diligence by the representative of the Prosecutor, – Subsequent delay in the enrolment of matter unacceptable – possibility exists that the accused already served 8 months of imprisonment – matter heard more than three years after sentencing– applications of this nature should be given priority and be dealt with expeditiously – Grounds for the appeal contained in the application for leave to appeal meritorious – a factor to be considered but not decisive – Application for condonation dismissed

**Summary:** The Prosecutor-General applied for leaved to appeal against a sentence imposed by the Magistrate's Court in terms of section 310 of the Criminal Procedure Act, 51 of 1977 as amended. The accused were convicted of robbery and sentenced to pay a fine of N$800 or eight (8) months imprisonment. The application for leave to appeal was lodged out of time and no explanation was given except to say that the representative of Prosecutor-General had resigned. A further delay occurred after the application was lodged. It was evident from correspondence that the Prosecutor-General's office adopted an incorrect procedure and an inordinate delay occurred in the appointment of a date for hearing. The court held that such an application may be enrolled on any date as it is considered by a single judge in chambers. Although the court held that there are reasonable prospects that the appeal may succeed, it was not decisive. In this case the factors weighed against this court granting an indulgence to the State. The application is dismissed and the matter struck from the roll.

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**ORDER**

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1. The application for condonation is dismissed; and
2. The matter is struck from the roll

**JUDGMENT**

TOMMASI J

[1] This is an application by the State for condonation for lodging an application for leave to appeal outside the prescribed time period.

[2] The applicant/appellant (the State) was required in terms of section 310(2)(*a*) of the Criminal Procedure Act 51 of 1977 as amended, to lodge a written notice of application for leave to appeal with the Registrar of this court within 30 days of sentence on within such extended period as may on application on good cause be allowed. The application for condonation, the application for leave to appeal, a written statement of rights; and a proof of service on 2nd and 4th respondent were laid before me in chambers on 9 July 2012. The matter was removed from the roll.

[3] All the above-mentioned documents together with proof of service on all four the respondents were once again placed before me on 17 September 2012. The State used the short form of application which did not adequately inform the accused of their right to oppose the application for condonation and the steps they had to follow if they wanted to do so.

[4] In order to afford the accused the opportunity to oppose the application, the following order was made:

1. That the application for leave to appeal be postponed pending the outcome of the application for condonation in terms of section 310(2)(a)

2. the application for condonation in terms of section 310(2)(a) be set down to be heard on 23 November 2012;

3. Directing the registrar to cause to be served by any police official or deputy sheriff upon the respondents:

(a) a copy of the notice of application for condonation in terms of section 310(2)(a)

(b) a Notice that if the respondents intend to oppose the application that they are required to: (i) notify the office of the Appellant's office (provide an address) in writing within 10 days after service of the application on the respondents and (ii) within 14 days of the service of a notice of their intention to oppose, to file their answering affidavits, if any

(c) A notice of the date on which the application will be heard;

(d) a notice that they may appear in person and represent themselves and they have a right to legal representation of their own choice, to apply for a legal representative to be appointed by the Directorate of Legal Aid or the approach the office of the Registrar to have counsel appointed, amicus curiae;

(e) a copy of this order.

[5] On 23 November 2012 all the respondents appeared in person and indicated to this court that they wanted to be legally represented. But that they could not afford private legal representation. I advised them to apply to the Directorate of Legal Aid for a legal practitioner to be appointed to act on their behalf and directed the registrar's office to approach the Law Society of Namibia for the appointment of counsel *amicus curiae*. Mr Greyling and Mr Tjombe agreed to act *amicus curiae* for the respondents and the court wishes to express its sincere appreciation for their assistance. Mr Lisulu appeared on behalf of the appellant.

[6] The application for leave to appeal and the application for condonation are two separate applications. It has become common practice for both these applications to be enrolled on the same day. However, in terms of the provisions of s310 the application for leave to appeal is placed before a Judge in chambers. The application for condonation is brought in terms of the Rules of the High Court and I deemed it expedient to hear the application for condonation first and in open court.

[7] The accused were charged with robbery in the magistrate's court for the district of Opuwo. They were convicted and sentenced to N$800 or eight months' imprisonment on 5 January 2011. The State lodged the application for leave to appeal against sentence on 29 March 2011.

[8] An applicant who applies for the indulgence of this court to extend the prescribed time period, is required to place sufficient and satisfactory grounds upon which the court can exercise proper judicial discretion.[1] It is only when good cause has been shown that the court would extend the time period [2] In this instance the application was brought 55 days after the prescribed 30 days lapsed.

[9] Mr Tjombe, in an affidavit filed, essentially objected to the application for condonation on the grounds that no good cause has been shown. Mr Greyling agreed with the arguments raised by Mr Tjombe.

[10] Mr Matota on behalf of the State deposed to an affidavit in support of the application for condonation. He gave the following explanation: The record of the proceedings was sent on review and received by the Registrar of this division of the High Court on 11 March 2011. The Registrar's office brought it to his attention on 16 March 2011. By this time the prosecutor who represented the State in the proceedings in the district court, had resigned. He submitted that no fault can be ascribed to the office of the Prosecutor-General for the delay which occurred.

[11] Mr Tjombe argued that, not only was there a complete lack of an explanation for the delay from date of sentencing, but there was no explanation given to the court why it was not possible to obtain an explanation from the initial prosecutor who was present on the date on which the accused were sentenced. He submitted that: it was not explained to this court why her resignation was relevant to the late filing; if the said prosecutor was unavailable to depose to an affidavit because of her resignation, the appellant should have informed the court of the efforts made to trace her; and her resignation was no bar to her deposing to an affidavit.

[12] The State, in its heads of argument, does not deal with the absence of an explanation by the prosecutor but argued that "the applicant's prospects of success is

[1] Karro and Dansky v van der Spuy, 1919 CPD 293
[2] Section 310 A (2) (a)

one relevant fact to the exercise of the court's discretion unless the cumulative effects of other factors in the case is such as to render the application for condonation obviously unworthy of consideration" [3]

[13] There is value in both arguments and it boils down to the same principal i.e. that the court, in the exercise of its discretion, must examine the extent of the delay and the explanation or as in this case, the lack thereof, whilst not losing sight of the other factors.

[14] In Namib Plains Farming And Tourism CC v Valencia Uranium (Pty) Ltd And Others 2011 (2) NR 469 (SC) at page 476, paragraph 19 the following was stated:

"In considering whether to grant such, a court essentially exercises discretion, which discretion has to be exercised judicially upon consideration of all the facts in order to achieve a result that is fair to both sides. Furthermore, relevant factors to consider in the condonation application include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. (Chairperson of the Immigration Selection Board v Frank and Another 2001 NR 107 (SC) at 165G – I. See also decisions of the South African Appellate Division in Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie 1969 (3) SA 360 (A) at 362G; United Plant Hire (Pty) Ltd v Hills and Others 1976 (1) SA 717 (A) at 720E – G among others.)"

[15] It was necessary for the State to set out the reasons for the failure to comply with the provisions of section 310(2)(*a*). The resignation of its representative did not preclude the State from obtaining an explanation. If for some reason it was not possible to obtain an explanation than this information should have been incorporated in the affidavit. which was not done in this case There may have been good reasons for not informing the office of the Prosecutor-General but, as it stands, there is no explanation before me.

[16] In Attorney-General, Venda v Maraga.[4] Ettienne Du Toit AJ, dealing with an application in section 310A of the Criminal Procedure Act, 51 of 19977 (as it applies to the Republic of South Africa) stated the following:

[3] Darries v Sheriff, Magistrate's Court, Wynberg and Another 1998 (3) SA 34 (SCA)
[4] 1992 (2) SACR 594 (V) at page 599 -601

"It is necessary in this regard to point out that the Legislature, obviously being fully aware of practical and even logistical problems suffered by the State, afforded the Attorney-General the lengthy period of 30 days from the date of the passing of sentence within which to bring his application for leave to appeal. ...

The Legislature has afforded the Attorney-General a period of 30 days, obviously keeping in mind that State machinery sometimes moves slowly, or not at all. I am of the view that the extended period within which the Attorney-General is entitled to bring an application for leave to appeal against a lower court sentence has already allowed for the practical or logistical problems which State machinery may suffer from. The ignorance of the Attorney-General, caused by a lack of action from a local representative may therefore not always be considered to be 'good cause' for purposes of s 310A(2)(a) of Act 51 of 1977. In my view, there is another reason why the Attorney-General, like the accused to his period of 14 days, will be held to the period of 30 days unless good cause is shown why an extended period may be allowed. It is this: legal certainty requires that litigation should come to an end. This is also true and may be especially true of criminal litigation" [my emphasis]

[17] The same holds true for applications for leave to appeal from lower courts in this jurisdiction but with an important difference. Section 310(2)*(a)* of the Act allows the State to appeal against any decision given in favour of an accused in a criminal case in a lower court including a sentence imposed or an order made; and any order made in terms of s85(2) of the Act whereas the South African counterpart only makes provision for an appeal against sentence.

[18] The State is thus allowed to extend its prosecution against an accused beyond the trial stage when there appears to be a miscarriage of justice. This however has serious ramifications for an accused. In Attorney-General, Venda v Maraga, *supra*, at page 601 C-E, Ettiene Du Toit A J remarked as follow:

"It is in the interests of justice that there should be certainty and that an accused person should not be in the position where the right of the Attorney-General to apply for leave to appeal should hang indefinitely over his head. If the Attorney-General were allowed to come to Court for condonation on the basis that he was not informed by the local public prosecutor of the allegedly inadequate or improperly light sentence, and was therefore ignorant, the situation may develop where the Attorney-General is effectively given a 'right' to bring an application for leave to appeal against the sentence on an indefinite basis

[19] In S v Gawanab 1997 NR 61 (HC), page 64A-G, Hannah J, stated as follow:

“Counsel said that in cases such as the present one the irregularity only comes to the attention of the Appellant after the expiry of the thirty day period and judges of this Court have refused to grant leave or extend the period on the ground that the State was represented at the trial and should, therefore, have been aware of the irregularity and should have applied for leave timeously. Subsequent to the hearing of this matter Miss Sauls provided the Court with two judgments to illustrate her point but, having read both, I do not think that either supports her contention. In S v Sikola (CA C 57/95) Frank J said:

'The prosecution was represented at the trial by a public prosecutor and there is no explanation why he did not do anything about the sentence and as to why the application could not be filed timeously. I am of the view that no acceptable reasons have been forwarded for the late filing of this application.'

And in S v Nuuyoma (CA 41/95) I had the following to say:

'I accept without hesitation that no fault exists on the part of the State Advocate for the delay but that is not to say that there was no fault on the part of the State. The State was represented at the trial by a police constable and he is recorded as having asked the magistrate to deal with the matter as a serious offence. If he considered the sentence inordinately low and inducing a sense of shock, as the State now contends it does, why did he not draw the matter to the attention of the Appellant timeously? Or if he was not of that view, why not? These questions remain unanswered because no affidavit from the constable has been filed with the application.'

It can readily be seen from these comments that what was exercising the mind of both judges was the fact that no explanation was forthcoming from the prosecutor in the magistrate's court as to why no prompt action was taken after the decision sought to be appealed was made. Neither judge was saying that because the State was represented action should necessarily have been taken promptly. There may well have been a reasonable explanation for the delay.”

[20] The State should endeavour to act within the time it is afforded to bring the application for leave to appeal. Any request for the extension beyond the 30 days should be well motivated. An indulgence for non-compliance would be sparingly granted.

[21] In the absence of any explanation tendered it can be accepted that the prosecutor who initially prosecuted the matter in the magistrates court failed to perform her function with due diligence given her failure to bring the "shockingly inappropriate lenient sentence" to the attention of the Prosecutor-General. Where there is such remissness amongst officers of the court, it is the court's duty to be vigilant against an abuse of its process wherever it may present itself.

[22] Mr Tjombe argued that the question of delay does not end at this juncture but extends to the time after the application was filed with the office of the Registrar on 29 March 2011. The application was finally heard by this court on 15 April 2013, more than three years after the accused had been sentenced. Mr Lisulu's argued that the appellant was required in terms of s310(3) to serve the notice of the application for leave to appeal at least 14 days before the day appointed for the hearing of the application. The practical difficulty hereof was that the appellant had to obtain a date from the Registrar which would accord the appellant sufficient time to serve the notice and to give at least 14 days notice to the appellant particularly when logistical problems are experienced to trace the respondents in remote villages. I pause to mention that this information was not placed under oath to explain the further delay after the matter was removed from the roll on 9 July 2012.

[23] Mr Tjombe, in his affidavit, informed the court that he had ascertained from the clerk of the court that the respondents were unable to pay the fine the court imposed and was therefore had to serve the alternative sentence of 8 months imprisonment. According to him the respondents were therefore in prison until September 2011. This evidence amounts to hearsay as it was not confirmed under oath by either the respondents or the clerk of the court.

[24] The court however cannot rule out the possibility that the respondents had served 8 months imprisonment in default of paying the fine. The record of the proceedings bears no receipt for the payment of the fine and it may be inferred, in the absence of payment of the fine, that the respondents have served a part or the whole of the term of imprisonment.

[25] In S v Mujiwa 2007 (1) NR 34 (HC) Muller J, gave clear guidelines for the procedure to be followed where the State acts in terms of the provisions of

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section310. I however deem it necessary to elaborate on the procedure in view of what had transpired in this matter. From correspondence filed with the office of the Registrar it is apparent that the appellant under cover of a letter dated 29 March 2011, dispatched the application for condonation together with the supporting affidavit, the notice of application for leave to appeal and the original record to the clerk of the court of Opuwo with a request to bring the application to the attention of the magistrate; to prepare the necessary copies; to forward it to the Registrar; and to return a copy thereof to the office of the Prosecutor-General.

[26] The record of proceedings together with a covering sheet for appeal cases bears the Registrar's date stamp of 3 June 2011. Written requests by the State for the enrolment of the matter for hearing was received by the Registrar's offices on 24 November 2011; 25 January 2012 and 2 April 2012. The Registrar's office notified the office of Prosecutor-General on 26 January 2012 that the matter will only be enrolled during the following term.

[27] Section 310(2)(*a*) requires that the appellant lodge the application for leave to appeal with the office of the Registrar. It follows logically that the judge requires the record of the proceedings in order to determine whether there are reasonable prospects of success and the duty to provide the court with it has to be that of the appellant. In this instance the record of proceedings was forwarded to Registrar for review and the Registrar was required in terms of s303 to place it before the judge in chambers as soon as possible. Leave to appeal may be granted by a single judge in chambers. The application could therefore be enrolled on any day as it is considered by a single judge in chambers and not in open court. There was furthermore no need to return the record to the clerk of the magistrates's court. It is only when leave to appeal has been granted that Rule 67(3) of the Magistrate's Court rules should be complied with. The magistrate's statement in terms of rule 67(3) was not required for the consideration of the application for leave to appeal.

[28] Section 310 furthermore stipulates that the notice of application together with the written statement of rights should be served on the accused at least 14 days before the "the date appointed for the hearing of the application". I fail to see how this could present any difficulties. The appellant may at the outset approach the Registrar

to appoint a date which would afford ample time for service of the application and written statements of rights. The 14 days notice which is afforded to the accused provides him sufficient time to respond within 10 days to the application.

[29] In this case the Registrar's office only notified the State on 12 April 2012, more than a year after the appellant filed the notice of application for leave to appeal, of the appointed date for the hearing of the application. The inordinate delay by the office of the Registrar to appoint a date greatly exacerbated the delay in finalising the matter. It is vitally important that criminal matters be finalised expeditiously. A delay of more than a year just to appoint a date for a hearing of the matter before a single judge in chambers is prejudicial not only to the accused but also to the administration of justice. The registrar's office, in appointing a date, should give priority to applications of this nature with due regard for the time frame which the State requires to comply with the provisions of section 310(2)(a).

[30] The notice of application for leave to appeal sets out five grounds of appeal. A summary thereof is that the magistrate had erred by (a) imposing a sentence which is startlingly inappropriate or induces a sense of shock or is disturbingly lenient; (b) failing to adequately appreciate the seriousness and the prevalence of the crime of robbery which generally warrants custodial sentence where the violence or threats involved the use of a dangerous weapon; (c) failing to consider the interest of society in combating crimes of robbery; (d) failing to consider that the accused operated as a gang and they benefitted from the commission of the offence; and (e) by overemphasising the personal circumstances of the respondents. Counsel for the accused submitted that there are no reasonable prospects for success and that the magistrate applied her discretion by taking into consideration that the accused were youthful first offenders.

[31] The grounds raised by the appellant are meritorious and I am of the view that there are reasonable prospects of success. The magistrate, *ex facie* the record made no reference to the seriousness and prevalence of the offence; although she noted that a knife and stones were used, imposed a sentence inconsistent with the other similar cases; made no reference to the interest of society; did not consider that the four accused ganged up against the complainant; and that they benefited

from their actions. The magistrate however considered the personal circumstances of the accused and it is not apparent from the record that she overemphasised the personal circumstances of the accused.

[32] The prospects of success are not in all cases decisive. It is the duty of the court to consider the importance of the State pursuing a miscarriage of justice, the principle of finality of litigation, the interest of the accused who in this case already may have served eight months; and the imprisonment remissness on the part of the party seeking the court's indulgence. In this case the factors weighed against this court granting an indulgence to the State. When this court considers all the factors herein it is of the view that the extension of the stipulated time period would not be in the interest of the administration of justice.

[33] In the premises the following order is made:

1. The application for condonation is dismissed; and

2. The matter is struck of the roll.

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MA TOMMASI

Judge

APPEARANCES

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| APPLICANT : | Adv. Lisulo<br>Instructed by the Prosecutor-General's Office. |
| FIRST RESPONDENT: | Mr. Greyling<br>*Amicus Curiae*<br>Of Jan Greyling & Associates. |
| SECOND and THIRD RESPONDENT: | Mr. Norman Tjombe<br>*Amicus Curiae*<br>Of TJOMBE-ELAGO LAW FIRM INC. |