

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2022/00019

In the matter between:

NEKWAYA  
APPELLANT

OMWATILE

IYAMBO

v

THE STATE

RESPONDENT

**Neutral citation:** *Iyambo v S* (HC-NLD-CRI-APP-CAL-2022/00019) [2022]  
NAHCNLD

122 (17 November 2022)

**Coram:** SALIONGA J *et* KESSLAU AJ

**Heard:** 04 November 2022

**Delivered:** 17 November 2022

**Flynote:** Criminal Procedure – Bail appeal- Assault common and Assault by threat- Combating of Domestic Violence Act- Application for condonation- Magistrates Court Rules- Requirements for application for condonation- Amended notice of appeal filed

out of the prescribed period- Offences charged not listed in PART IV of Schedule 2 of the CPA- Sec 61 of the CPA not applicable.

**Summary:** The appellant was denied bail after appearing in the Magistrates Court on two counts namely Assault common and Assault by threat both read with the provisions of the Combating of Domestic Violence Act 4 of 2003. In these proceedings the appellant is appealing against the Magistrates refusal to grant him bail following his application that was decided on affidavits without hearing oral evidence. At the appeal hearing the Respondent raised two points *in limine* being; firstly that the amended notice of appeal was filed out of time without an application for condonation. Secondly that ground 4 of the amended notice of appeal was vague and failed to meet the requirements provided for in Rule 67 (1) of the Magistrates Court Rules.

*Held:* that a notice of appeal should be filed within 14 days after the date of an order in terms of Rule 67 (1) of the Magistrates Court Rules.

*Held:* that when a notice of appeal is filed out of time, the appellant is expected to apply for condonation supported by an affidavit, explaining the reasons for the delays and for the failure to comply with the Rules of court inclusive of his prospects to succeed on appeal.

*Held:* that the appellant's application for a postponement to amend the notice of appeal did not constitute an application for condonation.

*Held:* that the scheme envisaged in Rule 67 is designed to facilitate the fair and expeditious adjudication of appeals and that the Court will not allow those rules to be deviated from without good cause.

*Held further:* that the Part IV of Schedule 2 of the amended section 61 of the Criminal Procedure Act 51 of 1977 is not applicable to offences the appellant was charged with (Common assault and Assault by threat).

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**ORDER**

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1. The first point *in limine* is upheld.
2. The matter is removed from the roll for non-compliance with rules of court.

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**JUDGMENT**

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SALIONGA J (KESSLAU AJ concurring):

Introduction

[1] The facts of the case are that the appellant and the complainant were in a domestic relationship as husband and wife. The appellant was charged with two counts, namely Common assault and Assault by threat, both read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The state alleged that the appellant had assaulted and threatened the complainant in both counts on the same date. At his first appearance in the Magistrates Court, the State objected to his release on bail resulting in a bail application that was not successful. The appellant's application for bail was dismissed on 12 May 2022.

[2] The matter now comes before us on appeal against the Magistrate's refusal to grant the appellant bail. Mr. Matota assisted by Ms. Ya France appears for the respondent and Mr. Ngula appears for the appellant.

[3] Appellant filed a notice of appeal on 24 May 2022 which was within the prescribed period in terms of Rule 67 of the Magistrates Court rules. The matter was then set down for hearing on 9 August 2022.

[4] On the date of hearing, Mr. Ngula, recorded that he had then received the case record and had discovered a need to amend his initial notice of appeal. He specifically asked for a postponement to effect the amendment. It was on that basis the court postponed the matter to the 6 September 2022 to enable counsel to amend their notice of appeal.

[5] A notice of appeal titled 'AMENDED NOTICE OF APPEAL' was filed with the Registrar of the High Court on 5 September 2022. The preamble of this notice reads as follows: 'KINDLY TAKE NOTICE that the Appellant hereby amends his entire initial notice of appeal (dated 12 May 2022) as directed by a court order dated 9 August 2022 and replaces those grounds with the following amended grounds of appeal.' (SIC)

[6] The grounds of appeal in the amended notice of appeal are completely different from the initial notice of appeal and are as follows:

1. The Learned magistrate erred in law / and on facts by placing too much emphasis and reliance on the alleged seriousness of the offences (assault and assault by threat) whilst in the circumstances, such was not the case (the seriousness of the case in the circumstances was exaggerated during the refusal of bail) nor was such established by the State during the bail application.

2. The learned magistrate erred in facts and law that the complainant has a genuine fear for her life given the fact that no credible evidence or similar evidence was presented by the state to substantiate and justify such a conclusion (bail refused on that basis).

3. The learned magistrate erred in law and on the facts that the accused might interfere with complainant, alternatively investigations or State witnesses as the complainant denied any unlawful doing during her bail applications.

4. The learned magistrate erred in law by not correctly interpreting section 61 of the Criminal Procedure Act 51 of 1977 and that the bail refusal was not in line with court rulings of similar or higher jurisdiction.

5. The learned magistrate erred in law and on facts by concluding that it would not be in the interest, and administration of justice to grant the appellant bail (by relying on hearsay and evidence that is not credible, alternatively applicable in the circumstances and consequently based her bail refusal unreliable legal sources.

6. The learned magistrate erred in law and on the facts to give no, alternatively, insufficient weight to the appellant's circumstances as testified by him during the bail proceedings (he is a breadwinner, is employed, youthful and owns property).' (SIC)

[7] At the hearing the respondent raised two points *in limine*. The first point *in limine* was against the late filing of the second notice of appeal titled 'AMENDED NOTICE OF APPEAL' without an application for condonation. The respondent correctly submitted that the notice of appeal should be filed within 14 days after the date of an order in terms of Rule 67 (1) of the Magistrates Court Rules. Respondent further submitted that when such notice is filed out of time, the appellant is expected to apply for condonation supported by an affidavit, explaining the reasons for the delays and for the failure to comply with the Rules of court. On this point Counsel concluded that the appellant's notice of appeal filed on 5 September 2022 indicates that he was amending his entire notice of appeal dated 12 May 2022 by replacing those grounds with new ones. Counsel was of the view that the course which appellant should have followed was to file a fresh notice under Rule 67 simultaneously with an application for condonation for the late filing thereof.

[8] The second point *in limine* attacked the fourth ground of appeal alleging that it was rather vague. Respondent stated that Rule 67 (1) of the Magistrates Court Rules was not complied with. This point specifically took exception to ground four of the appellant's amended notice of appeal dated 4 September 2022 by alleging that this ground was not clear and specific as required by the above Rule. Also that the appellant did not indicate how the interpretation of s 61 of the CPA was incorrectly applied and failed to provide the court with a proper interpretation of the said section. Respondent submitted that on that score alone this ground had to be struck-out owing to its vagueness.

[9] Counsel for the appellant in their written heads of arguments only replied to the first point *in limine*. He argued that the appellant had sought leave from the bar for the court to allow such an amendment and that such leave was granted as per the court order dated 9 August 2022. He went further to state that this court has the mandate to allow for such an amendment and as a result the amended notice of appeal was properly before court. He did not address the second point *in limine* in his oral arguments either.

[10] It is clear that the initial notice was well within the prescribed time period but the amended notice of appeal was filed out of time. Rule 67 (5) of the Magistrates Court Rules provides for instances where a notice of appeal is to be amended.<sup>1</sup> This is provided for when a need for such an amendment has been discovered by a party that filed the notice after the magistrate's reasons are provided. This Rule provides as follows:

(5) Within 14 days after the person who noted the appeal has been so informed, the appellant may by notice to the clerk of the court, amend his notice of appeal and the judicial officer may, in his discretion, within 7 days thereafter furnish to the clerk of the court a further or amended statement of his findings of fact and reasons for judgment.

[11] If the above Rule is anything to go with it means that since the Magistrate's reasons on the initial notice of appeal were received on 09 August 2022 then the appellant had 14 days from then to amend his notice of appeal. The last day for him to file an amended notice of appeal was the 29<sup>th</sup> of August 2022 in terms of subsection 5 above. His new notice of appeal was only filed with the Registrar's Office on 05 September 2022. There is also no indication that this notice was served on the clerk of court that dealt with this matter and when.

[12] A closer look at the purported amended notice of appeal reveals that it is indeed a new and fresh notice of appeal far distinct from the initial notice. It was also filed outside the 14 days period provided for in instances of an amended notice of appeal. What is on record is counsel for the appellant's application for a postponement to

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<sup>1</sup> Magistrates Court Rules

enable him to amend his initial notice of appeal. There was no application for condonation brought by him in this respect nor was there any application for him to file a fresh notice of appeal. Applications of this nature are brought on notice of motion supported by an affidavit and in which case the respondent should also be heard. Unfortunately this was not done in this case.

[13] The following is an extract from the Court Order dated 9 August 2022 and reads:

**WHEREAS** the Appellant is in custody but was not brought to court today and Mr. Ngula records that he has discovered a need to amend the notice of appeal after the case record was provided to him.

**IT IS HEREBY ORDERED THAT:**

1. The case is postponed to 06/09/2022 at 09:00 for status hearing to enable Counsel for the Appellant to amend the notice of appeal.
2. The Station Commander of Outapi Police Station is directed to ensure that the Appellant/Accused attends court session on 06 September 2022 at 09:00.
3. The Office of the Registrar is directed to serve a copy of this order on the Station Commander of Outapi Police Station and file a copy of the return of service on the ejustice file.'

Obviously when Counsel for the appellant was making the application for a postponement he well knew that the new notice of appeal was to be filed in terms of rule 67 of the Magistrates Court. He ought to have known that applying for condonation is mandatory and not once did this court condoned counsel's noncompliance with the rules. Practitioners are reminded that the scheme envisaged in Rule 67 is designed to facilitate the fair and expeditious adjudication of appeals and the Court will not allow those rules to be deviated from without good cause. Counsel's mundane contention that condonation was granted from the bar is neither here nor there and he should familiarize himself with rule 65 dealing with requirements for applications in general.<sup>2</sup>

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<sup>2</sup> 65.

(1) Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.

[14] In this regard, practitioners may do well to note the cautionary remarks made in *Molebatsi v Federated Timbers (Pty) Ltd* (supra) at 96G-H<sup>3</sup>, which were respectfully adopted by Hannah J and Maritz J in *S v Kakololo*<sup>4</sup>that;

'The Rules of Court contain qualities of concrete particularity. They are not of an aleatoric quality. Rules of Court must be observed to facilitate strict compliance with them to ensure the efficient administration of justice for all concerned. Non-compliance with the said Rules would encourage casual, easygoing and slipshod practice, which would reduce the high standard of practice which the Courts are entitled to in administering justice. The provisions of the Rules are specific and must be complied with; justice and the practice and administration thereof cannot be allowed to degenerate into disorder. Practitioners are enjoined to ensure that notices of appeal comply with the Rules.'

[15] As regard's Mr. Ngula's reply to the Respondent's first point *in limine* I quote the remarks in a recent Supreme Court judgment<sup>5</sup> where the following was said:

'As a matter of fact a court-bound lawyer is considered to be incompetent if he/she does not know the rules of procedure. Moreover, in law schools for learner legal practitioners they normally place a high premium on learning rules of procedure whether in criminal or civil matters. Furthermore, one expects that in every law firm of court practitioners there will be a library inclusive of rules of procedure. That stresses the pivotal role the rules play in litigation.'

[16] It thus follows that if counsel in this case had cared to peruse the rules of the Magistrates' Court and the rules of this Court he would have realized or discovered that his amended notice is late and had to file a condonation application supported by affidavit. An appeal of this nature including all interlocutory issues such as condonation and points *in limine* are normally dealt with by a quorum of two Judges and cannot be

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(2) Where relief is claimed against a person or where it is necessary or proper to give a person notice of such application, the notice of motion must be addressed to both the registrar and that person, otherwise the notice must be addressed to the registrar only.

(3) Every application must conclude with the form of order prayed and be verified on oath or by affirmation by or on behalf of the applicant.

<sup>3</sup> 1996 (3) SA 92 (B) at 94-95D and 96F)

<sup>4</sup> 2004 NR 7 (HC)

<sup>5</sup> *Ugab Terrace Lodge CC (Now known as Ugab Terrace Lodge (Pty) Ltd) v Damaraland Builders CC* Appeal Judgment SA 51/2011 (delivered on 25 July 2014) at para [3]



decided by a single Judge as was the case on 9 August 2022. Thus it cannot be correct for counsel to argue that the state's point of law be disregarded because he was directed by the Court Order dated 9 August 2022 to file an amended notice of appeal. To state that is both misplaced and misleading and should be rejected.

[17] On the second point *in limine* both parties during the hearing and after the court's intervention conceded that although the Magistrate applied section 61 of the CPA read with the amended PART IV in Schedule 2 same is not applicable to the offences the appellant was charged with and I have no issue with counsel's concession.

[18] Having been established that the appeal is not properly before court because the late amended notice of appeal was not accompanied by an application for condonation there is therefore no appeal before this court and it follows that the appeal has to be struck from the roll.

[19] In the result, the following order is made:

1. The first point *in limine* is upheld.
2. The matter is removed from the roll for non-compliance with rules of court.

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J. T. SALIONGA  
JUDGE

I agree,

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E. E. KESSLAU  
ACTING JUDGE

## APPEARANCES

For the Appellant:           Mr. N Ngula  
  Of Nicky Ngula Attorneys, Ondangwa

For the Respondent:       Mr. L Matota, assisted by Ms. N. Ya France  
  Office of the Prosecutor - General, Oshakati

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