

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

LEAVE TO APPEAL JUDGMENT

<b>Case Title:</b> <i>The State v Lydia Ndinomukulili Hafyenanye and Calvin Pomwenepawa Hamalwa</i>	<b>Case No:</b> HC-NLD-CRI-APP-SLA-2022/00039
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Kesslau AJ	<b>Delivered on:</b> 07 February 2023
<b>Neutral citation:</b> <i>S v Hafyenanye</i> (HC-NLD-CRI-APP-SLA-2022/00039) [2023] NAHCNLD 04 (07 February 2023)	
<b>The order:</b> 1. The application for leave to appeal is struck from the roll.	
<b>Reasons for decision:</b>	
KESSLAU AJ  [1] The respondents were acquitted in the Magistrate's Court of Oshakati on various charges. This is an application by the State for leave to appeal in terms of section 310(2) (a) of the Criminal Procedure Act 51 of 1977 as amended (the CPA), against the magistrates order of discharge. Following the ruling in <i>S v Mujiwa</i> <sup>1</sup> , the	

application was dealt with in chambers without a full hearing.

[2] Section 310 (2) (a) of the CPA states: 'A written notice of an application referred to in subsection (1) shall be lodged with the registrar of the High Court by the Prosecutor-General or other prosecutor, within a period of 30 days of the decision, sentence or order of the lower court, as the case may be, or within such extended period as may on application on good cause be allowed'.

[3] Whilst considering the compounding of days in terms of s 316 of the CPA, which equally would apply to s 310, it was stated in *S v Kashire*: 'The word "day" is defined in s 1 of the said Act as being the time between sunrise and sunset, and this definition, therefor, quite clearly cannot have any bearing upon the computation of the time mentioned in s 316. The days mentioned in this section must surely be computed with reference to s 4 of the Interpretation Act 33 of 1957, i.e. inclusive of Saturdays, Sundays and public holidays but exclusive of the first day and inclusive of the last day.'<sup>2</sup>

[4] When applied to the matter at hand it appears that the notice of leave to appeal was not filed within the 30 days allowed. The Magistrate gave her order on 28 October 2021 and the notice of leave to appeal from the State was filed with the Registrar of the High Court on 29 November 2021 resulting in a 32 day period. Condonation was not requested for the failure and thus the application is not properly before court.<sup>3</sup>

[5] In addition s 310(3) of the CPA provides that: 'The Prosecutor-General or other prosecutor shall, at least 14 days before the day appointed for the hearing of the application, cause to be served by any police official or the deputy sheriff upon the accused in person a copy of the notice, together with a written statement of the rights of the accused in terms of subsection (4): Provided that if any police official or the deputy sheriff is not able so to serve a copy of the notice, it may be served in any other manner that may on application be allowed'. (Emphasis added). The date of hearing was set for 24 January 2023 therefor service should have

<sup>1</sup> *S v Mujiwa* 2007 (1) NR 34 (HC); *S v Swartbooi and Others* (CA 59-2008) [2012] NAHC 63 (14 March 2012).

<sup>2</sup> *S v Kashire* 1978 (4) (SWA) 166 at p 167 par F-G.

<sup>3</sup> *The State v De Jager* (CA 94/2013) [2013] NAHCMD 353 (21 November 2013).

been fourteen days prior to give respondents time to file their submissions. The respondents were respectively served on 11 and 12 January 2023.

[6] In the result, it is ordered:

1. The application for leave to appeal is struck from the roll.

<b>Judge(s) signature:</b>	<b>Comments:</b>
E.E. Kessler, AJ	None