



REPORTABLE

CASE NO: SA 24/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CHARMAIN THERESIA MENTOOR

Appellant

and

NAIROBI LUKAS USEBIU

Respondent

Coram: SHIVUTE CJ, MAINGA JA and SMUTS JA

Heard: 31 March 2017

Delivered: 19 April 2017

Summary: In this matter an appeal was noted against the judgment and order of the High Court dismissing an application for condonation for the late delivery of the appellant's heads of argument and striking the appeal off the roll. The application for condonation was made in the course of an appeal in a civil case in that court against a decision of a magistrate's court.

Without obtaining leave from the High Court, the appellant lodged the appeal in the Supreme Court seeking to overturn the decision of the High Court.

Section 18(2)(b) of the High Court Act 16 of 1990 provides in effect that a judgment or order of the High Court sitting as a court of appeal in a civil case is not

appealable as of right. Leave to appeal must first be sought and obtained from the High Court. If such leave is refused an appeal to the Supreme Court is possible only once leave to appeal is granted by the Supreme Court itself.

It was argued on behalf of the appellant that the appellant did not require leave to appeal to the Supreme Court as the High Court had decided the condonation application as a court of first instance. The Court held that the appellant indeed required leave to appeal and that in the absence of the High Court granting such leave or the Supreme Court granting it in case the High Court refuses to do so, the appeal is not properly before this court. The matter was accordingly struck off the roll.

As the appeal was prosecuted with the assistance of the Directorate of Legal Aid, no order as to costs was made.

APPEAL JUDGMENT

SHIVUTE CJ (MAINGA JA and SMUTS JA concurring):

[1] This is an appeal against the judgment and order of the High Court refusing the appellant's application for condonation for the late delivery of the heads of argument and striking the matter off the roll.

[2] The facts relevant to the present appeal may be summarised as follows. On 10 November 2014, the appellant noted an appeal to the High Court against the judgment and order of the magistrate's court for the district of Windhoek in which it granted summary judgment in favour of the respondent for the eviction of the appellant and all other unlawful occupants from a house on Erf 2663 (a portion of Erf 114) Goreangab, Windhoek. After the necessary procedural steps were followed, the High Court set down the hearing of the appeal on 18 May 2015.

[3] In terms of rule 116(13) of the Rules of the High Court the appellant was required to deliver heads of argument together with a list of the authorities to be relied upon in support of the points to be made in argument, not less than 15 days before the appeal was due to be heard. According to the rule referred to above, the appellant was supposed to deliver her heads of argument on or before 24 April 2015. Instead, the appellant delivered her heads on 5 May 2015 resulting in the late filling of the heads by 4 days.

[4] As a result of this late delivery, the appellant sought condonation at the hearing of the appeal. In support of the condonation application, it was stated on behalf of the appellant that her legal practitioner miscalculated the *dies* for the filling of the heads of argument and counted 10 days instead of the 15 days prescribed by the applicable rule. It was further stated rather sheepishly that the administrative assistant of the legal practitioner had been on training at the particular time and could therefore not assist the legal practitioner to diarise court days. Not surprisingly, the explanation was not well received.

[5] The respondent opposed the appeal, but not the condonation application. On 18 May 2015 after hearing arguments in support of the application, the court *a quo* refused the condonation application and struck the appeal off the roll. Aggrieved by this decision, the appellant on 20 May 2015 noted an appeal to this court against that decision. This she did without first obtaining leave to appeal from the court that made the decision.

[6] At issue in this appeal is the question whether the judgment and order refusing the condonation application and striking the matter off the roll is appealable as of right.

[7] In deciding the issue stated above the starting point is s 18 of the High Court Act 16 of 1990 (the Act). Section 18(1) grants a right of appeal against a judgment or order given by the High Court in civil proceedings whether sitting as a court of first instance or a court of appeal to the Supreme Court 'except in so far as this section otherwise provides'.

[8] Section 18(2) of the Act is of direct application to the facts of the case and provides 'otherwise' as follows:

'(2) An appeal from any judgment or order of the High Court in civil proceedings shall lie -

- (a) in the case of that court sitting as a court of first instance, whether the full court or otherwise, to the Supreme Court, as of right, and no leave to appeal shall be required;
- (b) in the case of that court sitting as a court of appeal, whether the full court or otherwise, to the Supreme Court if leave to appeal is granted by the court which has given the judgment or has made the order or, in the event of such leave being refused, leave to appeal is granted by the Supreme Court.'

[9] According to s 18(2)(a), if the High Court sits as a court of first instance in civil proceedings, an appeal against a judgment or order of the High Court lies as of right to this court. This, however, is not the case where the High Court has sat

as a court of appeal. In such a circumstance, a judgment or order of the High Court is not appealable as of right. Leave to appeal to the Supreme Court must first be sought and obtained from the High Court. However, if leave to appeal is refused by the High Court, then the Supreme Court must be approached with a petition for leave to appeal. See *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz* 2008 (2) NR 775 (SC). See also s 14 of the Supreme Court Act 15 of 1990.

[10] At the hearing of the matter, the court invited the parties to address it on the question of whether or not s 18(2)(b) of the Act is of application to the present matter.

[11] On behalf of the appellant, counsel submitted that s 18(2)(b) is not of application. Counsel contended that although the appeal was noted against the judgment and order of the magistrate's court, the condonation application moved by the appellant and refused by the court *a quo* did not originate from the magistrate's court as it was dealt with by the High Court sitting as a court of first instance and not as a court of appeal. Counsel therefore argued that the applicable provision was s 18(2)(a).

[12] Counsel further submitted that as the court *a quo* considered the explanation for the late filing of the heads of argument and not the merits of the appeal, the appellant was entitled to appeal to the Supreme Court as of right. For this proposition counsel relied on *S v Nakale* 2011 (2) NR 599 (SC), a criminal appeal case.

[13] Counsel for the respondent, on the other hand, did not advance substantial arguments in regard to the issue at hand except to state that it appeared to him that there was a lacuna in s 18(2)(b) in relation to the High Court deciding an application for condonation based on explanation for the delay only and not the merits of the appeal. Counsel could, however, not provide any authority for this proposition nor could we find any.

[14] The submission by counsel for the appellant that the matter was heard by the High Court sitting as a court of first instance cannot be accepted. Clearly, when the High Court decided the application for condonation it was seized with the appeal. The application for condonation was an interlocutory matter arising from the appeal from the magistrate's court. Indeed, in delivering his ruling on the application for condonation the presiding judge prefaced the ruling by stating: 'This is a civil appeal which was set down at the instance of the appellant. . . .'. The court *a quo* was evidently sitting as a court of appeal and not as a court of first instance. It follows therefore that s 18(2)(a) does not find application in the instant matter.

[15] As to the *Nakale* judgment, as noted above, that case was a criminal appeal initially from the regional court to the High Court. The High Court refused Mr Nakale's application for condonation for the late filing of the notice of appeal without dealing with the merits. On appeal to the Supreme Court, this court held that where, on appeal noted to it, the High Court did not consider the merits of the

appeal, other than in the context of the application for condonation, but only decided and refused the application for condonation for the late noting of the appeal, an appellant was entitled to appeal to the Supreme Court against the decision refusing condonation, as of right. This court went on to observe at para 6 as follows:

'If the Supreme Court upholds the appeal against the refusal of the application for condonation, the matter has to be remitted to the High Court for the merits of the appeal to be heard and decided in that court. This is so because the Supreme Court does not have the power to hear the appeal on the merits, there being no provision in our law for an appeal directly to the Supreme Court against a conviction by a magistrate. If, on the other hand, the Supreme Court dismisses the appeal against the refusal of condonation that is the end of the matter.'

[16] The *Nakale* precedent is confined to criminal appeals with facts falling within the principles enunciated in it. Those principles were derived from a lacuna in our law referred to in the headnote to *S v Absalom* 1989 (3) SA 154 (A), a decision of the Appellate Division of the Supreme Court of South Africa - concerning a pre-Independence case that originated from this jurisdiction - where it was noted:

'An application for condonation for the late noting of a criminal appeal from the magistrate's court *is not a "civil proceedings"* as intended in s 20(4) of the Supreme Court Act 59 of 1959. Such an application is so closely bound up with the accused's conviction, sentence and appeal that it is a criminal proceeding. The Court further found that the amendment of the Supreme Court Act by the Appeals Amendment Act 105 of 1982 (whereby the requirement of leave to appeal was extended - see s 20(4) of 59 of 1959 as amended by s 7 of Act 105 of 1982) *did not cover an appeal against the refusal of condonation for the late noting of a*

criminal appeal. Such an accused can appeal to the Appellant Division and he did not have to leave to appeal therefor. (Emphasis added.)

[17] The Supreme Court Act 59 of 1959 was the legislation governing civil appeals to the Supreme Court of South West Africa – the High Court's constitutional predecessor - and ultimately to the Appellate Division of the Supreme Court of South Africa before the enactment of the High Court Act, 1990 and the Supreme Court Act, 1990. It is thus evident from the reading of both the *Absalom* and *Nakale* judgments that the courts were addressing in those matters a lacuna in the country's criminal procedure, which is not the position in the present appeal.

[18] In the instant matter there is no lacuna as the applicable provision is s 18(2)(b) of the Act. The *Nakale* case is thus no authority for the argument advanced on behalf of the appellant. To sum up, the principle of the Act is that where the High Court sits as a court of first instance, an appeal from a judgment or order of that court in civil matters lies with the Supreme Court as of right. However, where the High Court sits as a court of appeal, leave to appeal against any judgment or order of that court in civil proceedings must first be obtained from the High Court and if refused, leave must be sought and obtained from the Supreme Court by way of a petition to the Chief Justice as provided for under the law. The words 'any judgment or order' in s 18(2) of the Act make it plain that an appeal against interlocutory decisions of the High Court sitting as a court of appeal are also subject to the requirement of leave to appeal.

[19] The appellant's contention that a litigant in civil proceedings in the High Court sitting as a court of appeal has the right of appeal to the Supreme Court without leave if in an application for condonation the merits of the appeal had not been considered by that court is entirely untenable. Such an interpretation has the effect of eroding the filter system built into s 18(2)(b) of the Act intended to weed out unmeritorious applications for leave to appeal. The sieve built in the section ensures that the Supreme Court's limited resources are not spent on hearing appeals that have no prospects of success.

[20] For all these reasons, the appellant was therefore required to apply for leave to appeal from the High Court before approaching the Supreme Court. As the appeal is not properly before us, it is not necessary to consider the merits of the appeal even though we have heard arguments thereon. The appeal ought therefore to be struck from the roll.

[21] On the issue of costs, we have been informed that the appellant has been granted legal aid. Section 18 of the Legal Aid Act 29 of 1990 prohibits the making of a costs order in proceedings in respect of which legal aid had been granted. In the circumstances, no order as to costs will be made.

Order

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

1. The appeal is struck from the roll.
2. No order as to costs is made.

SHIVUTE CJ

MAINGA JA

SMUTS JA

APPEARANCES:

APPELLANT:

A H G Denk

Instructed by Ensafrica Namibia.

Inc (LorentzAngula Inc)

RESPONDENT:

M Ntinda

of Sisa Namandje & Co Inc