

THE STATE v. TUAFENI KAKOLOLO

CASE NO. CA 42/2001

2002/14/15

Hannah, J et Maritz, J.

CRIMINAL PROCEDURE

Appeals – from lower court - Rule 67 of Magistrates' Courts Rules requiring notice of appeal to set out clearly and specifically the grounds of appeal – given the objective of expeditious and fair adjudication of appeals, the rule for good reason formulated in peremptory terms – notice not stating any grounds of appeal but only intention to add them later – notice of amendment and application for condonation filed – notice constitutes the very basis of the appeal - if notice does not comply with rule, it is not a

valid notice and as such no notice at all – it is a nullity having no force and effect – it is incapable of being resurrected or revived by amendment or condonation – appeal struck from the roll.

CASE NO. CA 42/2001

IN THE HIGH COURT OF NAMIBIA

**TUHAFENI KAKOLOLO**

**Appellant**

versus

**THE STATE**

**Respondent**

**CORAM: HANNAH, J. et MARITZ, J.**

Heard on: 2002/11/08

Delivered on: 2002/11/15

---

**APPEAL JUDGMENT**

**MARITZ, J.:** The appellant was charged with and convicted in the Regional Court of the crimes of robbery (with aggravating circumstances) and attempted murder. Both counts were taken together for purposes of sentence and the appellant was sentenced to 20 years imprisonment on 27 March 2001. Dissatisfied with his conviction and the sentence subsequently imposed, he belatedly caused his legal representative to file a notice of appeal on 5 June

2001. The body of the notice, which is of importance for purposes of this judgment, reads as follows:

“Take notice that the abovementioned appellant hereby gives notice of his intention to appeal to the High Court of Namibia against his conviction and subsequently imposed sentence on charges of armed robbery and attempted murder, passed on 27 March 2001 by his Learned Magistrate Mr. G. Retief, in the Regional Court for the district of Windhoek.

Take further notice that, once a certified copy of the transcribed trial proceedings have been made available for perusal and scrutiny of same, a supplementary notice of appeal is to be filed subsequent thereto, same to set out fully the grounds whereupon the appellant is to base his appeal.

Please also note that a proper application for condonation, on notice of application, of the late filing of the notice of appeal, will be filed in time.”

A supplementary notice of appeal, listing the grounds on which the appellant sought to prosecute the appeal, was eventually filed more than three months later. When, after the expiry of yet another 12 months, the appeal was first called in this Court, the appellant applied for a postponement to rectify omissions in the record of proceedings. On that occasion the Court pertinently enquired from his counsel whether, given the failure to state any grounds in the notice of appeal as required by Magistrates’ Courts rule 67, it could be said that there was an appeal - properly brought - before us.

Counsel thought that it was properly noted. The submission notwithstanding, the Court required of the appellant to take such steps as are required in law to bring his appeal properly before the Court or, if he were to persist with his stance, to argue the point on the date of remand. He opted for the latter and, after hearing argument on the point, the appeal was struck from the roll for reasons to follow. These are the reasons.

Rule 67(1) of the Magistrates' Courts rules requires that convicted persons desiring to appeal under section 309(1) of the Criminal Procedure Act, 1977, "shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based...".

The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall (*S v Khoza*, 1979 (4) SA 757 (N) at 758B). It serves to inform the trial magistrate in clear and specific terms which part of his or her judgment is being appealed against, what the grounds are on which the appeal is being brought and whether they relate to issues of law or fact or both. It is with reference to the grounds of appeal specifically relied on that the magistrate is required to frame his or her reasons under Magistrates' Courts Rule 67(3). Once those reasons have been

given, the appellant may amend the notice of appeal under subrule (5) and the magistrate may again respond to the amended grounds of appeal. The notice also serves to inform the respondent of the case it is required to meet and, regard being had to the record and the magistrate's reasons, whether it should concede or oppose the appeal. Finally, it crystallizes the disputes and determines the parameters within which the Court of Appeal will have to decide the case (Compare: *S v Maliwa and Others*, 1986 (3) SA 721 (W) at 727; *S v Nel*, 1962 (1) SA 134 (T) at 135A and *R v Lepile*, 1953 (1) SA 225 (T) at 230H). Consequently, it also serves to focus the minds of the Judges of Appeal when reading the (sometimes lengthy) record of appeal, researching the law in point, considering argument and adjudicating the merits of the appeal.

Given the importance of its objectives, the rule is for good reason formulated in peremptory terms and, as Broome JP pointed out in *R v Hoosen*, 1953(3) SA 823 (N) at 824, "an attorney filing such a notice assumes the *onus* of satisfying this Court, when the case comes on for hearing, that the appeal has been properly noted" and that, if the notice "is not a proper notice, all the consequences of a failure to note an appeal properly in terms of the Rules necessarily follow.". Expounding on what those consequences are, Watermeyer J in *Hashe v Minister of Justice and Another*, 1957 (1) SA 670 (C), when dealing with a "notice" in which no grounds were mentioned said (at p. 675) that it "was not a valid notice of appeal, and as such

it was no notice of appeal at all.”. The same view was echoed by Galgut, J in *R v Zive*, 1960(3) SA 24 (T) at 26F and Erasmus J in *S v Matuba*, 1977 (2) SA 164 (O) at 166. Such a notice is a nullity (*per* Kirk-Cohen J in *S v Maliwa and Others*, *supra* at 726F) and does not have any force or effect (*per* Bresler J in *S v Nel*, 1962 (1) SA 134 (T) at 134F).

Once a nullity, it “remains a nullity and cannot be resurrected or revived” - neither by condonation of the non-compliance nor by amendment of the defective notice (*per* Friedman JP in *Molebatsi v Federated Timbers (Pty) Ltd*, 1996(3) SA 192 (B) at 94I, 95D and 96F). In *Risley v Gough*, [1953] Tas SR 78 at 79 (cited in Saunders’ *Words and Phrases Legally Defined* 3<sup>rd</sup> ed. at 78) Gibson J, dealing with a similar notice said: “...I cannot construe the word ‘amended’ other than to mean the perfecting or ameliorating of an existing thing - not supplying a vacuum with something that should be there”. By filing a notice of amendment well out of time and by seeking condonation for his failure to incorporate any grounds in his notice of appeal, the appellant endeavoured to do what the law does not and the Courts should not permit. If, as Broome J cautioned in *R v Nicholson*, 1949 (2) SA 585 (N) at 598D-E the Courts were to set foot on such a course, as the appellant’s counsel invited us to embark on -

"... we are only at the beginning of our troubles and (once), the clear meaning of the words having been departed from, an iliad of woes lies ahead of us before a workable rule is evolved. It would have been better to have been strict from the beginning. The hard way would, in the long run, have been the kindest to all concerned."

Once alerted to the consequences of his failure, the course which the appellant should have followed was clear: withdraw the appeal and file a fresh notice under rule 67 together with an application for condonation for the late filing thereof. Had he done so, the Regional Magistrate could have considered the grounds of appeal; furnished his reasons and the matter could have taken its course within the procedural scheme created for appeals of this nature. It is not now necessary for us to decide whether condonation would have been granted in those circumstances, but we must emphasise that the Court will only condone non-compliance on good cause shown and if reasonable prospects of success have been established. Practitioners are reminded that the scheme envisaged in Rule 67 is designed to facilitate the fair and expeditious adjudication of appeals. It contemplates, for example, that the Court of Appeal will have the benefit of the magistrate's reasons specifically addressing the grounds of appeal given at a time when the proceedings are still relatively fresh in his or her mind. The Court will not allow those rules to be deviated from without good cause. In this regard, practitioners may do well to note the cautionary remarks made in



*Molebatsi v Federated Timbers (Pty) Ltd, supra* at 96G-H, which I respectfully adopt:

“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, easy-going 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.”

It is for these reasons that the Court struck the appeal from the roll.

---

Maritz, J.

I agree.

---

Hannah, J.