

CASE NO.: CC 20/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WILLEM PETER

1st APPELLANT

GERT NUXABEB

2nd APPELLANT

JAFET NUXABEB

3rd APPELLANT

**JOHN KHAMUXABEB
APPELLANT**

4th

and

THE STATE

RESPONDENT

CORAM:

MULLER, J

Heard on: 24 January 2011

Delivered on: 24 January 2011 (*Ex tempore*)

LEAVE TO APPEAL JUDGMENT

MULLER, J.: [1] I must confess when I read the documents in the file, I was in the dark of what or who is before me. I have carefully perused the Court's file in order to comprehend what has been done in respect of an application for leave to appeal by any of the convicted accused since their sentence. Although this matter has apparently been set down by the Registrar's office on 26 June 2009 referring to "*leave to appeal in respect of Willem Peter (accused 2 in the trial) and 4 others*"

versus the State", the court's file does not contain any Notice of Appeal. Apart from that letter from the Registrar's office, the only other documents (after the trial) in the file are:

- a) Several letters to the Registrar referring to the court record which is apparently required by the Directorate of Legal Affairs;
- b) Letters to Willem Peter (accused) and Gert Nuxabeb (accused) from the Directorate of Legal Affairs informing them that their applications for legal aid had been received and that the court record is required in order to make an informed decision regarding their respective appeals;

An application (in handwriting) dated August 2010, for condonation for the late filing of the notice to appeal and supporting affidavit. This application for condonation is made by Willem Peter (accused 2) and refers to "*we/us*". The supporting affidavit is not made and sworn to by any of the accused. It refers to "*Willem Peter and others*". The Commissioner of Oaths also only referred to "*Willem Peter and others*"; and

- c) Heads of argument by Willem Peter and heads of argument by the State.

[2] There is nothing before me to indicate that accused 3-5 intended to appeal. I do not have any notice of appeal with grounds of appeal or any application for condonation for the late notice of their appeals. Although the condonation application before me may refer to we or us IT is neither signed by any of them, nor did they depose to any supporting affidavit. I can consequently not attend to anything purporting to relate to an appeal by any of accused 3, 4 and 5. Although they appeared today in person I informed them of this and let them leave the dock.

[3] All that I have is the documentation by Willem Peter, the 2nd accused in the trial. From him I neither have a notice of appeal nor any grounds of appeal. What his grounds of appeal are can to some extent be deducted from his heads of argument.

He admits that his notice of appeal was out of time and belatedly applied for condonation. The rules of this court requires him to give notice of his appeal against a judgment of this court within 14 days of sentence. He was convicted on 3 December 2009 and sentenced on 8 December 2009. Consequently, leave for appeal can only be considered if this court condones his late notice of appeal.

[4] The supporting affidavit to his application for condonation has not properly been deposed to. It is not a proper affidavit. Willem Peter did not sign it. All that appears on the end of the affidavit is the name of accused 2, namely Willem Peter and others. As mentioned, the Commissioner of Oaths used the same words, but did not say that Willem Peter signed the statement and took the oath. However, I shall accept that Willem Peter (accused2) understood and declared what is contained in that document.

[5] It is trite that an application for condonation is with the discretion of the court to condone non-compliance of the Rules of Court, if satisfied with the explanation for the delay and if there are prospects of success.

[6] It is also trite that if the explanation for the delay is not acceptable, the prospects of success do not even come into play. (See: *Abraham Ruhumba v The State*, case no. CA 103/2003, an unreported judgment of this court.) This is exactly the situation here. The only two explanations proffered by the accused, Willem Peter, for the long delay in noting an appeal against his conviction and sentence are that he is a laymen in gaol and that his family, who promised to assist him financially, left him in the lurch by not providing finances for his appeal. In the first instance he tried to explain the problems he has in goal to file leave to appeal. He was legally represented by a legal representative, Mr Boris Isaacks, during his trial and it can be accepted that his rights to appeal had been properly explained to him

after the trial. He confirmed this in court. He did not say it didn't happen. He does say that the "*Magistrate*" explained these rights to him, probably meaning his legal representative. Today he confirmed it was explained by Mr Issacks. The attempt to hide behind the fact that he is a layman does not hold water and this excuse is not accepted. Secondly, the fact that he was waiting for his family who promised to assist him in his appeal, is similarly a lame excuse. Even if they promised to find finances for his appeal, he was not prevented to give notice of appeal in time. He conceded that his rights had been explained to him. Furthermore, he was represented during the trial by Mr Isaacks, appointed by the Directorate of Legal Affairs. It is very suspicious that he would now make use of a private lawyer for whose services he had to find finances. His letters indicate the contrary. I do not accept that excuse.

[7] The application for condonation is rejected on the ground of a lack of an acceptable explanation for the delay. The question of prospects of success does not have to be considered any further. However, considering the submissions made in the heads of argument and the court's judgment's on conviction and sentence, there are in my opinion no prospects of success that another court may come to another conclusion.

[8] In the result, the late notice of appeal of Willem Peter is not condoned.

MULLER, J

On behalf of the Appellant:

In Person

On behalf of the Respondent:

Mr Campher

Instructed By:

Office of the Prosecutor-General