



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 94/2013

In the matter between:

THE STATE

APPELLANT

and

WESSEL DE JAGER

1ST RESPONDENT

HENRY GROTKOFF

2ND RESPONDENT

ANDRIES ALBRIGHTSEN

3RD RESPONDENT

PIETER FOX

4TH RESPONDENT

JOACHIM GROTHKOPT

5TH RESPONDENT

Neutral citation: *The State v De Jager* (CA 94/2013) [2013] NAHCMD 353
(21 November 2013)

Coram: HOFF J

Heard: 15 November 2013 (*In Chambers*)

Delivered: 21 November 2013 (*In Chambers*)

Summary: The Prosecutor-General may in terms of s 310(1) of Act 51 of 1977 appeal *inter alia* against an order made in a lower court.

In terms s 310(2)(a) such application must be lodged within 30 days of such order or within such extended period as may on application on good cause be allowed – Application for leave to appeal lodged more than eleven months late.

Applicant has not dealt with the issue of condonation at all and therefore no explanation for the late filing of the application for leave to appeal is provided – Court declines to consider application for leave to appeal – Application is struck from the roll – In terms of s 310(7) of Act 51 of 1977 State is ordered to pay costs respondents have been put to in opposing the application.

ORDER

- (a) The application for leave to appeal is struck from the roll.
- (b) In terms of s 310(7) of Act 51 of 1977 the State is ordered to pay the costs the respondents have been put to in opposing this application.

JUDGMENT

HOFF J

[1] The respondents were arraigned in the Regional Court, Mungunda street Windhoek, in respect of the unlawful dealing in a dangerous dependence producing drug, namely cocaine, in contravention of the provisions of s 2(c) of Act 41 of 1971, alternatively having been unlawfully in possession of the said cocaine in contravention of the provisions of s 2(d) of Act 41 of 1971.

[2] The respondents were discharged at the conclusion of the State's case in terms of s 174 of the Criminal Procedure Act 51 of 1977. The application for leave to appeal lies against this discharge.

[3] In terms of the provisions of s 310(1) the Prosecutor-General or other prosecutor may appeal against any decision given in favour of an accused in a criminal case in a lower court including an order made or sentence imposed by such lower court.

[4] Section 310(2)(a) provides as follows:

'A written notice of an application referred to in subsec (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.'

[5] The grounds advanced in support of the application for leave to appeal are contained in the heads of argument filed by the applicant. The respondents opposed this application.

[6] In the heads of argument filed on behalf of the respondents the point was taken that the application for leave was filed out of time without any accompanying condonation application regarding the late filing of the application for leave to appeal.

[7] It is common cause that the respondents had been acquitted in the Regional Court on 26 October 2012 and that the application for leave to appeal was lodged on 8 November 2013.

[8] It is trite law that where a notice (of an application for leave to appeal) is filed out of time, the applicant must bring an application for the condonation of the late filing of such notice. Such an application must be in the form of an affidavit in which the reasons for the failure to file the notice timeously are explained. This explanation must be reasonable, bona fide, and acceptable. An acceptable explanation must be

provided not only for the delay in noting an appeal but also in respect of any delay in seeking condonation. In addition an applicant in such affidavit must deal with the prospects of success on appeal in respect of the merits of the case. (See *The State v Karel Marthinus Theron* an unreported case of this court case no. CA 112/2002; *S v Basson* 2007 (3) SA 582 (CC) paras 155-156; *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC) at paras 20, 22 and 30-34; *Darries v Sheriff Magistrate's Court, Wynberg* 1998 (3) SA 34 (SCA) at 40I-41E; *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) at para 20; *S v Van Heerden* 2010 (1) SACR 539 (ECP) para 17).

[9] The application for leave to appeal by the applicant has been lodged more than eleven months outside the time limit prescribed by s 310(2)(a). The applicant has not dealt with the issue of condonation at all. There is no application for condonation in which the late filing of the application for leave to appeal is explained. The applicant has totally disregarded the provisions of s 310(2)(a) and this court therefore declines to consider applicant's application for leave to appeal.

[10] In the result the following orders are made:

- (a) The application for leave to appeal is struck from the roll.
- (b) In terms of s 310(7) of Act 51 of 1977 the State is ordered to pay the costs the respondents have been put to in opposing this application.

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E P B HOFF
Judge

APPEARANCES

APPELLANT: E N Ndlovu
Office of the Prosecutor-General, Windhoek

FIRST, SECOND, THIRD AND
FOURTH RESPONDENTS: J H Wessels
Stern & Barnard, Windhoek

FIFTH RESPONDENT: H Krúger
Krúger, Van Vuuren & Co, Windhoek