

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: CA 40/2017

In the matter between:

THE STATE

APPELLANT

and

JAN ALBERTUS SCHOLTZ

RESPONDENT

Neutral citation: *S v Scholtz* (CA 40/2017) [2017] NAHCMD 316 (06 November 2017)

Coram: UNENGU, AJ

Heard: 16 October 2017

Delivered: 06 November 2017

Flynote: Criminal Procedure – Application – Leave to appeal by State- Criminal Procedure – application to condone late filing and service of application for leave to appeal – Respondent absent after proper service of papers on him – Both applications unopposed and granted.

Summary: This is an application by the State seeking leave to appeal against the acquittal of the respondent by the Regional Court sitting at Keetmanshoop. The applicant also filed an additional application for condonation of late filing and service of the application for leave to appeal. Even though papers were properly served on the respondent, the respondent decided not to oppose both applications, and as such, applications were disposed off unopposed and granted by the court.

ORDER

- (i) The late service of the application for leave to appeal and the late filing of the applicant's heads of argument are hereby condoned.
 - (ii) The application for leave to appeal succeeds and is granted.
-

JUDGMENT

Introduction

UNENGU, AJ:

[1] This is an application for leave to appeal in terms of s 310 (1)(2) of the Criminal Procedure Act¹, herein referred to as the CPA, by the State against the decision of the Regional Court sitting at Keetmanshoop for acquitting the respondent on a charge of contravening s 43 (1) of Act 8 of 2003 – using his position or office for gratification and two alternative counts of contravening s 16(1)(a) of the Regional Councils Act, Act 22 of 1992 and a contravention of s 16(2) of the same Act.

[2] This happened on 17 March 2016. The ground on which the applicant relies for this application is that the trial court misdirected itself on the law or facts and or both law and facts to such an extent that it can be said that the decision to acquit the respondent on count two and the alternative counts, was irrational and above all, unsustainable.

[3] The application for leave to appeal was filed outside the period of 30 days from the date of the decision, or order of the Regional Court. However, an application to condone the late filing of the application accompanied by an affidavit deposed to by Mr S Nduna was filed.

[4] Despite proper service of the papers and the court order for a postponement on the request by respondent, the respondent failed to appear before court in person

¹ Act 51 of 1977 as amended (the CPA)

or through a legal representative properly mandated to represent him. In the result, the application was heard unopposed.

[5] I have considered the application for condonation. The cause for the delay in filing the application for leave to appeal was properly explained in the affidavit, in my view. The delay was not caused as result of fault on the part of Mr Nduna, the present counsel for the applicant but by his ex-colleague who had resigned from the Prosecutor-General's Office. Therefore, I grant condonation for the late filing of the application for leave to appeal.

Merits

[6] The respondent in the matter, Mr Jan Albertus Scholtz was charged by the State with offences under the Anti-Corruption Act and the Regional Council's Act indicated above. He was acquitted of both the main and the two alternative counts.

[7] The respondent, at the time of the alleged commission of the offences was the Councillor of the Luderitz Constituency and Chairperson of the Karas Regional Council. He was married to the mother of a certain Clayton Bruce the sole proprietor of Tommy Meat Products, a butchery which applied for a grant in the amount of N\$ 9 821.00 to the Regional Council of which his stepfather (the respondent) was the Chairperson and a Councillor of the Regional Council. This was also the only application received from the Luderitz Constituency tabled for consideration by the Regional Council on 18 November 2011 at Keetmanshoop.

[8] The respondent, despite being the stepfather of the owner of the applicant whose application for the grant was to be considered by the Council, failed to disclose his relationship with Clayton Bruce nor recuse himself from the proceedings of the Council due to conflict of interest – but instead presided over the meeting and motivated for the approval of the application. Finally, Council resolved to grant the application by Tommy Meat Products which used the money to purchase equipment.

[9] There seems to be a disagreement between Mr Stephanus and the respondent with regard the disclosure of the relationship between the respondent and Clayton Bruce. In cross-examination Mr Stephanus is not clear in his testimony

as to whether the respondent indeed disclosed his relationship with Clayton Bruce to him before the meeting and if it was done, what was said to him by the respondent.

Conclusion

[10] That being the case and because the respondent opted not to oppose the application to put his side of the story before court, in my opinion the applicant established prospects of success in the matter – put differently, that a reasonable possibility does exist that another court may come to a different conclusion. It follows therefore, that the application for leave to appeal must succeed.

[11] Consequently the following order is made:

- (i) The late service of the application for leave to appeal and the late filing of the applicant's heads of argument are hereby condoned.
- (ii) The application for leave to appeal succeeds and is granted.

E P UNENGU
Acting Judge

APPEARANCES

APPELLANT:

S NDUNA

Office of the Prosecutor-General, Windhoek