

REPUBLIC OF NAMIBIA



NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

LEAVE TO APPEAL

Case no: CC 05/2018

In the matter between:

KATRINA HANSE-HIMARWA

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *S v Hanse-Himarwa* (CC 05/2018) [2020] NAHCMD 33 (03 February 2020)

Coram: LIEBENBERG J

Heard: 16 January 2020

Delivered: 03 February 2020

Flynote: Criminal Procedure – Leave to Appeal – Application filed out of time – Condonation application – Applicant avers that late filing of application for leave was due to her inability to secure the necessary funds – Lack of funds sole reason – Applicant to have filed a confirmatory affidavit of legal representative confirming applicant's intention to lodge application for leave to appeal within prescribed time limit – Explanation for the delay not reasonable and acceptable.

Criminal Procedure – Leave to Appeal – Test – Whether there are prospects of success on appeal – Whether court committed misdirection on law or facts – Application grounds whether another Court may reasonably give different interpretation of section 43(1) of the Anti-Corruption Act 8 of 2003 – Approach followed by applicant seeking guidance from Supreme Court on interpretation of law not a proper ground of appeal.

Summary: The applicant was convicted on one count of contravening section 43(1) of the Anti-Corruption Act 8 of 2003, for corruptly using her office as Governor of the Hardap Region to benefit two of her family members. She consequently filed an appeal to the Supreme Court against her conviction and her grounds of appeal are mainly premised on the fact that another court may come to a different conclusion. However, the application for leave to appeal was filed out of time and applicant's explanation for the delay being the bold assertion that she intended lodging the application in time but lacked funds.

Held, that, it became more compelling for the applicant to approach her former attorney to back up her version to corroborate her intended appeal for purposes of the condonation application. Therefore, the applicant's assertion of lack of funds as the sole reason for delay in filing the application is inadequate.

Held, further that, the possibility that another Court may come to a different conclusion on the interpretation of the law is not sufficient to justify the granting of leave to appeal.

ORDER

1. The application for condonation is refused.
 2. The matter is struck from the roll.
-

JUDGEMENT

LIEBENBERG, J

[1] On the 08th of July 2019 the applicant was convicted on one count of contravening section 43(1) of the Anti-Corruption Act 8 of 2003, for corruptly using her office as Governor of the Hardap Region to the benefit of two family members. She was subsequently sentenced on the 31st of July 2019 to a fine of N\$50 000 which was paid. She now seeks leave to appeal to the Supreme Court against her conviction.

[2] The applicant filed an application for leave to appeal on the 23rd September 2019 which is clearly out of time. Section 316 of the Criminal Procedure Act 51 of 1977 provides that an accused person wishing to apply for leave to appeal, is required to do so within a period of 14 days after sentence.

[3] Pursuant thereto the applicant filed a condonation application explaining under oath her delay in lodging the application for leave to appeal within the prescribed time limit. The State, in response, gave notice of its intention to oppose both the application for leave to appeal and the condonation application.

[4] It is well established that the granting of condonation for non-compliance with the rules of court, is not for the mere asking. A litigant seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the granting of condonation and to launch the condonation application without delay. The Supreme Court in the matter of *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC and Others*¹ endorsed the *dictum* enunciated in *Petrus v Roman Catholic Archdiocese*² as per O'Regan AJA, stated in the following terms:

[9] It is trite that a litigant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. Moreover, it is also clear that a litigant should launch a condonation application without delay. In a recent

¹ Case No. SA 79/2016 delivered on 31 August 2018 at para 20.

² 2011(2) NR 637 (SC).

judgment of this court, *Beukes and Another v SWABOU and Others*, case No 14/2010, the principles governing condonation were once again set out. Langa AJA noted that “an application for condonation is not a mere formality” (at para 12) and that it must be launched as soon as a litigant becomes aware that there has been a failure to comply with the rules (at para 12). The affidavit accompanying the condonation application must set out a “full, detailed and accurate” (at para 13) explanation for the failure to comply with the rules.

[10] In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's prospects of success on the merits, save in cases of “flagrant” non-compliance with the rules which demonstrate a “glaring and inexplicable disregard” for the processes of the court (*Beukes* at para 20).¹

[5] From the above quote it is thus clear that an application for condonation must be launched without delay and the applicant is firstly required to provide a full, detailed and accurate explanation for the period of the delay, including the timing of the application for condonation³; secondly, satisfy the court that there are reasonable prospects of success on appeal.⁴

The Condonation Application

[6] With regards to applicant filing the application for leave to appeal outside the prescribed time limit, she advanced the following reasons: Subsequent to her being sentenced on the 31st July 2019, she instructed her erstwhile legal representative, Mr Namandje, that she sought leave to appeal against her conviction to which the response was that she had to put them in funds in order to file the application. Being without the required funds, she, without delay, approached entities and people for assistance. Having secured funding commitments on or about the 12th September 2019, she returned to her legal representative but learned that he could not assist due to outstanding trial fees. In light thereof, she solicited her current attorneys of record, MKK Inc. with the instruction to brief Adv. Barry Roux (SC) from South Africa. As for the prospects of success on appeal, applicant relies on the grounds set out in

³ See *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5.

⁴ *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J.

the notice filed. It is finally submitted that the delay in filing the application is not substantial and that it caused no prejudice to the respondent.

[7] The respondent in opposition of the application submitted that in light of the court's earlier finding that the applicant did not take the court fully into her confidence as regards her financial circumstances, it was imperative for her to have filed a supporting affidavit from her erstwhile counsel. In the absence thereof, counsel argued, this was not about financial constraints, but rather that applicant never intended appealing her conviction which only now comes as an afterthought.

[8] Mr *Roux* during oral submissions contended that because the respondent did not file an affidavit in which is set out the grounds and proper basis on which the credibility of the applicant is now attacked and questioned, applicant would have been in a position to reply thereto and considered the need to file any further affidavits. Notwithstanding, from applicant's perspective this was not an instance where the conduct of her attorney is material, but merely the applicant being without funds to launch the application in time.

[9] Mr *Maronedze*, for the respondent, argued that the state from the outset indicated that it would oppose the condonation application as well as the application for leave to appeal. Thus, applicant and her attorney knew what they were supposed to do to carry the indulgence of the court. It was therefore not dependent upon any response by the respondent what applicant should do to move the court to condone her non-compliance with the rules. With regards to applicant's failure to file a supporting affidavit from her former counsel, this was for purposes of showing that the averments made by the applicant were correct and is not aimed at the conduct of counsel. What such affidavit should have stated is that upon finalisation of the trial the applicant instructed him that she sought leave to appeal, but that he was unwilling to take the instruction because he had not been put in funds. Against this background where the applicant's financial means at the stage of sentence already became an issue and the court expressed the view that the applicant painted a distorted picture with regards to her financial means, it was argued that applicant was neither forthcoming in the current application for condonation.

[10] It seems necessary to briefly revert to the judgment on sentence and more specifically at paras 9 and 10 thereof where the financial position of the applicant was considered. As stated, the message conveyed by the applicant at that stage was one where she was 'financially strong and in a position to pay her own legal costs; at least, she is not relying on help from outside'. Contrary thereto, in the current application the applicant states under oath that by the time she obtained a firm commitment (from somewhere or someone unknown) to cover the costs of the application before court, she was turned away by Mr Namandje due to her not having settled the outstanding trial fees.

[11] Contrary to her earlier remarks there is no explanation forthcoming as to what brought about the sudden change in applicant's financial position, being the sole reason now advanced as to why she filed the application for leave to appeal out of time. On her own account, unless acting *pro bono*, legal practitioners do not provide their services for free. Hence, a litigant who engages the services of a legal representative knows very well that it involves costs and that his/her counsel must be put in funds; moreover, when opting to employ the services of senior counsel based in South Africa.

[12] Applicant stated on oath that she approached her erstwhile counsel to lodge an appeal against her conviction, but is silent as to the date thereof and, particularly, whether it was still within the period allowed to file the application for leave to appeal. Furthermore, well knowing that she was without the required funds and having already been informed that her application could not be filed without making the required payment, the more compelling it became for the applicant to approach her former counsel to back up her version. Not to confirm that she was without funds, but to corroborate her intended appeal for purposes of the condonation application. He was the only person who could verify that she immediately gave instruction to lodge the appeal. In the present application it is indeed not about the lack of funds, but applicant's clear intention to file an appeal against her conviction. Had this been confirmed, such information would obviously have been an important factor in considering the application for condonation. Moreover, in circumstances where the applicant relies on her financial predicament as the *sole* reason for non-compliance with the rules.

[13] Against this background a supporting affidavit from Mr Namandje to the effect that the applicant at all times intended appealing her conviction within the prescribed time limit, but that he was impeded due to applicant's financial constraints, appears to have been a necessity. Applicant's bold assertion of lack of funds as the sole reason for the delay in filing the application is inadequate and falls short of being a reasonable and acceptable explanation. In itself, in my view, this is sufficient reason to refuse the application.

[14] The second requirement is whether there are prospects of success on appeal. Here the applicant relies on what is set out in the application for leave to appeal.

[15] It is established law that the test to be applied in applications of this nature is that the applicant must satisfy the Court that there is a reasonable prospect of success on appeal (*R v Ngubane and Others*⁵; *R v Baloi*⁶). In *S v Nowaseb*⁷ the court cited with approval the case of *S v Ceasar*⁸ where Miller, J.A. emphasised that 'the mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal'. In *Nowaseb (supra)* the court said that what the trial judge is required to do is to disabuse his or her mind of the fact that there is no reasonable doubt as to the guilt of the accused person (applicant) and to ask himself or herself whether, on the grounds of appeal raised in the application, there is a reasonable prospect of success on appeal (640H-I). Applicant thus bears the onus to show on a balance of probabilities that she has prospects of success on appeal based on one or more misdirection committed by the trial court either on the law or the facts. (Emphasis provided)

[16] Mr Roux at the outset of his submissions pointed out that from the notice of appeal itself it is clear that there was no attack on the court's finding on credibility or the facts and, in his view, it was a well-considered judgment on the facts. The gist of the application turns on the question as to whether this court followed the correct approach when determining that the applicant abused the power of her office when

⁵ 1945 AD 185 at 186-7.

⁶ 1949 (1) SA 523 (AD) at 524-5.

⁷ 2007 (2) NR 640 (HC).

⁸ 1977 (2) SA 348 (AD) at 350E.

insisting that two names be removed from the list of elected beneficiaries and to be substituted with that of her family members, as she was not vested with such power. What in essence was argued in relation to the grounds of appeal is that another court may reasonably find differently on the same facts and, given the import of the correct interpretation of the ambit of section 43 of the Anti-Corruption Act 8 of 2003 (the Act), guidance by the Supreme Court is necessary where an abuse of office is alleged.

[17] Briefly summarized, the grounds of appeal amount to the following:

That another court may find that (a) the applicant did not act corruptly with intent to subvert or undermine the vetting process; (b) the deeming provision under section 43(2) of the Act did not become operative; (c) because the applicant was not vested with the power or duty to make a decision in respect of the selection of beneficiaries, she could not have been convicted of corruption; (d) the applicant did not overrule the selection committee's discretion and decision; (e) the selection committee's decision was a non-binding measure by an ad hoc administrative body and any subversion by the applicant of the list of beneficiaries did not constitute a violation of a criminal norm; (f) the exercise of political discretionary power is *per se* not unlawful; and lastly, (g) whether the substitution of names on the list did not render the criminal matter a triviality under Criminal Law.

[18] When pointed out by the court during oral submissions that with regards to the ground in (f) it was never part of the applicant's defence or testimony that she admitted having intervened with the selection process, counsel advanced no further argument and effectively abandoned these grounds. The decision is wisely taken. This would equally apply to the ground set out in (g) above.

[19] In amplification counsel reasoned that with regard to the Special Advisors and Regional Governors Appointment Act, 1990 (Act 6 of 1990) the applicant had no supervisory powers over the selection process. It was argued that even where there was a misconception on the part of applicant that she had supervisory powers over the selection process, then it still did not satisfy the requirement of direct or indirect corrupt use of her office as defined in section 43(1) of the Act. The Act itself makes

no provision for the assumption of power. Hence, the assumption and abuse of power did not fall within the ambit of section 43(1) of the Act. Furthermore, that even if it did, based on applicant's assumption of power and abuse of such power, applicant's conduct must be coupled with a specific intent to act corruptly as envisaged in that section because an abuse of power is not synonym with a corrupt act. In other words, an abuse of power should not be equated to the intention to act corruptly where, in the latter, a person knowingly and dishonestly acts with a *specific intent* to subvert or undermine the integrity of something.

[20] Mr *Maronedze* submitted to the contrary and based his argument on established case law stating that the test in applications of this nature is not whether the Supreme Court *may* (reasonably) give a different interpretation of the law than what this court did when adjudicating the case, but to show that the court *misdirected* itself on the law or the facts, or both. In this respect, it was said, the approach by counsel to seek the Supreme Court's interpretation and guidance in these circumstances is unjustified. Moreover, in view of the concession made at the outset that the court did not commit any misdirection in making its factual and credibility findings; neither does the applicant state in what way did this court misdirect itself in its interpretation and application of the law and why the judgment is wrong. Counsel further argued that the applicant was not convicted for having assumed responsibility over the selection process, but for having abused the power of her office as Governor when demanding that changes be made to the list of beneficiaries from which family members benefitted.

[21] Whether or not applicant has crossed the threshold by showing on a balance of probabilities that the court misdirected itself and, as a result thereof wrongly convicted the applicant, must be determined on the grounds relied upon in the application. Where it is conceded that the court did not err on the evaluation of the evidence adduced or findings of credibility and the application hinges on the interpretation of the law, the onus rests on the applicant to at least show in what manner or the extent in which the interpretation given by this court was wrong and open for an interpretation *favourable to the applicant*. This the applicant has not succeeded in doing. The approach followed by the applicant instead to seek guidance from the Supreme Court (for future reference) on an interpretation of the

law, is not acknowledged by the courts in this jurisdiction to constitute a ground of appeal; neither would it suffice to show that there are prospects of success on appeal.

[22] The grounds raised and relied upon in this application broadly overlaps with the defence relied on by the applicant in the trial and which were extensively discussed and decided in the judgment (paras 98 – 105) and there is no need to repeat what is stated in that regard. Suffice it to say that the court found that the applicant was not vested with the power to effect the amendment of the list of beneficiaries as she did and exerted her authority as Governor of the region over the officials responsible to compile the list by compelling them to change it in accordance with her directive. The evidence clearly established that this was solely brought about because of the power vested in her office, a fact she had made clear to them when saying that contrary to what the approach was in other regions, they were now in her region where things are done her way. Furthermore, as the Governor she would have officiated at the handing over ceremony the next day and used this as a threat or leverage against the officials who opposed her by saying that the ceremony would be cancelled if the list were not changed. There was no doubt in this court's mind that such conduct on the part of a public officer was wrong and amounted to the abuse of her appointment and office. This was a wilful and goal directed decision taken by the applicant, bringing her actions within the ambit of subsection 2 of section 43 of the Act.

[23] In view of the court reaching this conclusion it was submitted on the applicant's behalf that, based on her appointment as Governor in terms of the Special Advisors and Regional Governors Appointment Act, she had no power vested in her appointment to act in a supervisory capacity. This means that even where she assumed such power, it did not satisfy the requirements of section 43 of the Act. It has been the applicant's evidence that her involvement in the MHDP was merely in a supervisory capacity which, as found by the court, had manifested in her actions. This much is evident in the selection committee's decision – as was done in all the other regions where the programme was rolled out – to lay the final list before the Governor of the region.

[24] Section 2(4) sets out the functions of the Regional Governor in the following terms:

'(4) The functions of a regional governor shall be-

(a) to act as the representative of the central Government in the region concerned;

(b) to investigate and report on any matter relating to the region concerned if he or she has been requested to investigate that matter by the President or the Minister responsible for regional or local government;

(c) to keep himself or herself informed of all matters relating to the region concerned and to bring any matter to the attention of the President or the relevant Minister if he or she thinks that it is advisable;

(d) to settle or mediate any dispute or other matter that might arise in the region concerned, and

(e) generally, to act as a link between the central Government and the regional council, or any local or traditional authority in the region concerned.'

(Emphasis provided)

[25] Contrary to counsel's interpretation of section 2 with regards to the supervisory role adopted by the applicant in this matter, it would appear to me that this is likely borne out by the broad functions set out in the section and more specifically in (c) above which required of the applicant to keep herself informed of matters in her region and to report to the President or Minister any matter she thinks is advisable. This, in my view, would be more compelling where it concern the MHDP, a programme initiated and managed by central government and rolled out in the region where applicant was the appointed Governor. To this end, the argument that any supervisory role assumed by the applicant fell outside the ambit of the powers of her office, is respectfully without merit.

[26] Turning next to the ground in (e) above, relating to the selection committee's decision being a non-binding measure and any subversion of the list of beneficiaries by the applicant having no criminal consequence, counsel for the applicant did not further develop any argument in this regard in either the heads of argument or oral submissions made in support of the application. Standing alone, this bold assertion is without substance and does not meet the requirement of constituting a proper

ground on appeal. Hence, in the absence of any argument advanced in respect thereof, it deserves no further consideration.

[27] With regards to the question as to whether the applicant corruptly used her position in the MHDP to obtain a gratification, it is evident from the judgment that the court was guided by the approach followed by the Supreme Court in *S v Goabab and Another*⁹ when coming to the conclusion that the applicant's conduct fell within the ambit of corruption for purposes of a contravention under section 43 of the Act. I am therefore not persuaded that the Supreme Court, on the present facts, may reasonably come to a different conclusion as it had already decided the approach to be followed in matters involving corruption, and which this court followed in its adjudication of the matter.

Conclusion

[28] After due consideration of the grounds raised on which the applicant seeks leave to appeal; the submissions made by counsel on both sides and the court's reasons stated in its judgment of 08 July 2019, applicant, in my view, failed to show any prospects of success on appeal. The application for condonation therefore does not meet the two requisites of good cause, allowing her to proceed with the application for leave to appeal.

Order

[29] In the result, it is ordered:

1. The application for condonation is refused.
2. The matter is struck from the roll.

J C LIEBENBERG
JUDGE

⁹ 2013 93) NR 603 (SC).

APPEARANCES

APPLICANT	Adv B Roux (SC), Instructed by Murorua Kurtz Kasper Inc., Windhoek.
RESPONDENT	E Maronedze Of the Office of the Prosecutor-General, Windhoek.