

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no: CC 20 /2018

In the matter between:

WILLEM PETER

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Peter v S* (CC 20/2018) [2020] NAHCMD 241 (1 June 2020)

Coram: MILLER AJ

Heard: 01 June 2020

Delivered: 01 June 2020

Flynote: Criminal law – application for leave to appeal against sentence and application for condonation for the late filing of the application for leave to appeal –that is a second application in the same matter and for the same relief before the High Court

–the Court is not competent to express itself again on the same matter – the Applicant should approach the Supreme Court by petition –matter is struck from the roll.

Summary: The applicant was convicted and sentenced to 30 years' imprisonment for stock theft in the High Court. After that he brought a late application for leave to appeal against the sentence. The application for condonation for the late filing of the notice was then rejected by the High Court because of an unacceptable reason for the delay. Subsequent to the Applicant's conviction and sentence, the Supreme Court held that the mandatory minimum sentences prescribed by the legislature for a sentence of stock theft were unconstitutional. The matter rested for a while, and later the Applicant approached the High Court again in the present case with an application for leave to appeal and an application for condonation for the late filing of the application.

Held that the Judge is not entitled to override the express provision of Section 316 (6) of the Criminal Procedure Act 51 of 1977.

Held that the Applicant is not entitled to once more approach the High Court for the relief he seeks.

Held that the High Court is not competent to further express itself on the same matter.

Held that this matter should be decided by the Supreme Court on petition to it in terms of Section 316 (6) of the Criminal Procedure Act 51 of 1977.

Hence the matter is struck from the roll.

ORDER

1. The matter is struck from the roll.
 2. The matter is considered finalized.
 3. The Applicant is advised to consider a petition to the Supreme Court.
 4. Advocate Esi Schimming-Chase is appointed as amicus curiae for the Applicant.
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JUDGMENT

MILLER AJ:

[1] I have before me an application for leave to appeal to the Supreme Court of Namibia against the sentence imposed upon the Applicant by Mr Justice Muller in the High Court of Namibia, which sentence was imposed on the 3rd of December 2009. Together with the present application there is an application for condonation for the late filing of the application.

[2] Following his conviction and sentence on the 3rd of December 2009, the Applicant was sentenced to a term of 30 years imprisonment by Mr Justice Muller on the 8th of December 2009. An Application for leave to appeal against sentence was filed in due course and determined by Mr Justice Muller on the 24th of January 2011. On that date Mr Justice Muller rejected the application for the Applicant's application for condonation for the late filing of the notice and found in fact that there had been an unacceptable explanation for the delay.

[3] The matter was rested for a while until the Applicant as I have indicated once more approached this Court with another application for leave to appeal coupled with an application for condonation for the late filing of the application.

[4] The question remains whether the Applicant is entitled to once more approach this Court for the relief which he seeks, or whether on the other hand it is a matter that

should be determined by the Supreme Court on petition to it. Section 316 (6) of the Criminal Procedure Act 51 of 1977 states as follows and I quote, "If an application for condonation or leave to appeal is refused or if in any application for leave to appeal an application for leave to call further evidence is refused, the accused may, within a period of twenty-one days of such refusal, or within such extended period as may on good cause be allowed, by petition addressed to the Chief Justice submit his application for condonation or for leave to appeal..."

[5] It follows in my view that once an application for condonation of an application for leave to appeal has been refused, this Court is not competent to express itself on the matter in further and that it is incumbent upon the unsuccessful applicant in that event to file a petition to the Supreme Court and not to this Court. In a sense it is regrettable because subsequent to the Applicant's conviction and sentence, the Supreme Court held that the mandatory minimum sentences prescribed by the legislature for a sentence of stock theft were unconstitutional.

[6] I have seriously considered whether in the circumstances I am entitled to override the expressed provisions of the Criminal Procedure Act and in particular Section 316 (6) of that Act. I conclude however, that I am not competent to do so and that the Applicant should approach the Supreme Court by way of a petition.

[7] It follows therefore in my view that the present application should be struck from the roll and it is so struck.

[8] I have already expressed in my judgment my concern about the fact that the Applicant is serving a sentence which has been declared unconstitutional by the Supreme Court and as I have indicated the approach that the Applicant should follow is to petition the Supreme Court and not this Court. I heard that the Applicant is unrepresented and does not have any legal assistance. I have approached a member of the Society of Advocates in Namibia to assist the Applicant pro bono, and Advocate Schimming-Chase SC has indicated that she will be prepared to assist the Applicant pro bono in drafting his petition to the Supreme Court. The particulars of the Applicant will

be given to Advocate Esi Schimming-Chase SC so that she can assist the Applicant where necessary.

K Miller
Acting Judge

APPEARANCES:

APPLICANT: Mr. W. Peter
In Person
Windhoek

RESPONDENT: Mr Moyo
Office of the Prosecutor-General
Windhoek