

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2021/00082

In the matter between:

FRANSISCA RONGIPO PETRUS

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Petrus v S* (HC-MD-CRI-APP-CAL-2021/00082) [2022]
NAHCMD 455 (2 September 2022)

Coram: SHIVUTE J et CLAASEN J

Heard: 8 July 2022

Delivered: 2 September 2022

Flynote: Application for condonation – Non-compliance with Rule 67 of the Magistrates’ Court Rules – Appellant filing an improper notice of an appeal which causes confusion – Grounds of appeal vague, not clear and specifically set – Notice constitutes the very foundation of the appeal – Once a nullity, it remains a nullity and cannot be resurrected or revived, neither by condonation of the non-compliance of

the rules nor by the amendment of the defective notice. Counsel for appellant under obligation to comply with the Rules of Court.

Summary: This is an application for condonation for the late filing of the notice of appeal. The appellant failed to comply with Rule 67 of the Magistrate's Court Rules and filed an improper notice of appeal with inconsistencies in dates which causes confusion. Appellant was unable to give a satisfactory explanation concerning her improper notice of appeal. Grounds of appeal are also vague, not clearly and specifically stated. Improper grounds of appeal amounts to a nullity as well as the defective notice of appeal. Once a nullity, it remains a nullity and it cannot be resurrected or revived, neither by condonation of non-compliance with the rules nor by amendment of the defective notice of appeal. Counsel for the appellant is under obligation to comply with the rules of court as the notice of appeal constitutes the very foundation of the appeal. If the notice of appeal does not comply with the rules of court, it is a nullity without force and effect.

ORDER

1. The matter is struck from the roll.
 2. This appeal should not be enrolled until the appellant files a fresh notice of appeal accompanied by an application for condonation.
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APPEAL JUDGMENT

SHIVUTE J (CLAASEN J concurring):

Introduction

[1] The appellant was convicted of four counts namely; fraud, defeating or obstructing the course of justice, forgery and uttering a forged document in the Magistrate's Court sitting in Windhoek. She was sentenced to N\$20 000 fine or four years' imprisonment of which N\$10 000 or two years' imprisonment were suspended for a period of five years on usual conditions. The four counts were taken together for purpose of sentencing.

[2] She is aggrieved by the convictions hence this appeal.

Grounds of appeal

[3] The appellant advanced four grounds of appeal against her convictions as follows:

(1) Despite the fact that there was no sufficient and reliable evidence, to prove the charges against the appellant, the court a quo nevertheless proceeded and convicted the appellant.

(2) The court a quo considered irrelevant evidence or testimony from the state witnesses on issues which were not placed in dispute and finding that the said irrelevant evidence were corroborated on material aspects.

(3) The appellant's evidence that was consistent and proved to be unassailable was unfairly and irregularly rejected by the court.

(4) The court applied a wrong approach applicable to the evaluation of the evidence in a criminal trial and failed to consider material facts.'

[4] The notice of appeal was filed on 12 March 2019 whilst, the accused was sentenced on 24 August 2017. Although the notice of appeal was filed during 2019, it was inactive until it was pursued during August 2021. This notice of appeal was undoubtedly filed late. This being the case, the appellant applied for condonation for the late filing of her notice to appeal.

[5] Counsel for the respondent raised points *in limine* that the appellant filed her notice of appeal out of time. She gave a reason that she was not in the right mental state due to depression. The only available doctor's opinion about her condition is one that was given during 2009 which is over eight years and it cannot be assumed that it persisted up to the time she was convicted. The explanation advanced by the appellant for the cause of the delay is not reasonable and acceptable. Initially, the appellant filed a notice of appeal through her erstwhile legal representative on 12

March 2019. This was still out of time. There was correspondence from one of the legal clerks in the office of the Judiciary dated 4 October 2021, stating that the notice of appeal was erroneously not sent to the High Court. However, this notice was dated 11 February 2019. Although this notice was filed late, it was not accompanied by an application for condonation of the late noting of the appeal.

[6] Furthermore, on 11 February 2022, the appellant filed on e-justice an amended notice of appeal dated 10 February 2022. Again on the same date, a supporting affidavit for condonation dated 14 October 2021 was filed. On 14 February 2022 an application for condonation of the late filing of the amended notice of appeal dated 10 February 2021 was also filed. The affidavit in support of condonation dated 14 October 2021 could not have been in support of a condonation application dated 10 February 2021 that was filed on 14 February 2021. The appellant later on filed for condonation of the late filing of the amended notice of appeal which condonation application was purportedly filed together with the amended notice of appeal in October 2021. However, no such amended notice of appeal appears to exist among the documents filed. In light of the above mentioned, there is no application before this court at all.

[7] Counsel for the respondent argued that the appellant has no prospects of success on appeal on the merits especially if regard had to be given to the dates of filing of documents which are in a state that gives rise to so much confusion.

[8] Counsel for the appellant explained that the notice of appeal was filed late due to the following reasons:

(i) Although the appellant was advised that she has to file her notice of appeal within 14 days should she desire to appeal, she was unable to lodge her appeal notice on time because she was financially drained due to the funds she had already spent paying for her legal representative during the trial.

(ii) The appellant further stated that she was not in the right mental state to pursue her appeal matter at that moment as the doctor advised her that her depression was severe and that she had to avoid stress at all costs. In support of this, she attached a medical certificate, dated 1 September 2009. According to the certificate, the appellant suffers from a major depressive disorder which makes her susceptible to stressful situations. Her illness

has a high index of chronicity and may take six to nine months to achieve full remission of her symptoms.

(iii) The appellant further explained that, the magistrate's reasons for judgment were not part of the transcribed record and were only made available on 12 October 2021.

(iv) In connection with the confusion regarding the way the application for condonation was filed, counsel for the appellant stated that it was the appellant's intention to appeal from the outset. The client contacted another legal practitioner in respect of the disciplinary hearing who wrote to the Inspector General that she intends to appeal against the conviction and sentence. If these typos regarding the dates or delays as argued by the respondent are to be considered these may cause an injustice to his client. These are irrelevant and immaterial mistakes. The appellant's application should be heard despite these discrepancies or these typos or different dates of filing documents. These things were done by the legal clerk. It was one of those mistakes where a clerk just files one document and forgets the other.

(v) With regard to prospects of success, the appellant repeated the grounds of appeal as stated in his notice of appeal and stated that the prospects of success in this matter are reasonable and that the appeal is more likely to succeed when the grounds are argued.'

[9] Counsel for the appellant argued that, the explanation given by the appellant in her affidavit concerning the delay is reasonable and acceptable. Furthermore, the acceptable explanation is not the only test in deciding whether an application should be granted or not, as the prospects of success on appeal also plays a vital role at this stage.

[10] Counsel argued that, the court should have regard to the merits of the case in order to determine whether the appellant has reasonable prospects of succeeding on appeal. Counsel further argued that the prospect of success are good.

Applicable law

[11] In terms of Rule 67(1) of the Magistrate's Court Rules, the notice of appeal should have been filed within 14 days from the date of sentence. However, this was filed way out of time. An application for condonation is required to meet two

requisites of good cause before an applicant can succeed in such an application. These entail firstly, establishing a reasonable acceptable and bona fide explanation for the non-compliance with the rules and secondly, satisfying the court that there are reasonable prospects of success on appeal. *Balzer v Vries* 2015 (2) NR 547 (SC) at 551 J.

[12] The explanation for the cause of the delay will have to be contained in the affidavit that is accompanying the application for condonation. In the present matter, the applicant filed a notice of appeal that was filed out of time on 11 February 2019. However, this notice of appeal was not accompanied by an affidavit explaining the cause of the delay. Then there is an 'amended notice' dated 10 February 2022. There is no affidavit supporting the so-called late filing of the amended notice of appeal. The only affidavit filed was dated 14 October 2021. The 'amended notice' of appeal dated 10 February 2022 was not served in accordance with Rule 67(5). There is no proof that it was served on the presiding magistrate who has in terms of this Rule a discretion to add further reasons for her judgment.

[13] When counsel for the appellant was asked to explain the disorderly manner in which the application for condonation was filed, he played it down by saying these typos or delays as argued by the respondent were irrelevant and immaterial mistakes. He even shifted the blame to the legal clerk in the law firm.

[14] Counsel for the appellant is under obligation to comply with the rules of court when filing his application for condonation as required by Rule 67 of the Magistrate's Court Rules. This responsibility cannot be shifted on to legal clerks.

[15] Another issue for consideration is whether it is sustainable in law that an amended notice of appeal can ratify a defective notice. Although it is not indicated why counsel had to amend the earlier notice of appeal, it is evident from the record that the initial grounds of appeal were defective in its entirety as they were vague, not clear and specific. The notice of appeal constitutes the very basis of the appeal. If it does not comply with the rules, it is not a valid notice. However, the so-called amended notice of appeal contained grounds which are almost similar to the earlier grounds. If one has a closer look to the grounds of appeal in para 3, they are equally

vague and they amount to conclusions by counsel. They are not proper grounds at all and are a nullity.

[16] In *Molebatsi v Federated Timbers (PTY) Ltd* 1996 (3) SA 92 (BSC) at 94-95 A-D and 96 F - I the following was held:

An amended notice of appeal cannot ratify a defective notice of appeal. Improper grounds of appeal amounts to a nullity and that once a nullity it remains a nullity. It cannot be resurrected or revived, neither by condonation of the non-compliance nor by amendment of the defective notice. The correct procedure to be followed in such an instance is to withdraw the appeal and file a fresh notice in terms of Rule 67 together with a condonation application in respect of the late filing of the new notice of appeal. See also *S v Kakololo* (CA 42/2001) [2002] NAHC 6 (15 November 2002).

[17] The failure to lodge the notice of appeal in accordance with the requirements of Rule 67 has a consequence that there is no proper notice of appeal brought before this court. The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall. *S v Khoza* 1979 (4) SA 757 (N) at 758 B.

Conclusion

[18] The applicant's explanation for non-compliance with the rules of court in respect of the failure to lodge the notice of appeal within the prescribed time is unsatisfactory as it does not explain the entire period or why the compliance of the rules were deviated from. This court will not allow the rules of court to be deviated from without good cause. In the absence of a proper notice of appeal brought before this court it is not necessary to deal with the prospects of success even though we have heard arguments. Due to the defectiveness of the notice of appeal the following order is made:

1. The matter is struck from the roll.
2. This appeal should not be enrolled until the appellant files a fresh notice of appeal accompanied by an application for condonation.

N N SHIVUTE
Judge

C M CLAASEN
Judge

APPEARANCES:

APPELLANT: S.Kanyemba
Salomon Kanyemba Legal Practitioners, Windhoek

RESPONDENT: E.Moyo
Office of the Prosecutor-General, Windhoek