

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case No.: CC 14/2011

THE STATE

APPELLANT

*Versus*

IMMANUEL DAVID FREITAS DIAS

FIRST RESPONDENT

EDGAR CARDOSO ALVES

SECOND RESPONDENT

**Neutral citation:** *S v Dias* (CC 14/2011) [2022] NAHCMD 654 (2 December 2022)

**Coram:** Unengu AJ

**Heard:** 13 October 2022

**Delivered:** 2 December 2022

**Flynote:** Criminal Procedure – Application for leave to appeal in terms of s 316A of the Criminal Procedure Act, 51 of 1977 (CPA) by State against the sentence of this court – Notice of application to appeal not alleging that application enjoys reasonable prospects of success – Grounds improper for not setting out whether the court misdirected itself or has committed an irregularity during sentencing – Application for leave to appeal struck from the roll.

Criminal Procedure – Refusal to grant compensation order pursuant to s 300 of the CPA – Court not persuaded by appellant that refusal was wrong.

**Summary:** This is an application for leave to appeal against the sentence imposed by this court in terms of s 316A of the CPA by the State. The notice of application to appeal not alleging that the application enjoys reasonable prospects of success on appeal, such failure fatal to the application. Similarly, No proper grounds on which the application was brought were set out in the notice of application. No misdirection or irregularity by court alleged by the appellant.

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### **ORDER**

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- (a) The application for leave to appeal is hereby struck from the roll.
  - (b) The cost order in terms of subsection (3) of s 316A of the Criminal Procedure Act 51 of 1977 sought by the first respondent is declined.
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### **RULING (APPLICATION FOR LEAVE TO APPEAL)**

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UNENGU, AJ

[1] This is an application for leave to appeal in terms of s 316A of the CPA by the State against the sentence imposed on the first respondent by this court on 14 April 2022 following a conviction of 137 counts of fraud by the Supreme Court. Initially, the first respondent and two others were arraigned in this court for various offences of fraud with alternative counts of theft and theft by false pretences. After a trial, the first respondent and accused 2 were acquitted of these counts; however, the acquittal was set aside by the Supreme Court on appeal and substituted with a conviction of fraud on counts 1–137. As a result, therefore, the matter was referred back to this court for sentencing.

[2] As pointed out in paragraph 1, the court imposed a sentence of a fine of two hundred thousand Namibia dollars (N\$200 000) or five (5) years imprisonment plus an additional custodial sentence of five (5) years which was wholly suspended for a period of five years on the usual conditions. It is this sentence the State (Appellant) is seeking leave to appeal against on the alleged grounds listed in the notice of appeal. The application is being opposed by accused 1 (the first respondent) on all nine grounds raised in the notice of application. The parties herein will henceforth be referred to as the appellant and the first respondent.

[3] In the application, Ms Moyo from the Office of the Prosecutor-General is representing the appellant and Mr Makando is representing the first respondent respectively.

[4] Section 316 A of the Criminal Procedure Act 51 of 1977 provides for the Prosecutor-General or his or her representative to appeal from the High Court against any decision given in favour of an accused in a criminal case including any sentence imposed or order made by the court, amongst others. In subsection (3) thereof, it is provided that if an appeal in terms of subsection (1) or an application referred to in subsection (2) brought by the Prosecutor-General is dismissed or refused, the court or judge or judges may order the State to pay the accused concerned the whole or part of the costs to which such an accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of the court concerned. Mr Makando on behalf of the first respondent has requested the court to grant such an order in the event the application is dismissed or refused.

[5] The application served before me on 13 October 2022 and was postponed to 2 December 2022 for judgment. Both counsel filed written heads of argument which they supplemented with oral submissions. The heads are detailed, well researched and supported by applicable case law on applications for leave to appeal while the oral submissions were brief but to the point.

[6] It is a requirement that an application for leave to appeal states specifically and clearly the grounds on which the appellant relies on which the court should consider to grant him or her the relief sought in the application. Further, it is an indispensable requirement that the appellant states and satisfies the court that the application enjoys reasonable prospects of success on appeal. Failure to set out reasonable prospects of success in the notice of appeal together with grounds thereof, is fatal to the application and the application will fall as a result. In essence there will be no application before court to consider as leave to appeal is not granted on the basis of a mere possibility of success<sup>1</sup>.

[7] Similarly, in the matter of *Kaanjuka v the State*<sup>2</sup>, the court emphasized that in order to succeed the appellant must satisfy the court that he or she has a reasonable prospects of success and dismissed the application when it found that the appellant failed to show that he had reasonable prospects to succeed on appeal. In the instant application, the appellant has failed to indicate in the notice for leave to appeal that it has reasonable prospects to succeed on appeal. As it is the case, the court is not in a position to consider whether on appeal, the Supreme Court will come to a different conclusion than reached at by this court because the appellant self does not allege that the application enjoys reasonable prospects of success.

[8] It will not avail the appellant to allege reasonable prospects of success in the written heads of argument as it is a requirement that prospects to succeed on appeal is included in the notice of application together with legitimate grounds upon which the application is brought. In this application though, the grounds the appellant is relying on are not clear and specific in that the grounds do not state where the court misdirected itself or has committed an irregularity. In the matter of *Smith v State*<sup>3</sup>, a case referred to by counsel for the appellant in her written heads of argument, the following was said:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must

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<sup>1</sup> *Lameck v State* (CC 15/2015) [2014] NAHCMD 85 (10 April 2015); *Ditshabue v State*

(CA 31/2010 ) [2015] NAHCMD 60 (16 March 2015).

<sup>2</sup> *Kaanjuka v State* (CA 132/2004 [2015] NAHCMD 2 (20 January 2022).

<sup>3</sup> *Smith V State* (475/10) [2011] ZASCA 15 (15 March 2011) para 7.

convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding.’

[9] The principle on proper grounds was set out in the case of *S v Gey van Pittius and Another*<sup>4</sup>, where the court held that grounds stating that the magistrate misdirected himself on the facts or law that there were material irregularities during the proceedings and overemphasized the importance of other facts are not grounds but conclusions drawn by the drafter of the notice of appeal. The appellant in the application before me did exactly the same. The nine alleged grounds being relied upon in the application do not pass the test set out in the case of *S v Gey van Pittius and Another* above and other authorities quoted herein before, making the application a nullity in perpetuity.

[10] In fact, the appellant is aggrieved and wants to appeal against the sentence imposed by this court not because the court misdirected itself or has committed a material irregularity, but because the court did not adopt sentences imposed in cases referred to by counsel in her written heads during sentencing. Impression is created in oral submission that it was wrong for this court to deviate from sentences imposed in cases counsel referred to. In my view, case law principles play an important role as guides to courts when and where applicable for purposes of sentencing. It has not been shown by the appellant in the application that this court either did not exercise its discretion at all or exercised it improperly or unreasonably.

[11] Further, it should be remembered that it is trite that punishment is for the discretion of the trial court and that a Court of Appeal should not readily interfere unless there is a good cause, which, in my opinion, is none in the matter at hand. In that regard, I am inclined to agree with counsel for the first respondent referring to the matter of *S v Rakoma*<sup>5</sup> with regard to the interests of society and said the following:

“Caution has to be exercised however against overemphasizing the interests of society at the expense of the appellant’s circumstances. It is also in the interests of society that a useful human material should not be exposed unnecessarily to the negative consequences of imprisonment and

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<sup>4</sup> State V Gey van Pittius and Another [1990] NR 35 (HC).

<sup>5</sup> S v Rakoma [2004] JDR 0271 (T) at p 2 ] by AJ Terblanche

more specifically the disruption of an appellant's economic viability and the cohesion of his or her family.”

In any event, it is my view that there is no proper application before court for consideration, therefore, the correct thing to do is to strike it from the roll.

[12] With regard to the refusal to grant the compensation order in terms of s 300 of the CPA, I am not persuaded by the appellant that I misdirected myself by refusing to grant the order nor am I convinced that I have committed an irregularity for not granting the order. I stand on reasons stated in the main judgment. Similarly, I am also not persuaded by counsel for the first respondent to make an order of costs in favour of the first respondent in terms of subsection (3) of s 316A of the CPA. The request for such an order is also declined.

[13] As a whole, I am mindful that the application is suffering from multiple material defects rendering it a nullity due to non-compliance with the requirements of an application for leave to appeal. Even if I am wrong in finding that the application is a nullity, the appellant will still not succeed on the merits because, on the grounds set out in the notice, the application does not enjoy prospects of success on appeal. The Supreme Court will not come to a different conclusion than reached at by this court.

[14] Accordingly, after consideration of documents filed of record and submissions for and against the application, I come to the conclusion that there is no proper application before court to consider. Therefore, I make the following order:

- (a) The application for leave to appeal is hereby struck from the roll.
- (b) The cost order in terms of subsection (3) of s 316 A of the Criminal Procedure Act 51 of 1977 sought by the first respondent is declined.

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Unengu AJ



APPEARANCES:

FOR THE APPELLANT:           C Moyo  
  Of The Office of the Prosecutor-General  
  Windhoek

FOR THE RESPONDENT:       SS Makando  
  Of Makando Law Chambers  
  Windhoek