REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CIV-MOT-GEN-2022/00488

In the matter between:

SALOM SHIFELA **APPLICANT**

and

TITUS IPUMBU **RESPONDENT**

Neutral citation: *Shifela v Ipumbu* (HC-MD-CIV-MOT-GEN-2022/00488) [2023] NAHCMD 582 (20 September 2023)

Coram: CLAASEN J
Heard: **15 June 2023**
Delivered: **20 September 2023**

Flynote: Motion proceedings – Related to criminal appeal heard and decided in 2014 – Applicant seeks order to withdraw criminal appeal adjudged years ago – Sentence increased on appeal – Applicant's case is that he did not instruct legal practitioner to appeal – Respondent refutes that by tendering power of attorney signed by the applicant at the time – This court cannot withdraw a criminal appeal adjudged by a competent court – Relief prayed for dismissed.

Summary: The applicant is a sentenced prisoner who sued a legal representative. The legal representative appeared on the applicant's behalf in a criminal appeal wherein the sentence was increased by the appeal court. It is the appellant's case that he did not authorize the legal practitioner to lodge the appeal and essentially seeks an order for this court to withdraw that appeal. The respondent tendered in evidence a signed power of attorney which credibly refutes the contention by the applicant.

Held that, the signed and dated power of attorney presented by the respondent, credibly refutes the applicant's contention that he did not instruct the respondent to prosecute the criminal appeal on the applicant's behalf.

Held that, it is not competent for this court to withdraw a criminal case that was fully adjudged on the merits by the appeal court.

ORDER

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1. The application by the applicant for the relief sought in the notice of motion is hereby dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and it is regarded as finalised.

JUDGMENT

CLAASEN J:

Introduction

[1] This is an application wherein the applicant, a sentenced prisoner, seeks various types of relief against the respondent, a legal practitioner.

[2] The relief as set out in the notice of motion has four prayers phrased as follows:

a) That this Court orders the withdrawal of the applicant's appeal heard in on the 2 June 2014 and or alternative relief;
b) That the respondent be called to provide evidence to show that he was instructed by the applicant to appeal against his sentence on his behalf, which appeal resulted in the applicant not to be released after he served his initial sentence;
c) That the respondent provides documentary proof and court records that the appellant was at court as alleged by the respondent;
d) That the respondent provides evidence to show where he received instructions to appeal on behalf of the appellant.

Background

[3] It is common cause that the applicant was convicted of murder in the Regional Court on 17 September 2013. He was sentenced to 15 years' imprisonment, of which 5 years imprisonment was suspended for 5 years on the condition that he is not convicted of murder committed during the period of suspension.

[4] It is also apparent that the High Court on 28 July 2014 gave an order regarding a criminal appeal concerning this matter in the following terms:

'1. The appeal against sentence is dismissed.
2. The sentence is set aside and substituted with the following:
The appellant is sentenced to twenty (20) years' imprisonment.'

[5] The parties are before this court about the 'increase in the sentence' and how it came about.

Applicant's case

[6] It is the applicant's case that he was represented by the respondent in a criminal case[1] wherein which he was convicted on 24 June 2013. He deposed that on the day of sentencing being 17 September 2013 there was a women who indicated that she was sent by the respondent to represent him. The women, after explaining the appeal

[1] Regional Court Case No RC 19/2009 CR no 181.07.07.

procedure, asked him if he wants to appeal. He told her that he will go and think about it.

[7] According to him he did not speak to the women and or the respondent since then. Much to his surprise, he says, after he completed serving his sentence imposed by the Regional Court, he was told by prison officials that he could not be released as his sentence was increased to 20 years imprisonment for that criminal case.

[8] In relation to the power of attorney that the respondent has for the appeal, the applicant contends that he cannot recall that he signed such a document.

[9] The applicant also filed a 'supporting affidavit' and a short handwritten replying affidavit which purportedly relates to the points in limine raised by the answering affidavit. These affidavits will not be considered as the handwritten document does not comply with rule 131(1)(*b*) of the Rules of the High Court and the 'supporting affidavit' was not commissioned nor does it appear that he obtained leave of court to file an additional affidavit. The applicant also file a typed replying affidavit, which mainly responds to the points in limine.

The respondent's case

[10] The respondent, in answering the case, raised two points in limine. Firstly, that this matter should not be entertained because the applicant abused the court process by having filed two urgent applications with case number HC-MD-CIV-MOT-GEN-2022/00143 and case number HC-MD-CIV-GEN-2022/00209 for the same issue. The respondent asserts that the first one was set down on 22 April 2022 and struck because the applicant did not attend court. The second application was argued and also struck due to lack of urgency on 17 June 2022.

[11] Secondly, that the applicant should have joined Executive Director of the Office of the Judiciary, alternatively the Chief Justice or the two judges who presided over the criminal appeal because the insinuations in the applicant's papers amounts to procedural irregularities. In view of that, the respondent ask that the matter be dismissed.

[12] As for the merits, the respondent asserts that the Directorate of Legal Aid instructed him to represent the applicant in a criminal case. The respondent confirms the finalization of the matter in the Regional Court with a sentence of fifteen year's imprisonment of which five years' imprisonment was conditionally suspended. The said sentence was imposed on 17 September 2013. He confirms that he requested a certain, Petrine Hango to attend the Regional Court on the date of sentencing. Ms Hango was a candidate legal practitioner who worked at his practice at the time.

[13] He asserts that subsequently during September 2013 he was telephoned by a correctional officer, whose name he cannot recall now, and informed that the applicant wanted to see him. He asserts that the applicant instructed him to lodge and appeal in the High Court against the sentence. He furthermore emphasized that during the consultation he informed the applicant that the sentence in the Regional Court was lenient considering that he was convicted of murder *dolus directus* and informed him of the possibility the High Court may confirm the existing sentence or even increase the sentence. Notwithstanding the applicant instructed him to procced with the appeal. The respondent incorporated a power of attorney and a notice of appeal against sentence in his affidavit.

[14] The respondent further contends the appeal was initially set down for 2 June 2014, but it was not heard on that date. It was heard on 23 June 2014 by Justice Ndauendapo and Justice Liebenberg and the judgment was delivered on 28 July 2014, which documents he also annexed.

[15] Therefore the respondent denies that the averments by the applicant insofar as it implies that the last time they had seen each other was on the date of conviction in the Regional Court. According to him the allegations by the applicant are inconsistent with the practice of criminal appeal hearings insofar as it was implied by the applicant that the appeal was heard and judgment was delivered in the absence of an appellant. He thus prays for a dismissal of the application and issuance of an order of perpetual silence against the applicant.

Discussion

[16] I briefly pause to consider the contention by the respondent that the application should be dismissed because the applicant is vexatious and had instituted two urgent applications against the respondent. It is not in dispute that the applicant, as a sentenced prisoner, is not at liberty to come and go as he pleases. He asserts in the replying affidavit that on the day when case number HC-MD-CIV-MOT-GEN-2022/00143 was on the roll, he was not brought to court by the prison officials. There is no information to counter that and it explains why the matter was struck due to his absence at court. As for case number HC-MD-CIV-GEN-2022/00209, that was heard and struck due to lack of urgency. Having had the matter struck for lack of urgency, does not deprive the applicant from pursuing the same relief under the normal course. As such in this matter, I do not regard it as constituting to an abuse of process.

[17] As regards the non-joinder point, no relief is sought against the executive official or the judicial officers who presided over the matter and counsel for the respondent did not provide persuasive reasons to satisfy the court that they ought to have been joined. As such the court will proceed to the merits of the application.

[18] In looking at the relief, some of the prayers amounts to a duplication. In paraphrasing the relief sought by the applicant it is my understanding that the applicant wants the respondent to show on what basis the respondent filed an appeal against sentence on his behalf. More importantly the applicant essentially seeks that this court, through civil motion proceedings, undo the finding of a criminal court, sitting as an appeal court. The question is whether it would be competent for this court to do so?

[19] Notwithstanding the written mandate provided by the respondent for the criminal appeal, the appellant chose to write to the Office of the Prosecutor General, the Ombudsman and the Law Society, saying he did not instruct the respondent to file an appeal on his behalf. The respondent has tendered a power of attorney, bearing a signature affixed by the applicant in the presence of two witnesses. This document indicates that it was signed on 30 September 2013. It bears a stamp of the clerk of criminal court, dated 23 January 2014 and the document was certified to be a true copy of the original document.

[20] The respondent asserts the said power of attorney constituted his mandate to draw up a notice of appeal and prosecute the appeal. All the applicant states in relation to the power of attorney is that he cannot remember signing it. With respect, that is a lukewarm explanation to dispel the compelling nature of the written document.

[21] It is also noteworthy that the applicant's case is not that the said power of attorney was forged or that he did not sign it. The contention by the applicant is thus credibly refuted by the said document.

[21] Furthermore the respondent has provided a signed copy of the judgment[2] for the said criminal appeal which is also indicative thereof that the appeal was heard on 23 June 2014. The said judgment speaks for itself. The effect of the judgment was that the applicant's sentence of imprisonment was increased on appeal, which is permissible in law. It is also noteworthy that the applicant has not attacked the findings of the judgment, yet he is expecting from this court to have it disappear in thin air.

[22] Whether the prison authorities did or did not inform him of the sentence, at the time, is neither here nor there. It does not assist the applicant's case. The bottom line is that, on a balance of probabilities, this court is satisfied that the applicant was legally represented at the time when his criminal appeal was heard. The signed and dated power of attorney shows the basis on which the legal representative handled the appeal on behalf of the applicant.

[23] Incidentally, it appears that the applicant wants this court to sit on appeal or review of another court of competent jurisdiction in the criminal appeal case. This court is not competent to do that, as the criminal appeal case has been adjudged. That much is clear from the said judgment. Should the applicant be aggrieved by the outcome of the appeal court's judgment, this is not the way. This attempt by him is an exercise in futility.

[24] In conclusion, having considered the merits of the application, the applicant has not made out a case for the relief he seeks.

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[2] *Shivela v State* (CA 9/2014) [2014] NAHCMD 228 (28 July 2014).

[24] The respondent has not sought a cost order and the court does not grant a cost order in his favour.

[25] For these reasons, the following order is made:

1. The application by the applicant for the relief sought in the notice of motion is hereby dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

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C Claasen
Judge

APPEARANCES

APPLICANT:	S Shifela In Person
RESPONDENT:	T Ipumbu Of Titus Ipumbu Legal Practitioners Windhoek