

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA HELD AT WINDHOEK
BAIL APPEAL JUDGMENT

Case No: HC-MD-CRI-APP-CAL-2023/00059

In the matter between:

STEVE BIKO BOOYS

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Booys v S* (HC-MD-CRI-APP-CAL-2023/00059) [2023]
NAHCMD 623 (6 October 2023)

Coram: LIEBENBERG, J *et* JANUARY, J

Heard: 2 October 2023

Delivered: 6 October 2023

Flynote: Criminal Procedure – Bail appeal – Appeal against refusal of bail – Where appeal filed out of time, principles restated – *Bona fides* a factor – Appeal against refusal of bail where there have been subsequent bail applications on new facts – Appeal ought to be against each refusal of bail – Bail appeal against the initial

refusal of bail amounting to abuse of process – Subsequent judgments remain valid until set aside.

Summary: This is a bail appeal against the refusal of bail some two years after the hearing of the bail application. The bail application was heard on 13 April 2021 in the Regional Court Windhoek and on 13 April 2023, the appellant filed a notice of appeal against that refusal of bail. Prior to this application but subsequent to the bail application refusal in 2021, the appellant filed four new applications (one was eventually abandoned) for bail on new facts, all of which having been refused. The appellant now appeals against the first refusal of bail, contending that the magistrate erred and misdirected himself on the law and/or the facts. The appellant also filed an application for condonation subsequent to the filing of the notice of appeal. The appeal is opposed.

Held: The legal principles a court is to consider in exercising its discretion to condone a party's non-compliance with the rules of court are well established. The appellant must give a reasonable and acceptable explanation for the cause of the delay and satisfy the appeal court that he has prospects of success on appeal.

Held further that: In exercising its discretion whether to grant or refuse condonation, the *bona fides* of the application are also a factor to consider.

Held that: The appellant electing not to appeal against each refusal of bail, as he ought to have done, but instead reverting to the first bail application for unpersuasive reasons, constitutes an abuse of process.

Held further that: Section 65(1)(a) of the CPA cannot be interpreted to permit an aggrieved accused to turn to the refusal of the first bail application only after the court *a quo* refused two subsequent bail applications based on new facts.

Held that: What the appellant now attempts to do is to resuscitate the first bail application by bringing it back to life and place it before this court to pronounce itself on 'life after death'.

Condonation for the late filing of the notice of appeal refused and appeal consequently struck from the roll.

ORDER

1. Condonation for the late filing of the notice of appeal is refused.
2. The appeal is struck from the roll.

JUDGMENT

LIEBENBERG J (JANUARY J concurring):

Introduction

[1] This appeal emanates from the refusal of bail subsequent to four bail applications (of which one was abandoned) launched by the appellant in the Windhoek Regional Court.

[2] The appellant took an unusual approach and elected to appeal against the refusal of the first bail application, delivered on 13 April 2021 by magistrate Swartz.

[3] Mr Olivier appears for the appellant while Ms Shikerete represents the respondent.

[4] The notice of appeal was filed on 13 April 2023, exactly 2 years after the appellant was refused bail in his first application. It is clear that the notice of appeal was filed out of time for which the appellant simultaneously brings an application for condonation for the late filing. In support of the application, the appellant filed his

founding affidavit and the confirmatory affidavit of his counsel. The respondent opposes the application and raised two points *in limine*, the first dealing with the appellant's explanation for the delay in filing his appeal and the second, having shifted the blame to his erstwhile legal representatives for not lodging an appeal against earlier rulings, refusing the appellant bail.

[5] During oral argument Mr Olivier submitted that there was no blame shifting and that he takes full responsibility for bringing the appeal belatedly against the first ruling of the court *a quo*. There is accordingly no need to discuss and decide the points raised *in limine* individually, but as one, as both points concern the appellant's explanation for the late noting of the appeal in the condonation application.

Background facts

[6] The appellant stands charged with offences of two counts of rape, read with the Combating of Rape Act 8 of 2000, and two charges of incest.

[7] It is common cause that (a) the appellant is the biological father of the complainant and that (b) he was arrested on 2 February 2021 after handing himself over at the Okahandja police station. Subsequent to his arrest, the appellant, assisted by his erstwhile legal practitioner, Mr Lutibezi, applied for bail on 30 March 2021 which application was heard and refused by Swartz for reason that he was satisfied that the appellant did not discharge the onus on a balance of probabilities that (a) his release will be in the interest of the administration of justice and not likely to jeopardise the criminal justice system, and (b) that the appellant would not interfere with state witnesses.

[8] What is clear from the facts on record, is that the appellant, after his first bail application was refused, applied three more times for bail, on each occasion based on new facts. However, after the latest bail application was refused, the appellant elected to appeal against the first judgment refusing bail, and to this end contends that magistrate Swartz erred and misdirected himself on the law and/or facts in various respects.

Requirements for condonation

[9] The legal principles a court is to consider in exercising its discretion to condone a party's non-compliance with the rules of court are well-established. The appellant must give a reasonable and acceptable explanation for the cause of the delay and satisfy the appeal court that he has reasonable prospects of success on appeal.¹

Reasonable explanation

[10] As mentioned above, the notice of appeal against the first judgment was filed two years after it was delivered. Subsequent thereto, the appellant on 23 August 2023 filed an application for condonation of the late filing of the notice to appeal.

[11] In the affidavit supporting the condonation application, the appellant states that after the first bail application was refused, he, on the advice of his erstwhile legal practitioner, Mr Lutibezi, filed a notice of appeal. His relationship with Mr Lutibezi subsequently broke down whereafter he instructed new counsel to prosecute his appeal, Mr Andima. On the advice of Mr Andima, the appellant instructed Mr Botes, for purpose of the aforementioned appeal. The appeal however did not proceed as the appellant, at that stage, could not get hold of Mr Andima. Subsequently the appellant instructed Ms Gebhardt as his new counsel.

[12] On the advice of Ms Gebhardt, the appellant abandoned his appeal and filed an application for bail on new facts, the second bail application was heard by magistrate Mateus. The appellant was also unsuccessful with this application. The appellant then instructed Ms Gebhardt to file a notice of appeal against the refusal of the second bail application, which notice was served at the Magistrate Court in Okahandja. However, this appeal also did not proceed as the appellant could not afford Ms Gebhardt's fees and effectively abandoned the appeal.

[13] The appellant once again obtained new legal representation, Mr Muchali, who advised the appellant to launch another bail application based on new facts and to instruct Mr Diedericks to attend to the application. However, moments before the

¹See *S v Nakale* 2011 (2) NR 599 (SC) at 603 para 7 referred to by this court in *Sagarias v S* (HC-MD-CRI-APP-CAL-2022/00038) [2023] NAHCMD 257 (12 May 2023) para 5.

hearing, Mr Muchali informed the appellant that Mr Diedericks is not comfortable to proceed with the application and the application was subsequently abandoned.

[14] The appellant hereafter instructed Mr Olivier as new counsel in the matter, currently on record for the appellant. The appellant, for the fourth time, applied for bail on new facts, this time brought before Regional Court magistrate Nyazo. This application was equally refused. The appellant hereafter filed an application to appeal against the first judgment of magistrate Swartz. The appeal before us lies against this application.

[15] For some unexplained reason, the appellant chose to revert to the initial bail application and ignored the latter judgment refusing the fourth bail application based on new facts, which judgment essentially remains valid until set aside. This would also be the position regarding the court's ruling on the second bail application.

[16] When inquiring from Mr Olivier during oral argument why he chose to lodge the appeal against the court's ruling in the first bail application and not the last, he said that he takes full responsibility for doing so and reasoned that that court materially misdirected itself (on the application of the law), from which adverse findings were made against the appellant, warranting interference by this court on appeal.

[17] As pointed out by Ms Shikerete in her heads of argument, a reading of the appellant's application for condonation suggests that he attributes the blame for his failure to file his notice of appeal timeously and to prosecute an appeal, to his numerous former legal representatives. In this regard counsel referred to the matter of *Likoro v S*² where the following is said at para 27:

[27] In the same vein the court in *S v Chabedi*³ at 484 para 19 restated the well-established principle that 'an irregularity in the conduct of a criminal trial may be of such an order as to amount *per se* to a failure of justice, which vitiates the trial'.

(See: *S v Bennett*)⁴

[28] Van Oosten J in *Chabedi* (at para 21) summed it up in the following terms:

² *Likoro v S* (CA 19/2016) [2017] NAHCMD 355 (8 December 2017).

³ *S v Chabedi* 2004 (1) SACR 477 (W).

⁴ *S v Bennett* 1994 (1) SACR 392 (C) at 399c.

“[21] It is well established under our present constitutional setting that an accused's right to a fair trial embraces, inter alia, the right to legal representation and, as a corollary thereto, to be informed thereof (see *S v Mbambo* 1999 (2) SACR 421 (W)). Inextricably linked hereto, in my view, is the right of an accused person to be properly defended. Whether an infringement of this right has occurred will depend on the facts and circumstances of each particular case. That does not mean, of course, that the common-law principles to which I have referred do not apply. Insofar as they are not in conflict with the Constitution they remain good law. (Emphasis provided)”

[18] It was further said :

‘The general rule had always been that where an accused entrusts his defence to his legal representative, he is bound by the actions of his representative. However, the court in *R v Muruven*⁵ found the rule not entirely inflexible but with the qualification that:

“... it is clear that a very strong case must be made before a decided case can be re-opened on the ground of an error of judgment on the part of the legal representative. But for that, there would be a lack of finality about court judgments which would be entirely against public interest.”

[19] In consideration of the explanation advanced by the appellant, it should be noted that he, at all times, was legally represented and even though he was initially advised to appeal against the first ruling, he elected not to do so (albeit on the advice of his counsel – advice he seemingly took at his own peril). This was his position even after the second bail application was refused, including the last application for which position the appellant failed to give any explanation for failing to appeal the outcome of the bail ruling. Bearing in mind that the appellant from the outset knew his right to appeal, one is astounded why he did not appeal the latter judgment (which was directly linked to the first and subsequent bail application), but instead decided to revisit the initial bail application while having a complete disregard of the proceedings that followed. As stated, Mr Olivier explained that he took it upon himself to follow this route. However, in light of the appellant's silence in this regard in his affidavit, counsel's unsubstantiated explanation is of no assistance to the appellant for purposes of the condonation application as we are bound by the facts on record.

⁵ *R v Muruven* 1953 (2) SA 779 (N).

[20] When considering the explanation advanced by the appellant for the late filing of his appeal against this background, it is my considered view that the appellant's explanation is neither reasonable, nor acceptable and thus fails to meet the first requisite applicable to applications of this nature. For this reason alone, the application for condonation is bound to fail. There is however more.

Prospects of success

[21] Besides the applicant in a condonation application being required to give a reasonable and acceptable explanation for the late filing, the appellant in this instance still has to cross the second hurdle, namely to show that the appeal has prospects of success. This would obviously depend on the merits of the matter.⁶

[22] With regards to prospects of success, the appellant simply makes a bold assertion that 'I believe I have good prospects of success on appeal based on the grounds of appeal as raised in my notice of appeal', nothing more. That does not suffice. In applications of this sort, the deponent is required to briefly and succinctly set out essential information to enable the court to assess the appellant's prospects of success on appeal. At the very least, it calls for a concise reference to established legal principle(s) or applicable case law that forms the basis of the appellant's belief that he has prospects of success on appeal.⁷ To this end, the appellant also falls significantly short of satisfying the second requirement of the application, rendering the application for condonation unmeritorious.

[23] During oral argument I raised the question with counsel whether the decision to lodge an appeal against the first magistrate's court ruling and not against subsequent rulings (some two years later), did not constitute an abuse of process? Mr Olivier, however, held the view that this was not an instance of abusing court process when appealing the first ruling.

[24] It is established law that the bona fides of the application is a factor to be taken into account by the court in exercising its discretion whether to grant

⁶ *Sagarias v S* (HC-MD-CRI-APP-CAL-2022/00038) [2023] NAHCMD 257 (12 May 2023) para 7.

⁷ *Ibid* para 18.

condonation or not.⁸ In *Rainier Arangies t/a Auto Tech v Quick Build*⁹ the Supreme Court at paragraph 19 found that the courts have an inherent power to protect themselves against abuse of process. It continued as follows:

'Whether the court process has been used for improper purpose and therefore constitutes an abuse of process of the court is a question of fact that must be determined by the circumstances of each case. The circumstances in which abuse of process can arise are varied. It is therefore neither possible nor desirable to attempt to list exhaustively the circumstances under which the inherent power will be exercised. Inordinate delay in the prosecution or finalisation of litigation and the institution of a groundless action are among the grounds frequently relied upon as evidence of the abuse of the process of the court.'

[25] In *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd*¹⁰ the Supreme Court at paragraph 21 held that:

'Abuse connotes improper use, that is, use for ulterior motives. And the term "abuse of process" connotes that "the process is employed for some purpose other than the attainment of the claim in action".'

[26] Though the *dicta* in the above stated cases derive from civil matters, I am unable to see why it should not find equal application to processes of court applicable to appeal in criminal proceedings.

[27] That the appellant elected not to appeal against each refusal of bail, as he ought to have done, but instead reverted to the first bail application for unpersuasive reasons, in our considered view, constitutes an abuse of process. This must be the exact situation that the Supreme Court had in mind when it held that a litigant's prospects of success on the merits need not be considered when there was a 'flagrant' non-compliance with the rules which demonstrates a 'glaring and inexplicable disregard'.¹¹

⁸ *De Klerk v Penderis* 2023 (1) NR 177 (SC) para 22.

⁹ *Rainier Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC).

¹⁰ *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 676 (SC).

¹¹ *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) para 10.

[28] Section 65(1)(a) of the CPA¹² affords an accused who considers himself aggrieved by the refusal by a lower court to admit him to bail, to appeal against such refusal to a superior court. This section cannot be interpreted to permit an aggrieved accused to turn to the refusal of the first bail application only after the lower court refused two subsequent bail applications based on new facts. What the appellant in fact now attempts to do is to resuscitate the first bail application by bringing it back to life and place it before this court to pronounce itself on 'life after death'.

[29] This court, in protecting the integrity of the adjudicative functions of the court, must ensure that procedures permitted by the rules of court are not used for a purpose extraneous to the truth-seeking objective inherent to the judicial process.¹³ In our view, the appellant had a complete glaring and inexplicable disregard for the rules of court by employing avenues that amount to an abuse of process.

Conclusion

[30] In considering the motives, merits and lack of bona fides in bringing this application together with the lack of convincing reasons for the delay, coupled with the lack of prospects of success on appeal, the result is that the application for condonation stands to fall.

[31] In the result it is ordered that:

1. Condonation for the late filing of the notice of appeal is refused.
2. The appeal is struck from the roll.

¹² An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail... may appeal against such refusal... to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.

¹³ *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and others* 2020 (1) SA 327 (CC) at para 40.

JC LIEBENBERG
Judge

HC JANUARY
Judge

APPEARANCES

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