

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

LEAVE TO APPEAL JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: Usiel Gariseb v The State	Case No: CC 39/2001
	Division of Court: High Court, Main Division
Coram: Liebenberg J	Delivered: 3 November 2023
Neutral citation: <i>Gariseb v S</i> (CC 39/2001) [2023] NAHCMD 700 (3 November 2023)	
ORDER: <ol style="list-style-type: none">1. The applicant's non-compliance with a rule of this court is condoned.2. The application for leave to appeal to the Supreme Court is granted.	
REASONS:	

LIEBENBERG J:

[1] Applicant was on 8 November 2001 sentenced to an effective prison term of 69 years after he was convicted on 4 counts of murder, 1 count of housebreaking with intent to steal and theft and 1 count of robbery with aggravating circumstances.

[2] On 6 February 2018, some 17 years since applicant's sentencing, the Supreme Court delivered the landmark judgment of *S v Gaingob and others* (SA 7 of 2008) [2018] NASC 4 (6 February 2018). In terms of this judgment, it was held that inordinately long fixed terms of imprisonment which could extend beyond the life expectancy of an offender, constitute cruel, inhuman or degrading treatment or punishment which is in conflict with Art 8 of the Namibian Constitution.

[3] The applicant, like a host of other applicants before him, sought to appeal against his sentence on the strength of the *Gaingob* judgment. To this end, he approached this court in December 2018 seeking an order for leave to appeal against his sentence. The matter was accordingly set down for hearing before Justice Shivute on 10 June 2019 and on even date struck from the court roll for the reason that the applicant's condonation application was not accompanied by an affidavit. It was the further order of the court that the matter was not to be enrolled until such a time that all the documents were filed.

[4] It would seem that applicant has since gotten all his documents as he once again, approaches this court seeking the same relief, ie leave to appeal. The appeal was set down before me for hearing on 27 March 2023. In his notice of appeal, applicant seeks condonation for the late noting of his appeal which has been filed more than 3 years after being struck from the roll in 2019.

[5] The applicant's affidavit in support of his notice of motion clearly indicates that he is alive to the fact that his application for leave to appeal is well out of time, however, all he alleges further therein is that he is of the view his application for condonation will be granted.

[6] In a document titled 'application for condonation', applicant explains his reasons for delay in applying for leave following the delivery of the *Gaingob* judgment. Therein, he

cites the judgment in as far as it held that prison terms exceeding 37 and a half years are unconstitutional. He concludes by stating that because he was sentenced to 69 years of imprisonment, he is of the firm belief that there are reasonable prospects of success of his appeal and that his late application for leave therefore be condoned.

[7] The respondent, on the other hand, argues that despite the *Gaingob* judgment being delivered in 2018, the appellant has failed to explain why he could not file the appeal then, but only did so on 25 January 2023. According to the respondent, being a lay litigant is not a guarantor for the granting of condonation. The respondent contends that the test relating to applications for leave to appeal is trite and does not dispute that in this case, prospects of success are present when reliance is placed on the *Gaingob* judgment.

[8] In the present instance, this court is tasked with making a determination as to whether or not the applicant can be granted condonation for the late filing of his appeal under the circumstances.

[9] It is common cause that applicant decided to only file an appeal after delivery of the *Gaingob* judgment in 2018. The record reflects that he did so sometime in 2019, with his application being preceded by a condonation application which was subsequently struck.

[10] The authorities on condonation need no rehashing. A party applying for condonation must satisfy two requirements namely a reasonable explanation for the delay, as well as prospects of success on appeal.

[11] As rightly conceded by the respondent, the second leg need not be traversed for reason that the judgment is clear and prospects of success do exist in the present case. What is left for determination is the consideration by this court of the delay in bringing the present application following its striking from the roll on 10 June 2019.

[12] The authorities are clear as far as the requirements for the grant of condonation are concerned. Condonation will only be granted if a reasonable and acceptable explanation for the delay is proffered and where the applicant has shown that he has prospects of success. Where there is a flagrant disregard for the rules of the court, however, the court need not decide on prospects of success on appeal. This position is clearly articulated in *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC and*

Others,¹ wherein the Supreme Court cited with approval, the following passage from *Petrus v Roman Catholic Archdiocese*²:

[9] It is trite that a litigant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. Moreover, it is also clear that a litigant should launch a condonation application without delay. In a recent judgment of this court, *Beukes and Another v SWABOU and Others*, case no 14/2010, the principles governing condonation were once again set out. Langa AJA noted that “an application for condonation is not a mere formality” (at para12) and that it must be launched as soon as a litigant becomes aware that there has been a failure to comply with the rules (at para 72). The affidavit accompanying the condonation application must set out a “full, detailed and accurate” (at para 13) explanation for the failure to comply with the rules.

[10] In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant’s prospects of success on the merits, save in cases of “flagrant” non-compliance with the rules which demonstrate a “glaring and inexplicable disregard” for the processes of the court (*Beukes* at para 20).’

[13] The applicant in this case has not proffered any explanation for the delay. His affidavit in support of the application for the late filing is a bare one with no explanation whatsoever. The authorities opine that the application must set out a ‘full, detailed and accurate’ explanation for the failure to comply with the rules. Where there is a flagrant non-compliance with the rules which demonstrate a glaring disregard for the processes of the court, condonation will not be granted.

[14] Applicant’s conduct in this regard towards this court’s processes can be classified as being flagrant and inexplicable. Applicant makes a mere assertion that ‘I confirm that the application for leave to appeal to the Supreme Court is outside the 14 day period but that I have a genuine reason that the application be granted.’³ He goes further to state the reasons for the delay as follows: ‘1. it is worth noting that the Supreme Court ruled in February 2018 in the appeal judgment in the matter between *Zedekias Gaingob v The State . . .*, that prison terms exceeding 37 and half years of an offender are/is unconstitutional, 2. Therefore, having been sentenced to 69 years, I am pleading to this

¹ SA 79/2016 delivered on 31 August 2018 at para 20.

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

³ Appellant’s supporting affidavit.

court to condone my application as I believe that there are reasonable prospects of the appeal succeeding.’

[15] The applicant had one task, to explain in full detail the reasons for the delay. In determining whether or not to grant condonation, a court must consider whether the explanation is sufficient. In this case, there is a clear flagrant disregard for the rules. As per Gibson J in *S v Nakapela*⁴, these requirements must be satisfied in turn. Thus, if the applicant fails on the first requirement, the applicant is out of court.

[16] Ordinarily, applicant’s application should have fallen on this ground alone, however, the position has since changed and the apex court has held in recent decisions that there is some interplay between the obligation of a litigant to provide a reasonable and acceptable explanation for the non-compliance with a rule of court, and the reasonable prospects of success on appeal. This means therefore, that, good prospects of success may lead to a condonation and reinstatement application being granted, notwithstanding how unsatisfactory the explanation for the delay may be.⁵ In the criminal context, the position is set out in *S v Arubertus*.⁶

[17] In the present instance, and based on the authorities from the Supreme Court, it is settled that despite the flagrant non-compliance by the applicant with the rules of this court, there is no basis in law upon which this court can deny the application for leave to appeal.

[18] For the foregoing reasons, the following order is made:

1. The applicant’s non-compliance with a rule of this court is condoned.
2. The application for leave to appeal to the Supreme Court is granted.

<p>J C LIEBENBERG JUDGE</p>	
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⁴ *S v Nakapela and another* 1997 NR 184 (HC) para 185G-H.

⁵ *Standard Bank Namibia Ltd v Nekwaya* (SA 95 of 2020) [2022] NASC 43 (1 December 2022); See also: *Namibia Power Corporation (Pty) Ltd v Kaapehi* (SA 41//2019) [2020] NASC (29 October 2020).

⁶ *S v Arubertus* 2011 (1) NR 157 (SC).

