REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

LEAVE TO APPEAL JUDGMENT

PRACTICE DIRECTION 61

Case Title: Fabianus Shekunyenge v The State	**Case No:** CC 5/2015 **Division of Court:** High Court, Main Division
Coram: Liebenberg J	**Delivered:** 4 December 2023
Neutral citation: *Shekunyenge v S* (CC 5/2015) [2023] NAHCMD 789 (4 December 2023)	
ORDER: 1. The application for condonation is refused. 2. The matter is struck from the roll.	

REASONS:

LIEBENBERG J:

[1] This is an application for leave to appeal brought by the applicant. The applicant was sentenced on 20 November 2015 to 30 years' imprisonment following a conviction on a charge of murder by this court. The applicant's grounds of appeal were initially against both conviction and sentence. I return to this later in the judgment.

[2] On 30 August 2017, the matter was struck from the roll owing to the notice of appeal not satisfying the requirements as set out in the rules in that the grounds of appeal were not clear and specific.

[3] The matter was re-enrolled on 16 April 2018 followed by a number of postponements for the appointment of a legal representative from Legal Aid. On 18 September 2019 the matter was struck from the roll for want of a condonation application. It was then ordered that the matter only be enrolled after the filing of an application for condonation.

[4] There has not been any activity on the matter until 28 August 2023 when an amended notice and application for leave to appeal were filed. The applicant seems to now have complied with the previous court order as aforementioned, in that a condonation application has also been filed.

[5] Notwithstanding compliance with the court orders, it still remains that the application for leave to appeal based on the amended notice of appeal, have been filed out of time. I move next to consider the applicant's condonation application.

[6] An application for condonation requires that there be a reasonable explanation for the delay and the applicant to show that there are prospects of success on appeal. The authorities in this regard are trite.

[7] The applicant attributes delay to not being in a proper and composed state of mind which rendered him incapable of adequately comprehending the conviction and sentence in order to take adequate steps. It is the averral of the applicant that he remained under

this state of shock owing to the conviction and sentence. He further avers that it took him time to recover from the shock. According to the applicant, he has just come to realise now that he could appeal against the conviction and sentence handed down on 13 and 20 November 2015 respectively, further, that the delay was not wilful and that he has prospects of success on appeal.

[8] The applicant fails to apprise this court as to the time he remained under this shock, let alone how this shock inhibited him from prosecuting his appeal within the prescribed timeline. The assertion by the applicant that he only just came to realise now (at the time of bringing this application) that he could appeal is unsustainable for reason that he was at all material times during his conviction and sentence, represented by a legal practitioner. Further to this, it can hardly be said that it is the applicant's first encounter in this court, seeking leave to appeal. It has been stated earlier herein that the matter was previously struck at least twice before the present application for failing to comply with the rules of court. Thus, the reasons for non-compliance do not avail the applicant in passing the first leg of condonation for reason that his explanation is not reasonable and acceptable, especially when regard is had to the fact that there is only an explanation for the delay from 2017, but none from 2015 following his conviction and sentence.

[9] It must be stated that these were the initial reasons for the delay until about 13 November 2023 when a new notice for leave to appeal with new grounds of appeal, attacking only the conviction, was filed by the applicant's newly appointed legal aid representative. In the newly filed affidavit, the applicant makes a bare averral that after sentence on 20 November 2015, his legal aid lawyer during the main trial consulted him about appealing and waited on him but to no avail after informing him – the applicant – that Legal Aid would not allow him to continue representing the applicant in his appeal. No confirmatory affidavit is filed in this regard. The applicant avers further that it was after this, that he sought the services of a fellow inmate after various attempts to apply for legal aid. The applicant, in his own affidavit, states that he applied for legal aid in 2017, which is some two years after his sentence.

[10] Even if this court were to accept the explanation of the various attempts for legal

aid as well as the withdrawals of the various Legal Aid appointed lawyers, there is no explanation for the non-compliance following his sentence in 2015. This would explain the contradictory averments in the two affidavits. The affidavit is silent on timelines/dates following the supposed consultation with his lawyer during the main trial, as well as when exactly, the applicant made these attempts and waited for feedback.

[11] During argument counsel for the applicant expressed the view that, when filing the initial condonation affidavit, he was a layman and could thus not have given the explanation as would be expected and that preference should thus be given to the subsequent affidavit. Further to this, that where it differed materially, the second affidavit should have addressed the differences emanating from the first. The respondent shares a contrary view.

[12] Following the filing of the latest leave to appeal on 13 November 2023, the applicant abandoned his earlier grounds of appeal where he was appealing against both conviction and sentence. He now only appeals against his conviction.

[13] The applicant's grounds of appeal against conviction are premised on a number of grounds. He takes issue with the fact that the court rejected his version that he acted in self-defence in that there was an unlawful attack against him by the deceased who was intoxicated and wielded a knife at him. According to the applicant, the court could thus not have found him guilty of murder with intent in the form of *dolus eventualis*. It is evident from the judgment that evidence of the applicant was not considered in isolation but rather as a whole, full regard being had to the merits and demerits of the state as well as the defence case.[1] The reasons for rejecting such evidence is clearly set out in paras [13] – [14] of the judgment.

[14] The applicant further forms the view that the failure by the investigating officer in finding the alleged knife and thereby not presenting it into evidence as an exhibit, should not place a burden on him. He goes further to state that, just because the knife was not found, does not mean that it was not there. And, to state that the alleged sticks used in assaulting the deceased multiple times (as testified to by the state witnesses) were not presented, the court was wrong to reject his evidence that only one stick was used. The

[1] See Para 24 of the judgment.

judgment makes it clear that, had the knife been there, there was no reason for the investigating officer not to have handed it in as an exhibit as he did the sticks. The court had found that, aside from evidence that the deceased was intoxicated upon her admission arrival?, thus corroborating his version that she came home drunk, there was no support for his version that he had come under attack. Further to this, it was clear from the evidence that several sticks were used to assault the deceased as testified to by the state witnesses.[2]

[15] The applicant finally argues that the court erred in finding him guilty of murder, acting with *dolus eventualis*. As was rightly argued by the respondent, the viciousness of the attack went beyond negligence as the applicant foresaw the possibility of the deceased being killed, but nonetheless persisted in his assault. According to the applicant, he was not responsible for the death of the deceased owing to a *novus actus interveniens* in that, after his assault on the deceased and whilst she was hospitalized, she developed a condition called 'crush syndrome', accompanied by organ failure and had to be transferred to a hospital with ICU facilities. However, she died *en* route. According to the applicant, the failure by the medical staff to transfer the deceased sooner, constituted a *novus actus interveniens.*

[16] To this end, the court found as per the judgment on conviction, that the applicant's actions were a *sine qua non* of the deceased being hospitalized following the assault on her by the applicant. It was the conclusion of the court that there was no evidence showing that the deceased should have been treated differently, or that the causal relationship had been broken. Further that, from the assessment of the medical evidence, there were strong indicators showing that the deceased's condition was deteriorating as a result of her injuries and no evidence to show that, had the deceased been transferred to Windhoek sooner for whatever reason, that she would have survived. The trial court, after this evaluation found that there is no basis to find that the causal relationship between the accused's actions and the deceased's subsequent death had been broken by the alleged lack of proper medical care. The applicant thus enjoys no prospects of success in this regard.

[2] See para 15 -16 of the judgment.

[17] The leave to appeal is premised on whether or not to grant condonation in the circumstances. The Supreme Court in *Petrus v Roman Catholic Archdiocese*[3] held as follows when the question whether or not to grant condonation arises:

'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 process of the court (*Beukes* at para 20).'

[18] From the foregoing, it is apparent that the applicant has failed to proffer an acceptable and reasonable explanation for the delay in noting his application for leave to appeal. Moreover, the applicant enjoys no prospects of success on appeal. It therefore goes without saying that the application for condonation cannot succeed.

[19] In the result, it is ordered that:

1. The application for condonation is refused.
2. The matter is struck from the roll.

J C LIEBENBERG **JUDGE**	
APPLICANT: S Kanyemba Of Salomon Kanyemba Inc	RESPONDENT: E Ndlovu Of the Office of the Prosecutor-General

[3] *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC). See also *S v Arubertus* 2011 (1) NR 157 (SC).