

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
APPEAL JUDGMENT



NAMIBIA MAIN DIVISION,

Case Title: Prince Pienaar Applicant Hermanus Seibeb Applicant and The Respondent	Case No: HC-MD-CRI-APP-CAL-2023/00030 Division of Court: Main Division Heard on: 5 April 2024
First	
Second	
State	
Heard before: Shivute J <i>et</i> Christiaan J	Delivered on: 26 April 2024
Neutral citation: <i>Pienaar and Another v S</i> (HC-MD-CRI-APP-CAL-2023/00030) [2024] NAHCMD 194 (26 April 2024)	
The order: <ol style="list-style-type: none">1. The application for condonation in respect of each applicant is refused.2. The matter is struck from the roll and considered to be finalised.	
Reasons for order:	
SHIVUTE J (CHRISTIAAN J concurring):	

[1] This is an appeal against the sentence of five years, imposed in respect of each accused after they have been convicted of theft of stock, taking into consideration the provisions of section 11(1)(a), 1,14 and 17 of the Stock Theft Act 12 of 1990 as amended.

[2] The applicants stole three head of cattle valued at N\$31 000. They were sentenced on 11 February 2022 following a plea of guilty. However, the first applicant's purported notice of appeal was received by the court on 19 July 2022.

[3] It is not very clear from the documents filed as to when exactly the second applicant filed his notice of appeal. There is a document titled 'notice of appeal to the High Court of Namibia' which indicates that the notice of appeal was filed on 2 March 2023. The applicant also signed the document on 2 March 2023. There is also a document with similar title stating that the notice of appeal was filed on 2 March 2022, which contains grounds of appeal and it was signed by the second applicant on 2 March 2023. The second applicant had also stated in this document, that he had drafted his notice of appeal at Walvisbay Correctional Facility on 2 March 2023. This purported notice of appeal was accompanied by an application for condonation and a founding affidavit dated 2 March 2023.

[4] The official at the court who received the second applicant's notice of appeal did not put a date stamp on it to give an indication of when the notice of appeal was received. Court officials responsible for receiving appeals are urged to put date stamps on the documents to clear up any doubt as to when notices of appeals are received. Court officials should desist from omitting to stamp court documents, because this amounts to negligence that has serious consequences on the appellants.

[5] However, although it cannot be ascertained when exactly the second applicant filed his notice, what can be gleaned from the documents filed is that his notice of appeal was

either filed on 2 March 2023 or thereafter, because it was signed on 2 March 2023 and he also stated that he drafted it that day.

[6] Given the above facts, it is clear that both appellants filed their notices of appeal out of the prescribed time limit.

[7] Both appellants lodged applications for condonation wherein each prays for an order in essentially, the following terms:

(a) Condoning the applicant's non-compliance with the Rules of the Court and more specifically, the failure to lodge the notice of appeal within the prescribed time.

(b) Condoning an application for an amended notice of appeal in respect of the first applicant only.

[8] Although both applicants were represented by Mr Kanyemba, the grounds of appeal, the applications for condonation for the late filing of notices of appeal as well as accompanying affidavits were drafted by the applicants themselves. Mr Kanyemba however, drafted the amended notice of appeal as well as affidavits supporting the condonation application in respect of the second applicant. However, the application for the amended notice of appeal was abandoned as it did not comply with rule 67 of the Magistrate's Court Rules and the matter was heard on the basis of the notices of appeal filed by the accused persons.

[9] The appeal against the sentence in respect of both applicants are premised on the following grounds:

- (i) The trial magistrate misdirected himself by imposing a sentence of five years on each applicant, disregarding that they are first offenders who pleaded guilty.

- (ii) The trial magistrate misdirected himself by overemphasising the seriousness and prevalence of the offence at the expense of the applicants by overlooking their personal circumstances and the element of mercy.

[10] In support of each applicant's application for condonation, each applicant deposed to an affidavit. I will first deal with the affidavit of the first applicant who deposed as follows:

'The reason why I apply for late filing is because after I was sentenced at Outjo court I was still in Outjo police custody for 17 days waiting police escort to Omaruru Correctional Facility. Outjo police delayed my appeal period of 14 days. At Omaruru Correctional Facility there is no one to help me to write my appeal. Therefore, I request the honourable court to approve my application for late filing of my appeal.'

[11] The second applicant deposed inter alia as follows:

'I am the applicant in this matter and I am duly able to bring this application on my conscience. I am personally acquainted with the facts stated in this affidavit the content thereof falling within my personal knowledge unless the contrary clearly appears from the context thereof and which facts, are to the best of my knowledge and belief to be true and correct. The purpose of this application is to condone the late filing of my notice of appeal which have (sic) been filed outside the 14 days as required by the Magistrate's Court Rules. I humbly and respectfully submit that my non-compliance with the rules was not wilful nor intentional and I beg the honourable court to condone my late filing of notice of appeal.'

[12] The second applicant in the document filed, that is not under oath, stated that after he was convicted and sentenced he was in a state of shock and did not fully understand the magistrate's explanation of his rights to appeal hence the late filing of the notice of appeal.

[13] Counsel for the respondent raised a point in limine that the applicants filed their notices of appeal out of time and did not comply with rule 67(1) of the Magistrate's Court Rules. They further did not tender explanations that are reasonable and acceptable. They again failed to address the issue of reasonable prospects of success on the merits when prosecuting their appeal.

[14] Counsel for the applicants argued that both applicants were not represented during the trial. The applicants being lay persons could not file on time. Furthermore, although the court a quo explained their rights to appeal, they did not understand the explanation and the procedure to lodge the appeal.

[15] With regard to prospect of success, counsel for the applicants argued that the two applicants who were first offenders showed remorse and they expected the court to attach some degree of mercy. The sentence of five years direct imprisonment is inappropriate and it induces a sense of shock. The court a quo was supposed to suspend part of the sentence.

[16] Counsel for the respondent argued that, the explanation provided by the first applicant, that the cause for the delay was the fact that he was kept in custody and that he needed help to file his appeal being a lay person did not preclude him to file the notice of his appeal. Again, the second applicant by saying that he was in a state of shock there is no medical diagnosis attached to his affidavit confirming his state of mind. The court a quo explained the appeal procedure to them. Furthermore, counsel argued that the applicant had failed to show to the court that they enjoy prospects of success on the merit.

[17] The parties were allowed to argue the application for condonation as well as the merits in the context of the overall consideration of the prospects of success on appeal.

[18] For the application for condonation to succeed there are two legs. First, the applicant should give an explanation for the cause of the delay which is reasonable or satisfactory and bona fide. Secondly, he should also show that he has good prospects of success on the merits of the appeal. If the applicant fails to satisfy the requirements, then the application for condonation must fail. *S v Nakapela and Another* 1997 NR 184 (HC) at 185 G-H.

[19] The reasons given by the two applicants for the cause of the delay as stated in their affidavits are not reasonable and bona fide. The appeal procedure was explained to the applicants and they stated that they understood. Rules of Court are there and they are binding on both lawyers as well as lay litigants. Therefore, they should be respected and complied with by both lawyers and lay litigants.

[20] With regard to the prospects of success on appeal, as earlier stated the applicants never dealt with the issue in their supporting affidavits. However, the issue was only addressed by their legal representative in their heads of argument. The applicants were required to address the issue of prospects of success in their affidavits accompanying an application for condonation, as well as in their heads of argument.

[21] We also had regard to the sentence imposed and the nature of the offence committed as well as the value involved. Due to the wave of stock theft crimes sweeping throughout our country, there is a need for the court to effectively combat such crimes by imposing effective and deterrent sentences. The complainant in this matter suffered a loss, as the property was not recovered. The chances of the applicants succeeding are very slim as far as prospects of success are concerned. The applicants have failed to satisfy the second leg of the requirements.

[22] In the result, the following order is made:

1. The application for condonation in respect of each applicant is refused.
2. The matter is struck from the roll and considered finalised.

N N SHIVUTE
Judge

P CHRISTIAAN
Judge

Counsel:

Respondent

Applicants

M Shilongo
Respondent
Office of the Prosecutor General
Windhoek

S Kanyemba
First and Second Applicants
Salomon Kanyemba Inc