



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

BAIL APPEAL JUDGMENT

Case No: HC-NLD-CRI-APP-CAL-2019/00063

In the matter between:

TIMON FESTUS NDAHANGWAPO

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Ndangwapo v S* (HC-NLD-CRI-APP-CAL-2019/00063) [2020]
NAHCNLD 94 (27 July 2020)

Coram: JANUARY J

Heard: 01 July 2020

Delivered: 27 July 2020

Flynote: **Criminal procedure** — Bail Appeal – Appellant unrepresented – Strong *prima facie* case – No grounds of appeal – No prospects of success – Matter struck from the roll

Summary: Appellant in this matter stands charged with housebreaking with intent to steal and theft in the magistrate court Eenhana. He applied for bail in that court. The application for bail was refused. The appellant has five other pending cases for housebreaking committed when he was out on bail in another case. The appellant raised no grounds of appeal. There are no concise points of argument but only a restatement of mitigating factors. The appeal is struck from the roll.

ORDER

1. Condonation is refused;
2. The appeal is struck from the roll and considered finalized.

BAIL APPEAL JUDGMENT

JANUARY J

Introduction

[1] The appellant was arrested on 05 September 2018 on two charges of housebreaking with intent to steal and theft. He made his first appearance on 07 September 2018 in the magistrate's court Eenhana.

[2] He is representing himself and brought a formal bail application on 16 January 2019. The application was denied on 06 February 2019. The magistrate found amongst others: that the applicant has five other pending cases for housebreaking committed whilst he was out on bail in another housebreaking case; that the State has a strong case; that the appellant has a propensity to commit housebreaking; that bail is denied in the interest of justice to finalize all cases against the appellant.

[3] The appellant is appealing against the refusal to grant him bail.

The grounds of appeal

[4] The appellant is representing himself. In his purported notice of appeal he submits that he was unrepresented and did not know how to appeal; that the learned magistrate misdirected herself by not considering the appellant's personal circumstances in mitigation. The appellant restated his personal circumstances; that he has two children that his 66 year old mother is taking care of; that he supports his children; that he has a small business from which he generates about N\$2000 per month; that he suffers from a health condition for which a special diet was prescribed by a doctor. He further submitted that a plot was allocated to him by Town Council. He has to pay a monthly premium.

[5] The respondent is represented by Ms Petrus. She is opposing the appeal. She raised a point *in limine* that the purported grounds of appeal do not raise any ground of appeal. It thus is not an appeal and should be struck from the roll. The appellant merely raised and restated why he should be released on bail.

THE MERITS

Appellant's case

[6] The appellant testified under oath in the court *a quo*. He was 27 years old at the time of his bail application. He has two children whom he maintained before his arrest. His 66 year old mother takes care of the children. The biological mother with whom he does not have a good relationship is in Angola. A plot is allocated to him by Town Council. He has a cell phone business where he repairs and charges cell phones. He generates about N\$2000 per month from the business. He has a prescribed diet of soft food which is not provided to him in custody. He maintained that he will stand his trial. When confronted about other pending cases against him, he had no comment.

The respondent's case

[7] The investigating officer testified that he knows the appellant because 'he is a regular customer' in their police cells mostly for housebreaking cases. The witness objected to bail being granted because there are five other pending cases against the appellant. He testified that the five cases were committed whilst the appellant was out on bail in another matter. He further testified that the appellant has the propensity to commit housebreaking and steal property of a high value. There is fear that he might abscond. The appellant admitted a previous conviction for failing to appear at court. The investigating officer testified that there is a strong case against the appellant. There are state witnesses who gave statements that they bought stolen items identified by complainants from the appellant.

[8] Another police officer involved with criminal investigations, more specifically crime prevention, also testified. He knows the appellant as a resident of the area where the witness is involved in crime prevention. The appellant is mostly involved in housebreaking. This witness also objected to bail. The appellant may interfere with the investigation of pending cases. The police has not recovered all the stolen property and there is a second suspect who has to be traced and arrested. Housebreaking is a prevalent crime in the area. The witness traced State witnesses who implicated the appellant stating that they bought identified stolen property from the appellant.

THE LAW

[9] A notice of appeal is the foundation on which the case of an appellant must stand or fail. It informs the respondent of the case it is required to meet and considering the magistrate's reasons whether it should concede or oppose an appeal. It further informs

the magistrate in clear and specific terms which part of the judgment is being appealed against and what the grounds are on which the appeal is based.¹

[10] Rule 67(1) of the Magistrates Court rules stipulates that a notice of appeal should contain clear and specific grounds upon which the appeal is based.

[11] In accordance with rule 118(6) of the High Court rules not less than 15 days before the appeal is heard the appellant must deliver a concise statement, without elaboration, of the main points which he or she intends to argue on appeal as well as a list of the authorities to be tendered in support of each point.

[12] The notice of appeal does not comply with any of the abovementioned rules 67(1) and 118(6). I respectfully agree with Gibson J (as she then was) that:

‘Thus where the appellant has not complied with the Rules of Court as is the case at present, the Court may strike the appeal from the roll. However, the Court has a discretion in terms of Rule 27(1) of the Rules of the High Court whether to condone the noncompliance with the rules. In my opinion, proper condonation will be granted if a reasonable and acceptable explanation for the failure to comply with the sub rule is given; and where the appellant has shown that he has good prospects of success on the merits in the appeal; and where the appellant has a reasonable and acceptable explanation. In my opinion these requirements must be satisfied in turn. Thus if the appellant fails on the first requirement, the appellant is out of Court. In determining what is a reasonable and acceptable explanation for the failure to comply with the rules of Court, the Court makes a value judgment on the particular circumstances of the case. This of necessity will vary according to each case.’²

[13] The notice of appeal does not reflect clear grounds of appeal but only restates factors already prayed for in mitigation in the court *a quo*. The learned magistrate thoroughly considered the personal circumstances of the appellant. I find no error or misdirection. I have considered if appellant has prospects of success on appeal. In my view there are no prospects of success.

¹ See; *S v Kakakolo* 2004 NR 7 At 8 F-I.

² *S v Nakapela & another* 1997 NR 184 at 185F-H.

[13] In the result:

1. Condonation is refused;
2. The appeal is struck from the roll and considered finalized.

H C JANUARY
JUDGE

Appearances:

For the Appellant: Mr T F Ndahangwapo
 Of Oluno Correctional Facility
 Ondangwa

For the Respondent: Ms S Petrus
 Of Office of the Prosecutor-General
 Oshakati