



NOT REPORTABLE

CASE NO: SA 7/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

OSCAR !GAOSEB

Appellant

and

THE STATE

Respondent

Coram: SMUTS JA, HOFF JA and ANGULA AJA

Heard: 2 and 5 October 2020

Delivered: 5 October 2020

Reasons: 6 October 2020

Summary: On 9 August 2013, the appellant was convicted on a charge of murder and sentenced to 17 years imprisonment on 23 August 2013 by the regional court. He initially only appealed his sentence to the High Court. His notice of appeal was however filed outside the prescribed 14 days from the date of sentencing (a delay of some two and a half years before a notice was filed). An amendment was subsequently sought so as to appeal against the conviction as well as the sentence in September 2016. Condonation for the late filing of the appeal was sought. In support of his application, the appellant asserted that he was not 'fully' aware of the requirement for noting an appeal, the time period within which to note

the appeal as he is a lay person. During this process, appellant's legal aid representative withdrew and he became a self-actor.

The court *a quo* found that appellant had failed to provide a reasonable and acceptable explanation for the considerable delay in filing his notice of appeal; that no grounds were raised to show any prospects of success on appeal. As a consequence, the court *a quo* refused his application for condonation. An attempt to re-enrol his application for condonation and the appeal in the High Court was struck from the roll and the court made an order that the appellant could appeal to the Supreme Court as of right.

On appeal in the Supreme Court, the appellant's case was against his conviction and sentence instead of appealing against the judgment of the High Court dismissing his application for condonation. The process in this court was also marred with delays. Both his notice of appeal and the record of appeal were filed out of time, resulting in the appeal lapsing. A condonation and reinstatement application was made for the notice of appeal. However, no condonation and reinstatement application is before this court for the late filing of the appeal record. Appellant's submission for the non-compliances is that he is unrepresented. Respondent has opposed this appeal.

Held, the appeal to this court is misconceived. Appellant should be assailing the finding of the High Court instead of the findings of the regional court.

Held that, lay litigants are just as much under an obligation to follow the rules of court.

Held that, the High Court was correct to find his lack of explanation for the unexplained considerable delay in filing his notice of appeal unacceptable.

Held that, appellant's appeal against both conviction and sentence would not enjoy any reasonable prospects of success had it been properly before this court.

Held further that, appellant's failure to advance grounds or argument which challenge the judgment of the High Court made this appeal an exercise in futility and the appeal must fail for this reason.

Held further that, the failure to apply for condonation for the late filing of the record and for reinstatement meant that the appeal had lapsed and is to be struck from the roll.

APPEAL JUDGMENT (REASONS)

SMUTS JA (HOFF JA and ANGULA AJA concurring):

[1] This is an appeal against a decision of the High Court refusing condonation for the late filing of the appellant's notice of appeal against his conviction on 9 August 2013 on a count of murder and his sentence of 17 years imprisonment imposed upon him by the regional court on 23 August 2013. The appellant however failed to file a notice of appeal against the High Court judgment. His correspondence to the Registrar of this court and his written argument handed in during oral argument do not deal with or address the judgment appealed against. There is thus no appeal properly before this court and at the conclusion of oral argument, this court struck the appeal from the roll. These are the reasons for doing so.

[2] The appellant was charged on a count of murder and a second count of attempted murder arising from events on 16 June 2010. He pleaded not guilty on both counts and was convicted on the first count by the regional court, Swakopmund and acquitted on the second count and sentenced to 17 years imprisonment. The appellant was represented throughout the trial by counsel

provided by the Directorate of Legal Aid. When sentencing the appellant, the regional court magistrate recorded 'explain the accused rights to appeal' (*sic*).

[3] Following the sentencing and within the prescribed period of 14 days, the appellant on 28 August 2013 addressed the clerk of the court concerning an appeal. The document of that date does not form part of the record but the response by the clerk of the court, Swakopmund dated 19 September 2013 under the heading 'Appeal' was provided by the appellant in several letters and notices addressed to the registrar of this court:

'Re: Appeal'

I would like to inform you that the reasons given in your letter dated 28 August 2013 for an appeal is not relevant. This is mitigation that you are giving.

In an appeal you must state your side why you are not satisfied with the sentence. Please rectify it and send a letter with your reasons to prepare a appeal.

Thank you in advance.'

[4] The appellant confirmed receipt of this letter in representations he directed to the High Court in February 2018 but stated that he did not have assistance to deal with it, being untrained in the law. This letter was however forthcoming after his application for condonation had been rejected by the High Court on 20 October 2017 which is the judgment appealed against.

[5] The application for condonation is dated 4 June 2017. It refers to a notice of appeal filed on 1 March 2016. The notice of appeal had apparently only sought to appeal against the sentence only. But his legal representative then withdrew and an amendment was subsequently sought so as to appeal against conviction as

well as sentence in September 2016. In the condonation application, the appellant asserts that he was not 'fully' alerted to the requirement for noting an appeal and he is a lay person. He further states that he only received the judgment in his trial in 2015 (without specifying a month or date). He also states that he was in a state of shock after being sentenced and further suffered from epilepsy. These assertions are not supported by any medical evidence. He also states that he was unaware of the requirement to note an appeal within 14 days and that his counsel at the trial had not explained his right to appeal to him. He also denies that the regional court magistrate informed him of the 14 day requirement. He also states that his legal aid counsel in the trial had informed a police officer that he would lodge an appeal but was awaiting the trial record.

[6] The High Court found that the appellant had failed to provide a reasonable and acceptable explanation for the considerable delay in filing his notice of appeal. The court also found that no grounds were raised to show any prospects of success on appeal. The court accordingly refused his application for condonation.

[7] The appellant would appear to have thereafter attempted to re-enrol his application for condonation or his appeal in the High Court and that court on 20 February 2018 struck the matter from the roll and made an order that the appellant could as of right appeal to this court. The appellant thereafter engaged in correspondence with the registrar of this court, seeking assistance to set his appeal down.

[8] On 1 March 2018, the appellant also filed a notice of leave to appeal in this court against both his conviction and sentence and in it set out grounds of appeal

against both conviction and sentence. The appellant also filed a notice to condone the late filing of that notice supported by an affidavit. In this affidavit, the appellant revisits the late filing of the original notice of appeal, this time stating that his legal aid counsel had promised to lodge a notice of appeal but failed to do so. He further refers to his attempt at a notice of appeal on 28 August 2013, asserting that it was within the 14 day period but was not 'relevant' and needed to be rectified, as advised by the clerk of the court on 17 September 2013. The only reason proffered for not 'rectifying' his notice of appeal is that he is a lay person and that he was without assistance, although he later adds that he was unaware of the 14 day period despite his prior reference to it.

[9] The appellant thereafter engaged in correspondence with the registrar of this court directed at setting the matter down.

[10] The notice of appeal to this court does not deal with the judgment appealed against in the High Court, dismissing his application for condonation. The notice of appeal to this court purports to address the conviction and sentence in the regional court. The appeal to this court is thus entirely misconceived. This was put to the appellant during oral argument. He then requested leave to hand in written argument which the court received. His written argument dealt with exclusively the regional court's judgment on conviction and sentence and did not even refer to the judgment of the High Court.

[11] Quite apart from this fundamental flaw to this appeal, the record was not filed in time which results in the appeal lapsing. There is however no condonation

application, nor any application to reinstate the appeal as is correctly pointed out in his written argument by Mr Muhongo on behalf of the State opposing this appeal.

[12] The appellant's response to these defects and non-compliances which have characterised these proceedings from their outset is that he has been for the large part unrepresented with regard to his efforts to assail the conviction and sentence of the regional court on appeal. But this does not assist the appellant as he would appear to have been aware of the time limit for filing an appeal because of his attempt to do so within days of the sentencing. And there was thereafter an entirely unexplained delay for some two and a half years before a notice was filed. As has been made clear by the Judge President in the very context of a criminal appeal heard in the High Court, lay litigants are just as much under an obligation to follow the rules of court.¹ His lack of explanation for the unexplained considerable delay in filing his notice of appeal was found to be unacceptable by the High Court. That is the finding which the appellant should be assailing in this court.

[13] The appellant has however advanced no grounds of appeal against or any argument which challenge the judgment of the High Court. This failure to do so renders this appeal an exercise in futility and the appeal is to be struck from the roll for this reason alone. It is however apposite to point out that an appeal against this finding would in any event not enjoy prospects of success. The appellant has comprehensively failed to establish an acceptable explanation for the failure to file a notice of appeal despite the numerous attempts he has made at seeking to provide an explanation. There is simply no explanation put forward for the delay

¹ *Iyambo v The State*, Case No CA 165/2008, unreported 19/10/2009, para 10.

after initially attempting to file an appeal within days after sentencing for the two and a half years which followed it until a notice was filed. That lack of any explanation is compounded by the contradictory explanations which have been forthcoming at different junctures in his various notices, affidavits and letters.

[14] A careful reading of the record also reveals that an appeal against both conviction and sentence would also not enjoy any reasonable prospects of success.

[15] The application for condonation thus fell hopelessly short of meeting the two-pronged requirement for condonation. This is quite apart from the narrow ambit of an appeal against the exercise of a discretion and the failure to raise grounds of appeal against that judgment.

[16] I point this out in addition to the non-compliance with the rules of this court relating to the filing of the record which have resulted in this appeal lapsing. There is no application for condonation for that non-compliance and for reinstatement of the appeal. But as I have shown, an application for condonation for failing to comply with the rules of this court would not enjoy prospects of success, given the singular lack of prospects of success in an appeal against the judgment of the High Court. It follows that the appeal thus falls to be struck from the roll on that basis as well.

[17] The order which was given at the conclusion of oral argument was that the appeal is struck from the roll.

SMUTS JA

HOFF JA

ANGULA AJA

APPEARANCES

APPELLANT:

In person

RESPONDENT:

M H Muhongo

Instructed by Office of the Prosecutor
General, Windhoek