



REPORTABLE

CASE NO: SA 19/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

VINCENT KAPUMBURU LIKORO

Appellant

and

THE STATE

Respondent

Coram: HOFF JA, ANGULA AJA and NKABINDE AJA

Heard: IN CHAMBERS

Delivered: 12 April 2022

Summary: The Supreme Court has in terms of the provisions of the Supreme Court Act 15 of 1990 the jurisdiction *mero motu* to review proceedings of the High Court, any Lower Court, or administrative tribunal whenever an irregularity has occurred.

The High Court during December 2017 refused an application for condonation for the non-compliance with rule 67 of Magistrates' Court Rules, launched by the appellant and made certain orders.

During March 2018 the High Court, slightly differently constituted, granted the appellant leave to appeal to this court effectively reversing the December 2017 order.

Appeal against the refusal of condonation application lies as of right to this court and no leave to appeal from the trial court is necessary.

Two contradicting court orders existed side by side since the first order has not been set aside by a competent court of law.

It is a grave irregularity for the second constituted High Court to overrule an order of the first court. The High Court may not exercise jurisdiction as an appeal court in respect of its own previous order.

The first court order is further compromised in the sense that one member of that court sat in both courts, firstly concurring that there were no prospects of success on appeal, and subsequently holding that there were indeed prospects of success on appeal.

The second judgment and order offend against the principles of *functus officio* and *res judicata*.

The appeal was not procedurally placed before this court, but came to this court through a highly irregular March 2018 order.

These are vitiating irregularities and the second judgment and order cannot stand. They are reviewed and set aside.

The judgment and order of 20 March 2018 constitutes an irregularity and are reviewed and set aside.

The notice of appeal filed by the appellant on 23 April 2018 with the Registrar of the Supreme Court constitutes an irregularity, and is reviewed and set aside.

The proceedings heard by this court on 14 October 2019 are hereby struck from the roll.

REVIEW IN TERMS OF SECTION 16 OF THE SUPREME COURT ACT 15 OF 1990

HOFF JA (ANGULA AJA and NKABINDE AJA concurring):

Introduction

[1] This matter was set down as an appeal and argued before this court on 14 October 2019. After the judgment had been drafted, it transpired that an irregularity might have occurred during the proceedings in the High Court and as a result the following questions were put to counsel appearing on behalf of the appellant as well as counsel on behalf of the respondent. The following reflects part of the letter addressed to counsel:

- 2.1. The appellant was on 18 January 2016 convicted on one count of rape by the regional court sitting in Katima Mulilo and the appellant was sentenced to an effective 10 years imprisonment.
- 2.2 On 14 March 2016, the appellant filed a notice to appeal against both conviction and sentence, together with an application for condonation to the High Court. The State opposed both the appeal and condonation application.
- 2.3 On 17 November 2017, the Honourable Mr Justice Liebenberg and Honourable Lady Justice Usiku heard the matter. On 8 December 2017 the Honourable Justices refused the appellant's condonation application and

struck the matter off the roll. The justices held that there were no prospects of success on appeal.

2.4 According to the record, the appellant enrolled the matter before the High Court as an application for leave to appeal to the Supreme Court. The matter was heard on 12 March 2018 by a slightly differently constituted Bench comprising Honourable Lady Justices Usiku and Salonga. The Justices delivered judgment on 20 March 2018 granting leave to the appellant to appeal to the Supreme Court. The Justices held that there were prospects of success on appeal.

2.5 As it stands, the order of 8 December 2017 was not set aside and as a result, it exists to this date side to side with the order of 20 March 2018.'

[2] On authority of *S v Arubertus*,¹ the appellant's course of action after the judgment and order of 8 December 2017 was to appeal directly to the Supreme Court against the court *a quo*'s refusal of this application for condonation. As the record reveals this is not what transpired in the present matter.

[3] Section 16 of the Supreme Court Act 15 of 1990 (the Act) provides that the Supreme Court has jurisdiction *mero motu* to review the proceedings of the High Court or any Lower Court, or any administrative tribunal, whenever it comes to its notice or to the notice of any judge of the Supreme Court that an irregularity has occurred.

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

[4] The Judges who presided over the matter in the Supreme Court are currently considering whether or not the Supreme Court should assume its review jurisdiction as contemplated in s 16 of the Act in relation to the High Court proceedings.

[5] The parties were invited to submit such statements, documents and/or representations as they may deem necessary or appropriate to assist the Judges to deliberate on and decide whether to invoke s 16 of the Act. Any such statements, documents or representations had to be filed under cover of a filing notice at the office of the Registrar of the Supreme Court by no later than noon on 15 November 2021.

[6] To assist the Judges to deliberate on and decide whether to invoke s 16 of the Act, the parties were required to respond to the following questions:

- 6.1 Whether the judgment and order of 20 March 2018 constitutes an irregularity and stands to be reviewed and set aside?
- 6.2 Whether the notice of appeal filed by the appellant on 23 April 2018 with the Registrar of the Supreme Court constitutes an irregularity and ought to be reviewed and set aside?
- 6.3 Whether the matter heard by the Supreme Court on 14 October 2019 ought to be struck from the roll?

6.4 Whether the bail granted to the appellant be cancelled and appellant be ordered to report at the Windhoek Correctional Facility to commence serving his sentence?

6.5 Whether it will be in the interest of justice for an irregularity *a quo*, if any, to vitiate the appeal proceedings in circumstances of the case?

[7] Both legal practitioners responded and filed written submissions for which this court is grateful.

Background

[8] As alluded to above, the appellant after he had been convicted on a charge of rape and sentenced in the Regional Court – appealed to the High Court against his conviction and sentence. The appeal against sentence was later abandoned by the appellant following an order refusing condonation and striking the matter from the roll.

[9] The appellant filed his notice of appeal outside the prescribed time limit provided for in the rules.² He then applied for condonation for the late filing of his notice of appeal.

[10] In its judgment (the 8 December 2017 judgment) the court *a quo* stated the following in respect of the condonation application:³

² Magistrates' Court rule 67.

³ In para 9 of the judgment.

'Whereas the respondent opposed the appeal against conviction but not the condonation application, we must, for purposes of the present application, assume that the respondent considers the appellant's reasons for filing both notices⁴ out of time, reasonable and acceptable. What thus remains to be decided is the prospects of success on appeal.'

[11] The court did not elaborate on the reasons provided for the late filing of the notices of appeal but continued to deal with what was described as a procedural challenge and thereafter dealt with the prospects of success in respect of the merits of the appeal.

[12] At the conclusion of its judgment the court *a quo* made the following orders:

- '(a) The respondent's application for adjournment of the proceedings is refused.⁵
- (b) Appellant's application for condonation for the late noting of the appeal and amendment thereto, is refused and struck off the roll.
- (c) Appellant's bail is cancelled with immediate effect and he is to be taken into custody and brought before the Regional Court sitting at Katima Mulilo for committal.'

[13] On the authority of *S v Arubertus*, the appellant's next course of action was to appeal directly to the Supreme Court against the court *a quo*'s refusal of his condonation application. However, this was not what happened. In an inexplicable manner the appellant managed to re-enrol the matter as an application for leave to appeal.

⁴ The appellant also filed a supplementary or additional notice of appeal.

⁵ The respondent had at the inception of the condonation application applied for a postponement in order to file a cross-appeal.

[14] This application served before another court slightly differently constituted in the sense that one member of the second court served as a member of the first court which considered the appellant's application for condonation for the late filing of his appeal.

[15] The appellant's application for leave to appeal was heard on 12 March 2018 and judgment was delivered on 20 March 2018. The second court relying on *S v Nowaseb*⁶ held that there were prospects of success and granted leave to appeal to this court. This judgment will be referred to as the March 2018 judgment.

[16] Pending the hearing of the appeal, the appellant applied for bail which was granted. The bail proceedings do not form part of the appeal record. The significance of the appellant being granted bail lies in the fact that the court *a quo* overruled the December 2017 judgment which had cancelled the appellant's bail.

Was there an irregularity committed in the court *a quo*?

[17] A reading of the March 2018 judgment pertinently stated as a ground of appeal in the second paragraph that:

' . . . the learned judges of appeal erred in the law or on the facts '

In the third and fourth paragraphs of the judgment the listed grounds of appeal were that:

' . . . the learned judges of appeal . . . erred in the law and/or on the facts '

⁶ *S v Nowaseb* 2007 (2) NR 640 (HC).

[18] In the twelfth paragraph the court *a quo* concluded that there was a reasonable prospect that the court of appeal may take a different view and in the thirteenth paragraph (the last paragraph of the judgment) the court *a quo* granted the application for leave to appeal to the Supreme Court.

[19] The legal representative of the appellant in his written submissions in response to a letter from the Registrar⁷ submitted *inter alia* the following –

- (a) that the court *a quo* in the December 2017 judgment did not pronounce itself on the aspect of condonation at all except for the resultant order noted in paragraph 81 of the judgment;
- (b) that as the entire judgment of December 2017 concerns the merits of the appeal itself, and not his failure to file notices timeously, it can be accepted that the reasons for the late filing was accepted by the court *a quo*, and that the refusal for condonation constituted a consequential order and not the main order in the proceedings;
- (c) that it is common cause to all parties concerned, that the court *a quo* (March 2018 judgment) considering the application for leave to appeal, as well as this court, when the matter was argued before it, accepted that the court *a quo* (December 2017 judgment) refused the appeal in respect of conviction on the merits;

⁷ The content of the letter appears in paras [1] – [7] of this judgment.

- (d) that not satisfied with the dismissal of his appeal against conviction, the appellant applied for leave to appeal and that the learned judges considering the application for leave to appeal had no doubt that the appellant's appeal was refused on the merits;

- (e) that it is evident from the record, and it is accepted as such, that none of the parties or their counsel raised any point that the appeal was not correctly pursued on the basis that the alleged appeal would have lied directly to the Supreme Court against the court *a quo*'s refusal of the appellant's application for condonation. Similarly it was submitted that this court also did not raise the point during the hearing of the appeal, and it was further submitted that the reason simply being, that the appeal has been correctly interpreted by all parties involved as an appeal against the refusal of an appeal lodged against a conviction, and not the refusal of an application for condonation, which in the circumstances became irrelevant;

- (f) that counsel failed to comprehend what the concern with the order granting leave to appeal of 20 March 2018 can be as this court is the only court which in this instance has jurisdiction to adjudicate the appellant's appeal against the refusal of his appeal on conviction as the court *a quo* already expressed itself comprehensively on the issue;

- (g) that as such the matter cannot be returned to the court *a quo* to deal with the appeal against conviction as it already expressly and explicitly dealt with same and in fact refused the appeal;
- (h) that in fact the only court that is vested with jurisdiction to deal with the refusal of an appeal against conviction whether on a direct or an indirect approach is this court;
- (i) that the failure of this court to deal with the refusal of the appeal by the court *a quo* will in fact impermissibly divest the appellant having his appeal heard by this court;
- (j) this court has the jurisdiction to hear appeals on decisions or orders made by the High Court, and that other than under the previous dispensation, this jurisdiction will remain, and is not dependent on a question of procedural irregularities.

[20] The legal representative of the respondent submitted that the March 2018 judgment constituted an irregularity which should be set aside.

Applicable legal principle

[21] The current legal principle in respect of an appeal against the refusal of a condonation application was restated by this court in the matter of *S v Arubertus* where the following appears in para 7:

'The lacuna in our law referred to in *S v Absolom* supra has regrettably not been filled and has led to an undesirable state of affairs where appeals against the dismissal of applications for condonation have to be considered by this court without the benefit of the filter system provided for by the petition procedure intended to weed out unmeritorious appeals. It should, however be emphasised that an appellant is entitled to appeal as of right against the order refusing condonation and not against the conviction and sentence even though the merits of an appeal against the conviction and sentence are always part of the consideration of the application for condonation. If the Supreme Court upholds the appeal against the refusal to grant condonation, the matter has to be remitted to the High Court for the appeal against conviction and sentence to be heard in that court. On the other hand, if the Supreme Court dismisses the appeal against the refusal of condonation, that is the end of the matter (See also *S v Longer*)⁸'

[22] In respect of condonation applications, a litigant who failed to comply with the rules of court has to meet two requisites of good cause, namely, in the first instance establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal. The application must also be *bona fide*.

[23] In *Prosecutor-General v Paulo & another*,⁹ this court referred to the matter of *Telecom Namibia Ltd v Nangolo & others*¹⁰ where legal principles and factors were restated which a court will consider when exercising its discretion notwithstanding that the respondents are not opposed to condonation.

⁸ Unreported judgment of the Supreme Court *S v Longer* (SA 1/99) [2000] NASC 4 (8 December 2000).

⁹ *Prosecutor-General v Paulo & another* 2020 (4) NR 992 (SC).

¹⁰ *Telecom Namibia Ltd v Nangolo & others* 2015 (2) NR 510 (SC).

[24] A court may weigh the question of prospects of success in determining the application over non-compliance. For example, an application for condonation may be refused where a litigant has provided a good and acceptable reason but has failed to convince the court that there are reasonable prospects of success on appeal. Conversely, an application for condonation may be dismissed because the non-compliance with the rules has been glaring, flagrant or inexplicable. In such an instance, the court may decide the condonation application without regard to the prospects of success on appeal.

[25] In the December 2017 judgment it appears as if the court *a quo* accepted that the appellant provided an acceptable explanation for his non-compliance solely on the fact that the respondent did not oppose the non-compliance with the rules, and thereafter considered the second leg of the application, namely, the question whether there were reasonable prospects of success on appeal.

[26] The fact that in the December 2017 judgment the court *a quo* concentrated on the merits of the appeal does not transform the condonation application into an application for leave to appeal where only the prospects of success are considered. Considering the prospects of success on the merits is part of an overarching exercise to determine whether the court will exercise its discretion in favour of the applicant or not, and, as was stated in *Arubertus (supra)*, prospects of success on appeal always form part of the consideration whether to grant condonation or to refuse it.

[27] It appears to me that counsel for the appellant has not understood this legal position since counsel focussed on the merits of the application ignoring the fact that at the inception of the December 2017 judgment it was stated that the application before court was an application for condonation for the non-compliance with the rules, and, as concluded, condonation was refused.

[28] The distinction made, on behalf of the appellant, that the December 2017 order dismissing the condonation application was a consequential order and not the main order, is artificial and self-serving. If the December 2017 order was made in respect of the merits of the appeal, as contended on behalf of the appellant, one wonders why it was necessary then for the appellant subsequently to approach another court with an application for leave to appeal. If the appellant had viewed the December 2017 judgment as a dismissal of his appeal against conviction on the merits, appellant should have petitioned the Chief Justice for leave to appeal, a course not followed by the appellant.

[29] Additionally, one rhetorically asks why the instructing legal practitioner and instructed counsel did not advise the appellant, as one would have expected of seasoned legal practitioners, that his appeal should be lodged directly in the Supreme Court is difficult to comprehend. It was stated, on behalf of the appellant, that because the condonation was refused, the appellant appealed to the second court *a quo* for leave to appeal against the merits of the case. As will appear later in this judgment, this was totally unnecessary.

[30] Counsel on behalf of the appellant is eager to know why this court is over concerned with procedural irregularities, whilst this court has the jurisdiction to hear and has heard argument on the merits of the conviction. The appellant disingenuously claims lack of knowledge as to why this court is concerned. The irregularities *a quo* are not merely procedural but are also material as the reconstituted court was not competent to hear the application. The order of March 2018 is, in my view, a nullity and cannot stand. Therefore, reliance on *S v Bushebi*¹¹ is misplaced because the concern here is manifestly not about the correctness of the judgment or mistake in law. It is a jurisdictional issue and/or the competency of the court *a quo* that the legal team for the appellant seems to be oblivious of.

[31] The appeal before this court was lodged on the basis of the March 2018 order, in terms of which the appellant was granted leave to appeal. Although it is correct that this court heard the argument on the merits of the conviction on 14 October 2019, it does not help the appellant to evade responsibility and pass the buck. Poignantly, the appellant was represented by the same legal practitioners, Mr Botes who was assisted by Mr Wessels. Evidently from the reading of the record, they were instructed by the legal practitioners of record: Stern and Barnard.¹² Mr Wessels still appears as a counsel for the appellant. These sets of legal representatives chose not to disclose all background facts regarding the substantive irregularity. Had they made

¹¹ *S v Bushebi* 1998 NR 239 (SC).

¹² In *Likoro v S* (CA 19/2016) [2017] NAHCMD 355 (08 December 2017). In *Likoro v S* (CA 19/2016 [2018] NAHCMD 58 (20 March 2018), the appellant was also represented by Mr Botes on instructions from Stern and Barnard. For the State, Mr Lisulo, of the Office of the Prosecutor-General, appeared in both matters. He continues to represent the State, to date.

the disclosure, there can be no doubt that this court would not have proceeded to hear argument on the merits.

[32] The appellant has quizzed about this court's concerns. The Supreme Court has jurisdiction in terms of the provisions of s 16 of the Act, to review proceedings of the High Court '*mero motu* whenever it comes to its notice or the notice of any judge of that court that an irregularity has occurred in any proceedings referred to in that section, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court . . . '.

[33] I have referred to the grounds of appeal considered in the March 2018 judgment which referred to the judges in the December 2017 having erred in law or in fact. The gist of the March 2018 judgment is that it overruled the December 2017 judgment and orders. This is a grave irregularity because in essence it amounts to the same court overruling or setting aside its own previous decision. The second constituted court in fact sat as a court of appeal in respect of the first court's judgment and order. Differently put, the second court pronounced itself as a court of appeal on its own judgment and order thereby raising a question of its competency or jurisdiction. This is impermissible. An appeal from a judgment of the High Court lies only to the Supreme Court and not to another differently constituted High Court with one of its members being legally disqualified to reconsider an application for leave to appeal having sat in the same matter previously. The December 2017 judgment and order were never set aside by a competent court. This means that in fact the December 2017 judgment and order exist to date side by side with the March 2018

judgment, the latter by a court that, virtually, had no jurisdiction to pronounce on the matter.

[34] Secondly, the March 2018 judgment and orders are compromised by the fact, and this is quite baffling, that one member of that court sat in both courts, firstly concurring that there were no prospects of success on appeal, and subsequently writing a judgment which held that there were indeed prospects of success. Given the fact that the December 2017 judgment and orders had not been set aside, both orders stand until one of them is set aside.

[35] Thirdly, the March 2018 judgment and order offend against the principle of *functus officio* as well as *res judicata* in respect of the December 2017 judgment and order.

[36] Fourthly, the appeal was not procedurally placed before this court as it should have been as per *Arubertus*, but came before us through a highly irregular March 2018 order.

[37] This court cannot close its eyes to material irregularities that vitiate the proceedings of the court *a quo* including its March 2018 judgment and order which cannot, in the circumstances, stand since it will serve as a dangerous precedent that undermines judicial authority.

[38] The correct route the appellant should have followed subsequent to the refusal of his condonation application and striking the matter from the roll was to appeal directly to the Supreme Court and, in the event of his failure to comply with the provisions of the rules and the provisions of the Criminal Procedure Act,¹³ to have launched a condonation application in the Supreme Court – a route still open to the appellant.

[39] In view of the aforementioned material irregularities, this court is constrained to exercise its review jurisdiction in terms of s 16 of the Act *mero motu* in respect of the March 2018 judgment.

Order

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

- (a) The judgment and order of 20 March 2018 constitutes an irregularity and are reviewed and set aside.
- (b) The notice of appeal filed by the appellant on 23 April 2018 with the Registrar of the Supreme Court constitutes an irregularity, and is reviewed and set aside.
- (c) The proceedings heard by this court on 14 October 2019 are hereby struck from the roll.

¹³ Act 51 of 1977. See s 311 read with s 316.

HOFF JA

ANGULA AJA

NKABINDE AJA

APPEARANCES

APPELLANT:

L C Botes (with him J Wessels)

Instructed by Stern & Barnard

RESPONDENT:

D M Lisulo

Of the Prosecutor-General