

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 0027676/2022

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO <i>MM</i>
	
DATE 12 SEPTEMBER 2023	

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA

Applicant

And

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS,

Second Respondent

KWA-ZULU NATAL

NATIONAL PROSECUTING AUTHORITY

Third Respondent

THE REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA:

GAUTENG LOCAL DIVISION, JOHANNESBURG

Fourth Respondent

BLACKHOUSE KOLLECTIVE FOUNDATION NPC

Amicus Curiae

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

THE COURT

[1] Relying on s17(a)(i) and/ or s17(1)(a)(ii) of the Superior Court's Act,¹ Mr. Jacob Gedleyihlekisa Zuma ("Mr. Zuma") seeks leave to appeal this Court's whole judgment and order handed down on 5 July 2023 and signed on 7 July 2023. The President of the Republic of South Africa ("the President") is opposing the application. The second and third respondents abide the Court's decision. The rest of the parties did not enter the fray.

[2] An application of this nature is granted in terms of s17(a)(i) if there is a reasonable prospect that another court would find differently. It is granted in terms of s17(1)(a)(ii) when there are other compelling reasons why leave to appeal should be granted.

[3] Having considered Mr. Zuma's elaborate grounds for appeal as set out in his application for leave to appeal, heads of argument filed on behalf of the parties, as well as submissions by counsel for the parties, we are not persuaded that Mr. Zuma meets the test for leave to appeal on any of the two statutory provisions on which he relies.

[4] We therefore stand by the reasons and orders set out in the judgment.

[5] We, however, deem it necessary to address two issues for the benefit of the Supreme Court of Appeal if Mr. Zuma successfully petitions it. The first is the contention that this Court misdirected itself and flouted s34 of the Constitution by failing to deal with Mr. Zuma's defense in respect of failure to pay a security deposit as required in terms of s9 of the Criminal Procedure Act ("CPA")². For convenience, we refer to this defense as the s9 exemption defense. The second is the contention

¹ 10 of 2013.

² 51 of 1977.

that this Court misdirected itself by failing to recognize that the Court in Part A condoned the late payment of a security deposit by Mr. Zuma.

[6] After reserving judgment in this application, Judge Modiba presiding, issued a directive ("the directive") calling on Mr. Zuma's current attorney of record to place the correspondence exchanged with Sutherland DJP's office regarding whether the Court in Part A granted Mr. Zuma security for late payment of the security deposit ("the correspondence"), file an affidavit placing the correspondence before this court; and explain amongst other issues, why there was persistence with the contention that this Court ignored the order for condonation granted by Court A notwithstanding Sutherland DJP's response that no such order was granted. Mr. Zuma's current attorney of record complied with this directive. The President's attorney also wrote a letter to Judge Modiba clarifying his client's position as set out in the papers and as argued by Mr. Manaetje.

[7] The directive was necessitated by the fact that during oral argument in respect of Part B, this Court invited Mr. Zuma's current attorney of record to prove that the Court in Part A granted condonation by obtaining an order to that effect. Mr. Zuma's current attorney of record did not revert to this Court. As a result, this Court dealt with the condonation question on the basis that the Court in Part A did not grant it.

[8] During oral argument in respect of this application, Mr. Manaetje for the President referred to the correspondence to rebuff the persistence on behalf of Mr. Zuma that the Court in Part A granted him condonation. Mr. Zuma's current attorney of record had not disclosed the correspondence to this Court notwithstanding that he approached Sutherland DJP in response to an invitation by this Court.

[9] This judgment considers the contents of the documents filed in response to the directive. This Court is appreciative of the assistance rendered by the parties' attorneys in response to the directive.

S9 exemption defence

[10] At paragraph 6.11 of Mr Zuma's notice of application for leave to appeal, the following is stated:

"In failing to totally even address the argument advanced by Mr Zuma that the security deposit provisions of s9 so not apply in cases of process which was not issued by the private prosecutor himself but issued in terms of Rule 54 of the Uniform Rules of Court. This failure amounts to a breach of section 34 of the Constitution and the Rule of law;"

[11] This Court's judgment does not expressly deal with Mr Zuma's s9 defence. However, this does not mean that this Court did not consider it. It considered whether Mr Zuma complied with s9 and found that he failed to do so. This is how the question for consideration was articulated in the parties' joint practice note. Below, this Court explains its approach to the question whether Mr Zuma complied with s9.

[12] The parties' affidavits reflect that non-compliance with s9 of the CPA is one of the grounds of review the President relied on. At no point in his answering or supplementary answering affidavits did Mr Zuma assert that when he issued summons, his then attorney of record approached the Registrar based on the purported s9 exemption defence. Instead, he initially vacillated between saying that security has been paid and that it will be paid.

[13] At paragraph 197-206 of his answering affidavit dated 6 January 2023, Mr Zuma answered to the allegation that he failed to pay a security deposit as required in terms of s9 of the CPA. He asserted sufficient and substantial compliance with s9 of the CPA by taking all the necessary steps to make payment. The steps relied on are enquiries his attorney made to the Registrar regarding the payment of security. Therefore, when Mr Zuma's then attorney of record caused summons to be issued through the Registrar's office, Mr Zuma sought to comply with the requirement to pay a security deposit in terms of s9. It was never his contention that he is exempted from paying it.

[14] In his replying affidavit filed on 10 January 2023, the President denied that Mr Zuma paid security and asserted that the issuing of summons under these circumstances is unlawful. The unlawfulness cannot be remedied by attempting to make payment after the summons were issued.

[15] Therefore, during Part A of the proceedings, Mr Zuma had raised the only one defence referenced above.

[16] After Part A of the President's application was determined, Mr Zuma had called on the Registrar and the Director of Public Prosecutions to file records of their impugned decisions. Both Mr Zuma and the President subsequently supplemented their papers as entitled in terms of Uniform Rule 53(4). In his supplementary affidavit filed on 14 April 2023, Mr Zuma's defence morphed into two new defences. He contended that in terms of Rule 54(1), s9 of the CPA is not applicable when summons is issued by the Registrar. He also contended that his late payment of security was condoned by the court in Part A.

[17] Several issues arise from these new defences. Mr Zuma contradicted his purported exemption from paying security by paying it. The new defences could not have been stimulated by the records of the impugned decisions. They reflect a desperate attempt to cure Mr Zuma's non-compliance with s9 at the time the summons was issued. If Mr Zuma enjoys an exemption in terms of R54(1) not to pay a security deposit, it begs the question why his first defence to the allegation that he failed to pay the security deposit was that he has sufficiently and substantially complied with s9.

[18] This Court determined the question of Mr Zuma's alleged non-compliance with s9 consistently with the procedure his attorney followed when he caused summons to be issued against Mr Ramaphosa.

[19] Rule 54(1) provides as follows:

"The process for summoning an accused to answer any indictment shall be by writ sued out by the chief clerk to the Attorney-General who presents the indictment, or in the case of a private prosecution by the prosecutor or his attorney, and shall be directed to the sheriff: Provided that in the case of the Witwatersrand Local Division the writ may be sued out of the office of the registrar of that division by the Deputy Attorney-General, Johannesburg."

[20] Two questions arise from Rule 54(1). The first is whether summons in a private prosecution may be issued personally by the prosecutor or his attorney and not

through the Registrar's office. The second question is whether, when the private prosecutor or his attorney does not issue summons through the Registrar's office, the private prosecutor is exempted from paying a security deposit to the Registrar in terms of s9. The latter is not the procedure followed when Mr Zuma caused summons to be issued on Mr Ramaphosa. Neither his attorney nor he issued the summons personally. They approached the office of the Registrar, thus bringing Mr Zuma into the ambit of S9. S9 requires that the Registrar only issue the summons when he is satisfied that the private prosecutor has paid the security deposit. This probably why his attorney did not lean on the purported exemption but made enquiries on how to make payment for the security deposit.

[21] Mr Zuma only raised the s9 exemption defence in Part B. As argued on behalf of the President, s9 requires compliance at the time of issuing the summons by the Registrar. As this Court found in its judgment, this was not done.

[22] Therefore, the fact that this Court did not expressly deal with the R54(1) is of no moment. The purported exemption created in Rule 54(1) simply finds no application in this case. There is therefore no prospect that another Court would find differently. Even if it did, the impugned summons was reviewed and set aside on other grounds. A different finding on the s9 exemption would not rescue the impugned summons.

Condonation for failure to pay security

[23] During oral arguments in respect of Part B, whether Mr Zuma had complied with s9 remained a strong point of contention between the parties. As already mentioned, this Court had invited Mr Zuma's current attorney of record to furnish it with proof that the Court in Part A condoned the late payment of security. Having not heard from Mr Zuma's attorney, in its judgement in respect of Part B, this Court ruled that no such condonation was granted.

[24] During oral arguments in this application, the contention that this Court ignored an order for condonation granted by the Court in Part A was persisted with argument notwithstanding that the presiding judge in Part A, Sutherland DJP had clarified that

the Part A Court did not grant condonation. Notwithstanding his client's persistence with the relevant ground of appeal, Mr Zuma's current attorney of record had an ethical duty to disclose to this Court that Sutherland DJP did not acquiesce his request to modify the order granted by the Court in Part A to reflect that it granted condonation because it had not granted it. By not making such disclosure, Mr Zuma's current attorney of record failed in that duty.

[25] Apparently Mr Zuma's attorney did not give Mr Mpofu instructions regarding Sutherland DJP's response to his request for an order evincing that the Court in Part A condoned Mr Zuma's late payment of security. Mr Mpofu was merely copied in the correspondence. Having been copied in the correspondence, Mr Mpofu also had an ethical duty to disclose Sutherland DJP's response to this Court when he addressed the Court in the application for leave to appeal notwithstanding his client's persistence with the relevant ground of appeal. He too failed in his duty towards this Court. In the result, Mr Zuma's attorney and Mr Mpofu sought to mislead this Court by committing these omissions. If Mr Manaetje had not brought the existence of Sutherland DJPs response to this Court, this Court would not have been aware of it.

[26] The fact that Mr Zuma's current attorney of record M Ntanga of Ntanga Nkuhlu incorporated only started acting for Mr Zuma later and was not part of case management meetings with Sutherland DJP where the purported condonation was granted is irrelevant. He committed the omissions referenced above.

[27] This Court dealt with the condonation issue consistently with the position as subsequently confirmed by Sutherland DJP. It did not need to determine the question whether condonation may be granted for failure to comply with s9 at the time of issuing of summons because Mr Zuma did not apply for condonation in Part B. Therefore, this Court did not misdirect itself or breach s34 of the Constitution by dealing with this issue as it did.

[28] In the premises, we therefore make the following order:

ORDER

1. The application is dismissed with costs.



ISMAIL J
JUDGE OF THE HIGH COURT
JOHANNESBURG



BAQWA J
JUDGE OF THE HIGH COURT
JOHANNESBURG



MODIBA J (She)
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

For the Applicant:

D Mpofu SC, assisted by L Moela, S
Mamoepa (She), M Mavhungu and K
Pama-Sihunu (She)

Instructed by:

Ntanga Nkuhlu Incorporated

For the Respondent:

N. H Manaetje SC, assisted by N Muvangua
P Sokhela (She) and I Chaba (She)

Instructed by:

The State Attorney

DATE OF HEARING:

30 August 2023

DATE OF JUDGMENT:

12 September 2023

MODE OF DELIVERY: this judgment is handed down virtually on the MS Teams platform and transmitted to the parties' legal representatives by email, uploading on Caselines and release to SAFLII. The date and time for delivery is deemed to be 10 am.