

REPUBLIC OF SOUTH AFRICA



THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

NOT REPORTABLE

Case No:2459/2017

OLWETHU KULATI

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

Mfenyana AJ

Introduction

[1] The defendant seeks leave to appeal to the Full Bench of this Division against the judgment and order of the court handed down on 18 February 2020.

The notice of application for leave to appeal states that leave is sought against the said judgment in so far as it relates to the detention of the plaintiff from 13h00 on 15 April to 17 April 2017. However in the heads of argument filed on behalf of the defendant, it is stated that leave to appeal is sought against the whole judgment (facts and the law). From the reading of the papers, it is clear that all contentions raised are in respect of the plaintiff's detention for the period aforestated. In this judgment, the parties are referred to as in the main action.

[2] The defendant also seeks condonation for the late filing of the application for leave to appeal. The application for leave to appeal is premised on the contention that this court erred on various grounds more fully set out in the notice of application for leave to appeal. I do not intend dealing with the grounds of appeal individually, save where necessary, and will confine this judgment to those which for some reason or another, warrant specific mention. For good order, it is befitting that I first deal with the application for condonation before dealing with the application for leave to appeal.

[3] Both applications are not opposed by the plaintiff.

Condonation

[4] In the affidavit filed in support of the application for condonation, deposed to by Ms Leonie Sharlene Hart (Ms Hart), the circumstances and the basis for the condonation sought are set out thus:

That the application is launched by the defendant for his 'alleged non-compliance with the time periods' set out in Rule 49(1)(b). Ms Hart states that having received the judgment on 8 February 2020, she finalised the application for leave to appeal on 28 February 2020. She thought that she

had posted the application for service and filing, but this turned out not to be the case. She states that she was working without a secretary for a year as her secretary had retired in 2018. When a new secretary commenced in December 2019 it soon became apparent that she could not cope with work-related stress and was booked off. She was ultimately allocated a secretary at the end of March 2020. She was herself under a lot of work pressure and had to consult a wellness practitioner to help her cope. Soon thereafter a lockdown was imposed due to the Covid-19 pandemic. Lockdown regulations were later relaxed, but her office was only attending to urgent matters through to June 2020. She also suffered a physical injury at home leading to her being booked off from 23 May to 26 June 2020. It was not until 8 June 2020 while she was attending at the office that she received a copy of the plaintiff's bill of costs and only realised at that stage that she had not served or filed the application for leave to appeal which should have been filed by no later than 8 March 2020. She immediately filed the application on 8 June 2020. She contends that the period of lockdown from 26 March 2020 until 1 June when their offices reopened should be taken into account by this court, in considering the application for condonation.

[4] She avers that the application for leave to appeal enjoys good prospects of success, moreso in view of the great public interest this matter enjoys in light of there being two potentially conflicting judgments on the same issue. She further contends that *Malisha*, in which Crouse AJ ruled contrary to the judgment of this court was later confirmed by the SCA. Thus the defendant avers that there is good cause for the delay in filing the application for leave to appeal, and that another court seized with the same facts may come to a different conclusion.

[5] In dealing with what an applicant in an application for condonation needs to demonstrate, the Supreme Court of Appeal in *Mlaudzi v Old Mutual Life Assurance*¹, held:

‘What calls for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation. An appellant should, whenever he realises that he has not complied with a rule of this court, apply for condonation without delay. A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.’

[6] In my view the defendant has offered adequate explanation for the delay, which explanation covers the whole period of the non-compliance. Contrary to the defendant’s assertion in his application for condonation, the non-compliance is not merely alleged, but actual. It is also worth noting that the plaintiff opted not to press ahead with his opposition in respect of the condonation, having filed a withdrawal of his intention to oppose the application on 9 December 2020. It seems to me that the withdrawal of the opposition by the plaintiff was prudent and well considered. Despite some lapse at one point or another, on the part of the defendant, it appears that there had always been a genuine intention to comply with the Rules of this Court. In those circumstances, I am persuaded that good

¹ 2017 (6) SA 90 SCA at 101 at para 26

cause exists for condoning the late filing of the application for leave to appeal and that it would be in the interests of justice that condonation is granted.

Application for leave to appeal

[7] The next issue for consideration is whether, having granted condonation, the defendant should be granted leave to appeal to the Full Bench of this Division.

[8] In his notice of application for leave to appeal, the defendant states that the only issue of contention is the detention of the plaintiff from 13h00 on 15 April to 18 April 2017. In this regard he contends that the Court erred in various respects, and in particular in not having regard to the evidence of the defendant's two witnesses, to the effect that the plaintiff was arrested over the Easter long weekend and thus taken to court on the next court day following the 48- hour period prescribed by law.

[9] The defendant further contends that the respondent was informed of his rights by Mr Allers, including his right to apply for bail, and the respondent opted not to exercise this right, and 'speak in court'. As such, the applicant contends that there was therefore no need for Kwitshi to ask the respondent about bail, after having regard to the docket which indicated that the respondent had chosen to 'speak in court'.

[10] As far as the evidence of Mr Allers goes, the defendant contends that the court erred in not having regard to the evidence that there is a problem of drug abuse in the area and the impact thereof on the community, the role of the SAPS in fighting the scourge and their experience and observations in witnessing users strating small and ultimately selling drugs.

[11] In respect of these grounds of appeal, I must hasten to state that any reference in the judgment as well as in the evidence presented by the defendant's witnesses, in particular, Allers, to the effect that the plaintiff was found to be in possession of mandrax, is only in relation to the suspicion entertained by Allers at the point of arresting the plaintiff. This is indeed what informed his decision to arrest the plaintiff. That suspicion was not taken much further following the plaintiff's arrest as no laboratory results were received to confirm that suspicion. This leads to a further suggestion by the defendant, that the court did not view possession of drugs in serious light. I do not consider the defendant's submission in this regard, to be warranted. While the seriousness of drug abuse cannot be overstated, it is not for the court to tailor- make the evidence to suit either of the parties when no evidence had been adduced. The plaintiff was subsequently released without appearing in court. Even further, what presented before the court for determination, was not the merits of a charge against the plaintiff, but the lawfulness or otherwise of his arrest. This submission is therefore misplaced. To that extent, there is no merit to this ground.

[12] In relation to section 59 of the Criminal Procedure Act, the defendant contends that the court erred in finding that section 59A does not require an accused person to make representations or application to be released on bail as the possession of mandrax is an offence listed in Part II of Schedule 2 and as a result of which the plaintiff could not be released on bail by a member of the SAPS in terms of section 59(1)(a). It is not in contention that the police have no authority to release an accused person in relation to an offence listed in Part II of Schedule 2. The issue at hand is not whether the police should have granted bail but whether or not there was an obligation on them to refer the matter to the prosecutor for bail. However, the defendant's main contention appears to be in relation to the issue of whether there was a duty on the police to facilitate the release of the plaintiff on bail, in the absence of a request from him.

[13] In terms of section 17(1) of the Superior Courts Act² (the Act)

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration...”

[14] The relevant question in considering this application is whether the applicant has satisfied the stringent test set out in the Act in respect of leave to appeal, which requires some degree of certainty that another court would find in his favour. He must show a sound and rational basis for that conclusion and not merely that his case is not hopeless and has a possibility of success.³ I am of the view that on the narrow issue as enumerated above, the defendant has shown such basis and established a reasonable prospect of success.

Conclusion

[15] There seems to be conflicting views between this judgment and the judgment in *Malisha* on the narrow issue of whether or not the police had a legal obligation to contact the prosecutor, in the absence of a request from the plaintiff to be released on bail. This is an issue which would require reflection by another court moreso in view of the fact that *Malisha* has been confirmed by the SCA. There needs to be certainty on this issue to create harmony within the judgments handed down in this Division. To the extent that there is a conflict between the judgment of this court and the judgment in *Malisha*, the appeal must succeed.

² Act 10 of 2013

³ *S v Kruger 2014 (1) SACR 647 (SCA) at para [2]*

Order

[16] In the result I make the following order:

- (a) *The application for condonation is granted.*
- (b) *Leave to appeal is granted to the Full Bench of this Division.*
- (c) *Costs shall be costs in the appeal.*

S. M. MFENYANA

ACTING JUDGE OF THE HIGH COURT

Counsel for the Plaintiff:

No appearance

Counsel for the Defendant:

Ms A Rawjee

Instructed by:

The State Attorney, Port Elizabeth

Date Heard:

10 September 2021

Date Delivered:

14 December 2021