

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. [REDACTED]

20 February 2024

DATE

SIGNATURE

CASE NO: 30198/2022

In the matter between:

THE MINISTER OF POLICE

APPLICANT

and

LUKIE MARIA MAHLANGU

FIRST RESPONDENT

MPALENG MATRON DIKOTOBÉ

SECOND RESPONDENT

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 20 February 2024.

JUDGMENT

MBOWENI AJ

Introduction

- [1] This is an application for condonation for the late filing of the transcripts in the application for leave to appeal. The first and second respondents were police reservists at the time of their arrest on 20 April 2015. They were arrested following allegations that they stole money during the search and seizure that took place on 13 March 2015 at Winterveld.
- [2] Subsequently, the respondents instituted claims for unlawful arrest and detention for three days each. The Magistrate awarded damages in an amount of R200 000.00 each to the respondents. It is the applicant's case that the amount awarded to the respondents forms the basis of the appeal, it is excessive and out of kilter with the caselaw, it Magistrates' Court judgment was attached.
- [3] The applicant submitted that the judgment was received on or about 08 January 2020. Upon receiving the judgment, the judgment was immediately

sent to client who gave instructions that the judgment should be appealed, and Counsel should be appointed.

- [4] The applicant launched an application for leave to appeal against the award of damages on 03 February 2020.
- [5] Mr. Zulu attended to their internal State Attorney processes to appoint Counsel towards the end of January 2020. Counsel sought further supporting documentation and proceeded to prepare an opinion. Counsel's opinion was only provided in March 2020, no specific date is provided.
- [6] It is common cause that the country was placed under lockdown level five (5) on 27 March 2020. The transcripts were only requested on 01 July 2020, three months after the discussion of the matter with Counsel. The applicant submitted that the transcribers could not access the court due to the Covid-19 protocols. As a result, the transcribers could not access the recordings.
- [7] There were a few email follow-ups to the transcribers that was attached to the application for condonation regarding the availability of the transcripts. The dates of the emails are as follows:
- 31 March 2021
 - 24 February 2022
 - 28 April 2022
 - 02 June 2022

The transcripts were received by the Applicant on 28 April 2022.

- [8] There is no explanation provided why no further follow-up was made in the year 2020.
- [9] Only one follow up was made in the year 2021. Almost a year passed before another follow up was made on 24 February 2022.
- [10] On 28 April 2022 the transcribers indicated that the transcripts together with the invoice was sent in October to the State Attorney and by that date no payment has been received for the services rendered.
- [11] The only reasonable inference that can be drawn is that the transcriber is referring to October 2021 when the transcripts were already transmitted to the State Attorneys offices.
- [12] The transcripts were filed effective two years after the application for leave to appeal was lodged. The explanation proffered by the applicant relates to the delay by the transcribers. On behalf of the respondent it was contended that the delay is not adequately explained however one interprets the period of the delay. This behoves no argument as there are periods that are unexplained or not explained in any detail.

[13] The law with regard to condonation is well established. The applicant in his heads of argument refers to a number of decisions, including those by this Court dealing with condonation and some need not be rehashed herein. With regard to the factors to be considered in an application for condonation it need to be emphasized that the degree of lateness in this matter is not sufficiently explained in detail.

[14] In **Bertie van Zyl v Minister of Safety and Security 2010 (2) SA 181 (CC)** the following is stated:

“[13] The application for condonation relates only to the applicants’ application for leave to appeal against the High Court’s order regarding section 20(1)(a). The first applicant lodged its condonation application about one month late. The second applicant, who filed its application for leave to appeal even later, gives no reasons for the delay other than that it was “unfortunately impossible” for it to attend the consultation with the applicants’ counsel on 17 October 2008.⁷ This despite, the second applicant’s submission that it has “always been unhappy with the finding of the High Court.” There is no explanation for why there was no attempt at an earlier filing. The limited justifications for late filing offered by the applicants are inadequate and, generally, would militate against granting condonation.

[14] However, in determining whether condonation may be granted, lateness is not the only consideration. The test for condonation is whether it is in the interests of justice to grant condonation.⁸ In this case, the interpretation of section 28 is already before us for confirmation. The questions relating to section 20 (1) (a) raise similar interpretative questions. Furthermore, the lateness of the applications does not appear to have caused substantial prejudice to the

respondents, who do not oppose the condonation application. The respondents are already familiar with the issues articulated in the court a quo. More importantly, for purposes of legal certainty it is opportune to resolve the question of the proper construction of section 20(1)(a) with a view to settling the dispute between the parties. For these reasons, condonation is granted in the interests of justice."

[15] In **Ferris v FirstRand Bank 2014 (3) SA 39 (CC)** the following is stated:

"[10] In *Bertie Van Zyl* this Court held that lateness is not the only consideration in determining whether condonation may be granted. It held further that the test for condonation is whether it is in the interests of justice to grant it. As the interests of justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors.

[11] Mr and Mrs Ferris blame their late filing of the application on their correspondent attorney. In my view this explanation is less than satisfactory. Further, Mr and Mrs Ferris do not have prospects of success, as will appear below. I note that FirstRand does not oppose the application for condonation, nor is there an indication that the late filing has caused any prejudice. However, the mere fact that there is no opposition and no apparent prejudice does not necessarily warrant granting condonation. Condonation cannot be had for the mere asking.

[12] Nonetheless, FirstRand stated that the issues raised are important to the banking sector and its customers because a pronouncement by this Court will bring certainty on when a credit provider may enforce a loan that is subject to a debt-restructuring order that has been

breached. On balance, I am of the view that it is in the interests of justice to grant condonation."

- [16] In **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others** (619/12) [2013] ZASCA 5 (11 March 2013) the following is stated:

"[11] 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 (per Holmes JA in **Federated Employers Fire & General Insurance Co Ltd & another v McKenzie** 1969 (3) SA 360 (A) at 362F-G). I shall assume in Dentenge's favour that the matter is of substantial importance to it. I also accept that there has been no or minimal inconvenience to the court. I, however, cannot be as charitable to the appellant in respect of the remaining factors.

- [12] In **Uitenhage Transitional Local Council v South African Revenue Service** 2004 (1) SA 292 (SCA) para 6 this court stated:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; 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. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[17] In **Mtshali & others v Buffalo Conservation 97 (Pty) Ltd** (250/2017) **[2017] ZASCA 127** (29 September 2017) the following is stated:

"[37] The approach of this court to condonation in circumstances such as the present is well-known. In **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others** Ponnar JA held that factors relevant to the discretion to grant or refuse 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'.

[38] In **Darries v Sheriff, Magistrate's Court, Wynberg & another** these general considerations were fleshed out by Plewman JA when he stated:

'Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the applicant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.'

[39] Reference was made in the passage I have cited above to it being an erroneous assumption that if the cause of the delay in complying with the rules is the conduct of the appellant's attorney, condonation will be granted. That assumption was dispelled in no uncertain terms in *Saloojee & another NNO v Minister of Community Development*. In that matter the notice of appeal, the record and the condonation application were filed some eight months late. After considering the explanation given for the delay and concluding that it was not even 'remotely satisfactory' Steyn CJ proceeded to hold:

'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations of misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'

[40] While the various factors that have been listed in the cases should be weighed against each other, there are instances in which condonation ought not to be granted even if, for instance, there are reasonable prospects of success on the merits. This was alluded to in the passage that I cited from the *Darries* matter. In *Tshivhase Royal Council & another v Tshivhase & another*; *Tshivhase & another v Tshivhase & another* Nestadt JA said that this court 'has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable

explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are' and that this applies 'even where the blame lies solely with the attorney'.

[41] In the present case we did not hear argument on the merits. Counsel were asked to make their submissions on the assumption that an appeal would have reasonable prospects of success. The appellants' counsel went further, submitting that his clients' prospects of success on the merits – the peremption point aside – were strong. An assumption to this effect does not change the outcome on the particular facts of this case."

[18] In **Mathibela v The State** (714/2017) [2017] ZASCA 162 (27 November 2017)

"[5] This Court recently stated the following in *Mulaudzi v Old Mutual Life Insurance Company Limited & others, National Director of Public Prosecutions & another v Mulaudzi*:

'[34] In applications of this sort the prospects of success are in general an important, although not decisive, consideration. As was stated in *Rennie v Kamby Farms (Pty) Ltd*, it is advisable, where application for condonation is made; that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success. This was not done in the present case: indeed, the application does not contain even a bare averment that the appeal enjoys any prospect of success. It has been pointed out that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.'

(My emphasis)

[6] The same principles apply in the context of criminal cases as restated in *Mogorosi v State* where this Court said:

'[3] . . . [G]iven that the appellant was seeking an indulgence he had to show good cause for condonation to be granted. In *S v Mantsha* 2009 (1)

SACR 414 (SCA) para 5 Jafta JA stated that "good (or sufficient) cause has two requirements. The first is that the applicant must furnish a satisfactory and acceptable explanation for the delay. Secondly, he or she must show that he or she has reasonable prospects of success on the merits of the appeal'

...

[8] A court considering an application for condonation must take into account a range of considerations. Relevant considerations include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the court and the avoidance of unnecessary delay in the administration of justice. (See S v Di Blasi 1996 (1) SACR 1(A) at 3g.)'

- [7] The appellant provided no reasonable explanation for his non-compliance with the rules of this Court. The delay in prosecuting his appeal in this Court alone amounted to one year and one month. In total ie in both the court a quo and this Court it took the appellant eight years and one month to prosecute his appeal. Even if I take into account the fact that he was unrepresented at times during the prosecution of his appeal, that can hardly compensate for the inordinate delay in his application.

- [8] As pointed out in Uitenhage Transitional Local Council v South African Revenue Service the requirements for granting an application for condonation are the following:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking: a full, detailed and accurate account of the causes of the delay and its effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

- [9] As was the case in Mulaudzi, as is apparent, the founding affidavit is singularly unhelpful in explaining the long delay. The explanation is not in the least satisfactory. Even worse, no explanation was provided

for the third application for condonation and reinstatement of the appeal. This delay is unreasonable and there is no cogent explanation for it. It remains to consider whether the prospects of success on the merits justify the granting of condonation."

[19] Insofar as the prospects of success are concerned the following is worth noting. This application for leave to appeal is only against the award for damages.

[20] This being an application for leave to appeal, this Court is guided by the prescripts of Section 17 of Superior Courts Act 10 of 2013, which provides:

"Leave to appeal

17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

*(a) (i) the appeal **would** have a reasonable prospect of success; or*

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

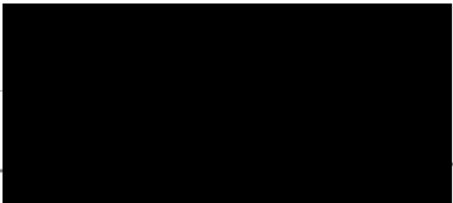
(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

(emphasis added)

- [21] Bearing in mind the stringent test that now applies to applications for leave to appeal and having considered all the submissions made on behalf of the applicant, this Court is of the considered view that there are no reasonable prospects of success on appeal. No other court **would** come to a different decision than what this Court had arrived at. There being no prospects of success on appeal, the application for condonation for the late noting and prosecuting of the application for leave to appeal should resultantly also fail.

Order:

- [22] Consequently, the following order is made:
- (i) The application for condonation for leave to appeal is refused.
 - (ii) The applicants to pay the costs of this application.



L.J MBOWENI

**Acting Judge of the High Court,
Gauteng Division, Pretoria**

Date of Hearing: 05 February 2024

Date of Judgment: 20 February 2024

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