



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: 3953/2019

In the matter between:

THE MINISTER OF POLICE

1st Applicant

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

2nd Applicant

and

THIEHO WILLIAM MOFOKENG

1st Respondent

JACOB SAOANA LETUKA

2nd Respondent

MAQAESA OSIAH SEHLAKO

3rd Respondent

TLADINYANE DAVID TLALE

4th Respondent

CORAM: MTHIMUNYE AJ

HEARD ON: 21 JULY 2023

DELIVERED ON: 24 JULY 2023

JUDGMENT BY: MTHIMUNYE, AJ

This judgement was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 13:00 on 24 July 2023

Introduction

[1] This is an application for leave to appeal the whole judgment handed down by this court on 24 August 2022 to the Full Bench of this Division alternatively the Supreme Court of Appeal. The judgement was in respect of a delictual claim for unlawful arrest, unlawful detention and malicious prosecution respectively. and I found in favour of the Respondents in the following terms:

"1. The claim in respect of the First Plaintiff is postponed sine die.

2. The defendants shall pay to the plaintiff's the following amounts as compensation:

3. Second Plaintiff

3.1. An amount of R1 300 000.00 (One Million Two Hundred Rand) for the entire period of detention.

3.2. An amount of R250 000.00 (Two Hundred and Fifty Thousand) for malicious prosecution.

4. Third Plaintiff

4.1. The third Plaintiff, an amount of R1 400 000.00 (One Million Four Hundred Rand) for the entire period of detention.

4.2. An amount of R250 000.00 (Two Hundred and Fifty Thousand) for malicious prosecution

5. Fourth Plaintiff

- 5.1. *An amount of R1 400 000.00 (One Million Four Hundred Rand) for the entire period of detention.*
- 5.2. *An amount of R250 000.00 (Two Hundred and Fifty Thousand) for malicious prosecution*
6. *The defendants shall pay interests at the applicable legal rate on the said amount from 14 (fourteen) days from the date of judgment to the date of payment.*
7. *The defendants shall pay the plaintiffs' agreed or taxed costs, including costs of Counsel, travel and accommodation for 4 days".*

[2] At the onset of the hearing, this court was ceased with an issue that arose between the parties in respect of the alleged late filing of the applicant's application for leave to appeal. The Applicants' Counsel informed the Court that the Respondents had raised an issue that the Applicants papers were filed out of time but stated that the Applicants believe they were within the prescribed time limits.

[3] The Respondent's Counsel insisted that this application was filed out of time and therefore the Applicants should have brought an application for condonation, in the absence of which the Applicants' papers are not properly before court and should be struck off the roll. It is noteworthy that the Respondents raised this issue in a letter written to the Applicants' attorneys of record on 19th September 2022 i.e. four days after the Applicants had filed their papers. The Applicants on one hand submitted that in terms of their calculation they hold a view that the application was filed within the prescribed 15 days and therefore there was no need to bring an application for condonation.

[4] It follows then that before even considering the application for leave to appeal, this Court has to answer the question of whether or not the Applicants' papers were filed out of time. If the question is answered in the affirmative, it would not be necessary for this Court to consider the application for leave as it would not be properly before court. However, if the question is answered in the negative, the Applicants would indeed be correct in submitting that there was no need for a condonation application.

[5] Applications for leave to appeal are governed by **Rule 49 (1) of the Uniform Rules of Court** which provides as follows:

“ ...

(b) *When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefore shall be furnished within 15 days after the date of the order appealed against.*

”
...

[6] In terms of this Rule, applications for leave to appeal must be filed within 15 days from the date of the assailed judgment or order. The determination this court is seized with necessitates a calculation of the *dies* and I turn now to do so. The starting point is section 4 of the **Interpretation Act, 33 of 1957** which provides as follows:

“When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.”

[7] Prior to the reckoning of day and for purposes of completeness, it is necessary to clarify what a court day for purposes of the Rules is. A court day is defined in the Uniform Rules as:

“a day that is not a public holiday, Saturday or Sunday and only court days shall be included in the computation of any time expressed in days prescribed by these Rules or fixed by any order of court”.

[8] The assailed judgment was handed down on 24th August 2022. The Applicants served and filed its notice for leave to appeal on 15th September 2023. It is clear from a simple calculation of the *dies* excluding weekends and in line with the Interpretation Act that the Applicants filed their notice on the 16th day, which is a day out of the prescribed time. As stated above, the Respondents brought this late filing to the attention of the Applicants on 19 September 2022 i.e. four days after the Applicants had filed their notice. The Applicants chose not to bring a condonation application.

[9] During his address, Counsel for the Applicants argued that if the court finds that the Applicants filed out of time, the court should not be 'mechanical' as the delay is only one day. It is trite that condonation falls within the discretion of the court. The test for condonation is the interests of justice and in determining this, the court must, in the exercise of its discretion, consider a number of factors, one of which is the degree of lateness (length of the delay). Ordinarily, a court would grant such condonation if the delay was not long and caused no prejudice to the other party and it would be in the interest of justice to do so.

[10] The dilemma this court finds itself in is that there was no condonation application brought before this court to consider. Although the granting of condonation is in the discretion of the court as articulated in

Grootboom v National Prosecutions Authority & Others¹, in the absence of an application, a court cannot consider factors that it would ordinarily be expected to consider in exercising its discretion. I deem it prudent to state that despite giving the Applicants' Counsel an opportunity to take instructions and adjourning court for this purpose, the Applicant insisted that it filed within time and would not bring an application for condonation.

[11] It follows therefore that the next question this court must answer is whether or not a court can grant condonation for non-compliance with the Rules when same is not asked for. I hold a view that in the absence of an application, it would be improper for this court to consider condonation. In this view, I am guided by the *obiter dictum* in **SA Transport and Allied Workers Union & Another v Tokiso Dispute Settlement and Others**², where the court held:

"...where the steps constitute a jurisdictional step, a time-limit, and the party is out of time, then, in the absence of an application for condonation, a court cannot come to the party's assistance..."

Simply put, in my view, in the absence of a condonation application, there is no discretion to exercise.

Consequently, I make the following **Order**:

1. The application for leave to appeal is struck from the roll with costs.


D.P. MTHIMUNYE

¹ ZACC 37; 2014(2) SA 68 (CC); 2014 (1) at para 20 & 35

² 2015(36) ILJ 1841 (LAC) at para 19

Appearances:

For the Applicants : Adv L Bomela
Bloemfontein Society of Advocates
Instructed by Office of the State Attorney
Bloemfontein

For the Respondents : Adv C Zietsman
Pretoria Society of Advocates
Instructed by Loubser Van Wyk Inc
c/o Jacobs Fourie Inc.