



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

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

Case no: **A128/2009**

In the matter between:

HENRY FABA

Appellant

and

STATE

Respondent

CORAM: MBHELE, DJP *et* NAIDOO, J *et* MHLAMBI, J

HEARD ON: 28 JULY 2023

DELIVERED ON: 31 OCTOBER 2023

JUDGMENT BY: MBHELE, DJP

- [1] The appellant, was convicted on one count of robbery with aggravating circumstances, two counts of murder, one count of attempted murder, one count of unlawful possession of a firearm and one count of unlawful possession

of ammunition by a single judge of this division on 08 April 2008. On 03 July 2008 he was sentenced as follows:

Fifteen years' imprisonment on Count 1;

Life imprisonment on Count 2;

Life imprisonment on Count 3;

Ten years' imprisonment on Count 4;

Three years' imprisonment on Count 5; and

Six months' imprisonment on Count 6.

- [2] Aggrieved by the outcome of the matter, the appellant successfully applied for leave to appeal in the trial court on 03 July 2008.
- [3] In the court *a quo* the appellant was convicted on the evidence of the complainant in count 4 (Annarette) in respect of charges in counts 1 – 4, a single witness who also identified the appellant at an identification parade subsequent to the date of the incident. The main issue for determination in the court *a quo* was centred around the complainant's identification of the appellant and whether same was sufficiently reliable to secure a conviction against the appellant.
- [4] In his grounds of appeal the appellant submits that the court *a quo* misdirected itself in relying on the evidence of a single witness and in finding that the identification by Annarette was satisfactory and reliable in all material respects. He contends, further that the court *a quo* erred in rejecting the evidence of the appellant and finding that it is not possibly true.
- [5] Due to a delay in prosecuting the appeal, the appellants have filed a substantive application for condonation for the late prosecution and reinstatement of the appeal which had lapsed. The application for condonation and reinstatement of the appeal is opposed by the respondent.
- [6] The chronology of events giving rise to the application for condonation and reinstatement are as follows:

- 6.1 The appellant was convicted on 08 April 2008. He was sentenced on 03 July 2008 and granted leave to appeal both his conviction and sentence on the same day.
- 6.2 The record of the proceedings was received by the High Court on 26 June 2009. The notice of appeal was filed with this Court on 28 January 2010, 18 months from the date on which leave to appeal was granted and 7 months from the date of receipt of the record. The matter was set down for hearing on 23 February 2010. On the date of hearing the appellant withdrew his mandate from Legal Aid SA and instructed a private Attorney.
- 6.3 Appellant proceeded with his appeal under the case no: A128/2009 and on the 22nd of June 2010 the matter was placed before honourable justices Van Zyl J, Mocumie J and Jordaan J¹, it was on that day postponed *sine die* due to complications with his Attorney.
- 6.4 On 23 of August 2010 the Appeal was removed from the Roll by Honourable justices Van Der Merwe J, Van Zyl J and Mthembu AJ.
- 6.5 Legal Aid South Africa was again instructed to assist the Appellant and to prosecute the Appeal after his attorney was struck from the roll, it is not clear on which date was Legal Aid SA's mandate reinstated.
- 6.6 Between 2011 and 2016 he received no report from Legal SA on the progress of the matter.
- 6.7 In 2016 the appellant was informed by an attorney from Legal Aid SA, whose name he cannot remember, that his matter could not be enrolled due to the record having been misplaced.

¹ The Appellant's Attorney was struck off the roll of Attorneys.

- 6.8 In 2019 he terminated his mandate with Legal Aid SA and instructed his current Attorneys.
- 6.9 The appeal was set down for argument on 27 July 2020 and was again struck off the roll due to the fact that it had lapsed and no proper application for Condonation had been filed.
- 6.10 According to the Appellant, his family could not raise the necessary funds to prosecute the appeal thereafter, they only managed to raise the required funds around September 2022.
- 6.11 By way of a letter dated 11 July 2022 the registrar notified the appellant and the respondent that there had been no activity in the matter since 27 July 2020 when it was struck off the roll for the appellant's failure to apply for condonation and reinstatement of the appeal and informed the parties that unless they respond within 5 days from the date of the letter the matter would be removed from the system and sent to the archives.
- 6.12 The appellant only filed his application for condonation on 07 December 2022, 4 and a half months from the date of the registrar's letter and 2 years and 16 days from the date on which the matter was removed from the roll in 2020.
- [7] It is common cause that on 16 November 2006 at Rietvlei farm near Verkeerdevlei in the district of Bloemfontein Eugene Fourie and his wife Annamarie Fourie were attacked, brutally shot and killed by robbers who stormed their farm while their daughter Annarette Fourie survived the attack and sustained gunshot wounds on her body.
- [8] Annarette Fourie identified the appellant at the identification parade. Her testimony was to the following effect. Her father was outside at approximately 20h00 when he heard gunshots being fired. At that time, she was in the kitchen. Her mother came to her in the kitchen to tell her that her father has been shot. At first she thought that her father was firing warning shots to scare away

animals. Her mother devised an unsuccessful plan for them to escape through the backdoor. While her mother was still struggling to open the backdoor through which they were going to escape to a room outside the door opened and she saw the appellant entering the kitchen. He was a man light in complexion with an earring on his left ear.

- [9] At that time Annarette's eyes were fixated at the door because she was hoping that her father would come in through the same door from outside. She at that time did not believe that her father was shot. The appellant fired shots at Annarette and her deceased mother while at a distance of about 3 metres. The lights were on in the kitchen when the accused entered. They both fell on the ground. She observed the appellant when he entered the room and at the time he was firing many shots at her and her mother. His distinctive light complexion and facial appearance was captured in her mind and she would never forget the appellant's face. Although the incident did not last long to her it felt like a lifetime. She denied that she ever saw the appellant on the farm before the incident.
- [10] Inspector Van Rhyn, an Investigating officer, arrested the appellant. He testified to the following effect:
- When they arrived at the appellant's place of abode he tried to flee and in the process he fired shots at the police who returned fire. Upon arrest he was found in possession of a 9mm pistol with ammunition. He sustained injuries during the shooting and was taken to Pelonomi hospital.
- [11] The appellant denied any involvement in the offences he was charged of and that he was ever at Annarette's family farm on the date of the incident. He however admits that he knows the farm and that Annarette and her husband were regular visitors on the farm. They used to visit the farm over weekends. His knowledge of the activities on the farm, is according to him, attributable to his alleged employment by one of the deceased's relatives. He stated that he was at his home during the incident.

- [12] The appellant's wife testified and confirmed the appellant's *alibi* that he was at home on the date of the incident. It, however, emerged during cross examination that she was given a note by the appellant in which the appellant told her to tell the court *a quo* that he was at home with her on the date of the incident.
- [13] It is well established that condonation cannot be had just for asking. It is an indulgence extended to a party who failed to comply with the rules of court. A party seeking an indulgence must show cause why the court must condone its non-compliance with the rules. The applicant must provide reasons for the delay in sufficient detail to enable the court to understand the real cause for the delay.
- [14] It is trite that the following factors must be considered by a court from which condonation is sought: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or failure to comply with the prescribed time frames; (c) prospects of success or bona fide defence in the main case (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; (g) avoidance of unnecessary delay in the administration of justice. See **Foster v Stewart Scott Inc.**² where Froneman, J remarked as follows:

'It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of a 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, but the list is not exhaustive. These factors are not individually decisive, but are interrelated and must be weighed one against the other. A slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong. Conversely, very good prospects of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay. See, in general,

² (1997) 18 ILJ 367 (LAC) at page 369

Erasmus *Superior Court Practice* at 360-366A.” See Also **Melane v Santam**³ and **National Union of Mineworkers v Council for Mineral Technology**.⁴

- [15] In **Brummer v Gorfil Brothers Investments (Pty) Ltd**⁵ the constitutional court held that an application for condonation should be granted if it is in the interest of justice and be refused if not in the interest of justice. The interest of justice must be determined by reference to all relevant factors. i.e. factors laid down in **Melane supra**. See also **Grootboom v National Prosecuting Authority & another**⁶ where the court said the following:

“[T]he standard for considering an application for condonation is the interests of justice. However, the concept ‘interests of justice’ is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors, but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default.

...The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but

³ 1962 (4) SA 531 (A) at 532 C-F.

‘In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation.’

⁴ **National Union of Mineworkers v Council for Mineral Technology** [1999] 3 BLLR 209 at 211.

⁵ 2000 (2) SA 837 (CC) at 839.

⁶ 2014 (2) SA 68 (CC) at para 22-23 and 51.

there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”

- [16] In **Saloojee and Another NNO v Minister of Community Development** ⁷ Steyn CJ made the following remarks when dealing with lack of diligence on the part of an Attorney and how a litigant who chose such an attorney should not be exonerated from the normal consequences of such relationship:

‘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 his 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 on the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue 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 consequences of the failure are.’

- [17] In **Du Plessis v Wits Health Consortium (Pty) Ltd**,⁸ the Court held as follows:

‘It is clear from the above and other judgments that a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the court into his or her confidence in seeking its indulgence by explaining when, not only that he or she finally raised funds to conduct the case, but also how and when did he or she raise those funds. The ‘when’ aspects of the explanation are

⁷ 1965 (2) SA 135 (A)

⁸ [2012 JDR 1523 (LC) at para 16.

important, as it provided the courts with information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay.'

- [18] It took 15 years for this matter to be argued before court. The notice of appeal was filed on 28 January 2010, 18 months from the date on which leave to appeal was granted. There is no explanation for this delay. The matter came before court for argument for the first time in July 2010. The appellant attributes failure to prosecute his appeal timeously to lack of diligence on the Attorney who assisted him at Legal Aid SA between 2011 and 2016 and lack of funds. The matter was inactive from 2010. There is no explanation of the delay between August 2010 and sometime in 2011 when he gave instructions to Legal Aid SA to prosecute his appeal.
- [19] The appellant terminated the mandate of the Legal Aid SA Attorney who came to court to argue his appeal in February 2010 and instructed Mr. Khalaki who did nothing to prosecute the appeal. It is not clear on which date he reinstated the Legal Aid SA mandate, what is apparent is that sometime in 2016 he spoke to a Mr. Mothibi. Even if we were to put the blame at the door of Legal Aid SA for the lapse of time between 2011 and 2016 there is still no explanation for an inordinate delay between 27 July 2020 and December 2022 when an application for condonation was filed.
- [20] He knew on 27 July 2020 that an application for condonation was required. As soon as it became clear that his appeal had lapsed and it required reinstatement he ought to have approached court for an application for condonation and reinstatement which he did not do. Lack of funds cannot be accepted as a reasonable explanation for the delay. Rules exist for a reason, they are an integral part of our justice system. They serve as guidelines to ensure order, fairness and certainty. There would be chaos in our courts if courts were to allow litigants to flagrantly disregard the rules of court and provide no explanation for non-compliance thereof. If courts were to allow lack of funds as an excuse to not comply with the rules, no matter would see finality. There is, in any event, no explanation for the delay between September 2022

when funds were secured and 7 December 2022 when application for condonation was filed. Even after a letter was written to the appellant's Attorneys to enquire about their intentions on the matter it took them 5 months to file the condonation application.

[21] The explanation given by the appellant is far from adequate and is unreasonable. The appellant left long periods of delay unaccounted for. It is in the interest of justice for any matter to be finalised as soon as possible. The matter came to court 17 years from the date of commission of the offence and more than 15 years from the date on which application for leave to appeal was granted. The inordinate delay on this matter is not in the interest of justice.

[22] The next question to ask is whether there are prospects of success in the matter. The evidence brought by the state shows that an eyewitness identified the appellant and gave a clear description of him. The witness explained that her eyes were focussed on the door through which the appellant entered because she had hoped to see her father walking in through the same door. She said although she saw the appellant's face for a few seconds, it felt like eternity, his image stuck in her mind and she would never forget it. The appellant did not deny that he wore an earring on his left ear during that period as described by Annarette. The application for condonation must fail, both because of the fact that no proper explanation was given for the delays and because there are no reasonable prospects of success on appeal.

[23] I accordingly make the following order:

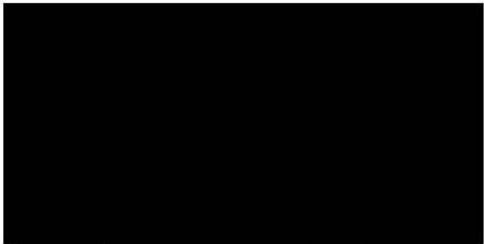
ORDER:

1. The application for condonation is dismissed
2. The appeal is struck off the roll



N.M. MBHELE, DJP

I concur.



S. NAIDOO, J

I concur.



J. J. MHLAMBI, J

Appearances:

For the Appellant:

Mr. P. Peyper

Peyper Austen Inc. Attorneys
Bloemfontein

For the Respondent:

Adv. S. Giorgi

Director Public Prosecutions
Bloemfontein