



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 SAONA LETUKA

2nd Respondent

MAQAESA OSIAH SEHLAKO

3rd Respondent

TLADINYANE DAVID TLALE

4th Respondent

CORAM: MTHIMUNYE, AJ

HEARD ON: 20 SEPTEMBER 2023

DELIVERED ON: 22 NOVEMBER 2023

JUDGMENT BY: MTHIMUNYE, AJ

Introduction

[1] This is an application for leave to appeal the whole judgment handed down by this court on 24 August 2022. The applicants seek leave to appeal to the Full Bench of this Division alternatively the Supreme Court of Appeal. The judgement is in respect of a delictual claim for unlawful arrest, unlawful detention and malicious prosecution respectively. The First Plaintiff was deceased before the commencement of the trial and consequently his claim was postponed *sine die*. During the hearing, the plaintiffs abandoned the claim for unlawful arrest and at the end of the trial I made the following orders:

- "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] I deem it necessary to mention that this application was brought before this court initially on 21 July 2023. On the said date the Respondents raised an issue that the application was filed out of time when regard is had to the rules. Despite the Respondents having raised this issue with the Applicants in a letter sent to the Applicants as far back as 19th September 2022, the Applicants brought no application for condonation. When this was raised at the hearing, this court gave the applicants time to consider bringing a condonation application. The Applicants still brought no condonation application and first insisted that the application was on time, and later conceded that it may be out time but only by a day. Having satisfied myself that the application was indeed brought out of time, and having no condonation application to consider, this court struck the application for leave to appeal from the roll.

[3] The Applicants have now brought this application, with a condonation application which I heard virtually on 20 September 2023. I must now first deal with the condonation application. The deponent to the Applicant's founding affidavit, Mr Ganyani Phanuel Chauke, submits that he had laboured under a *bona fide* error that the application was served on time. This error was as a result of his wrong interpretation of section 4 of the Interpretation Act 53 of 1957, and the Applicant's Counsel's wrong interpretation of Rule 49(1) of the Rules of Court.

He says the one day delay was caused by a delay in the approval of a decision to appeal by the National Director of Public Prosecutions ("NDPP"), which resulted in him obtaining instructions only on 14 September 2022. The application was filed the following day, i.e. on 15 September 2022. For this reason, he submits the Applicant was not in wilful default. It is noted that no confirmatory affidavits were attached to the deponent's affidavit by the people and officials mentioned therein. The Applicant further submits that it has substantial prospects of success in this matter.

[4] In opposing condonation, the Respondents aver that the Applicant was in wilful default as the Respondent had issued a cautionary letter about this on 19 September 2022. Further, that the fact that post the judgment of this court where the application was struck off the roll on 24 July 2023, the Applicant took another one and half month to bring this application, exacerbates the Respondents' frustration and prejudice.

[5] The test for condonation is the interests of justice. It is trite that the granting of condonation falls within the discretion of the court, which discretion must be exercised judiciously upon consideration of all facts. Condonations are not merely for the taking, the party seeking a condonation must show sufficient course for the court to exercise such a discretion in its favour – **Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC)** at para 23. The Appellate Division (as it then was) set out the test for condonation in **Melane v Santam Insurance Co. Ltd 1962(4) SA 531 (A)** at 532 as follows:

"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, save of course that if there are no prospects of success there would be no point in granting condonation..."

[6] Looking at the degree of lateness i.e. one day, and the reasons proffered by the Applicants, despite there being no confirmatory affidavits from the Counsel and the NDPP's officials, I am of the view that on the averments attributable only to the deponent to the affidavit, the explanation is reasonable and the Applicants cannot be said to have been in wilful default. It is clear from the reasons herein that the delay was not at all as a result of the appellants' neglect but systematic issues for which the Appellants cannot be blamed.

[7] In **Brummer v Gorfil Brothers Investments (Pty) Ltd 2000 (2) SA (CC)**, the Constitutional Court stated that an application for condonation should be granted if it is in the interests of justice and refused if it is not. Looking at the reasons for which the applicants assail my judgement, which reasons I deal with below in my consideration of the application for leave, it is my considered view that it is in the interests of justice that condonation be granted.

[8] I now turn to deal with the application for leave to appeal. In the main, the Applicants assail my judgment on the basis that I failed to have regard to prescription. They assail my finding that prescription on detention only starts to run once a person is released from custody. They aver that there was no evidence to justify a finding for malicious prosecution and further that the damages awarded are out of sync with prevailing jurisprudence. For these

reasons the Applicants submit the appeal court will arrive at a different conclusion.

[9] In opposing this application, the Respondents point out that the Applicants did not plead that the claim premised on arrest and / or detention had prescribed and that the award for damages fall within the purview and wide discretion of the trial court. The Respondents pray that this application be dismissed with costs.

[10] The substantive law pertaining to applications for leave to appeal is encapsulated in **Section 17 (1) of the Superior Courts Act 10 of 2013**, and sets out the test as follows:

“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.”*

[11] Section 17(1) clearly sets out that an applicant seeking leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success in the appeal. In **Democratic Alliance v President of the Republic of South Africa and Others (21424/2020) [2020] ZAGPPHC 326 (29 July 2020)** at para [4]- [5] the Full Court held as follows:

*“The test as now set out in s17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion. See, for example, **Van Heerden v Cronwright and Others 1985(2) SA 342 (T) at 343 H**. The fact that the Superior Courts Act now employs the word ‘would’ as opposed to ‘might’ serves to emphasise this point. As the Supreme Court of Appeal said in **Smith v S 2012(1) SACR 567***

(SCA) at para 7: *'More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal. The applicant must show that another court "would" come to a different conclusion in its favour'.*

[12] This dictum serves to emphasise a vital point: Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court *a quo* and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful.

[13] I do not deem it necessary to repeat the Applicant's reasons for appealing my judgement as they have been clearly stated in Para [8] above. In summary, the basis of this appeal is that I failed to have regard to prescription and that there was no evidence to justify a finding for malicious prosecution and further that the damages awarded are out of sync with prevailing jurisprudence. In this regard, if the court of appeal is in agreement with the Applicants in this regard, it may be that it would come to a different conclusion. For this reason, I am of the view that this application for leave must succeed.

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

1. The late filing of the applicants' application for leave to appeal is condoned.
2. Leave to appeal to the full bench of this Division is granted.
3. Costs shall be costs in the cause.


D.P. MTHIMUNYE

Appearances:

For the Applicants : Adv N A Cassim, SC
Maisels Chambers
Johannesburg 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.