



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: CA 68/2022

ECGH: 1542/2017

In the matter between:

**MINISTER OF POLICE
NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

**FIRST APPELLANT

SECOND APPELLANT**

and

THEMBANI GQADA

RESPONDENT

JUDGMENT

MBENENGE JP

[1] Foundational to this appeal is an order by the court *a quo* dismissing, with costs, the appellants' application to be absolved from the instance. The appeal serves before this Court with the leave of the court *a quo* and emanates from an

action instituted by the respondent against the first appellant for malicious arrest and detention, and for malicious prosecution against the appellants.

[2] In pursuit of his defence to the action, the first appellant pleaded that the arrest had been lawful and not malicious, it having been sanctioned by section 40(1)(b) of the Criminal Procedure Act 51 of 1977;¹ the arrest of the respondent had been based on a reasonable suspicion that the respondent had committed murder, an offence referred to in Schedule 1 to the Act. Apropos the malicious detention claim, the first appellant pleaded that the respondent had been charged with a Schedule 5 offence,² with the result that the Magistrate's Court had been obliged to detain the respondent until he adduced evidence establishing that releasing him from custody would be in the interests of justice; the respondent's detention subsequent to his first appearance in court had been a sequel to the exercise of the court's discretion and was thus unassailable.

[3] Both appellants pleaded that, based on information contained in the relevant police docket, there was a *prima facie* case on the strength of which the respondent could be prosecuted.

[4] At the hearing before the court *a quo*, the respondent adduced evidence in support of the claims. Upon closure of the respondent's case, the appellants, being of the view that the respondent had failed to adduce sufficient evidence upon which a reasonable court might grant judgment in the respondent's favour, applied to be absolved from the instance,³ which was opposed by the respondent. On behalf of the appellants, the court *a quo* was urged 'to dismiss

¹ The Act.

² Murder.

³ The test set out in *Gordon Lloyd Page and Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 92E-G as formulated in *Claude Neon Lights (SA) Ltd v Daniele* 1976 (4) SA 403 (A) at 409G-H is:

'[N]ot whether the evidence led by the Plaintiff established what would finally be required to be established, but whether there is evidence upon which a Court applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.'

this application “with costs”. The respondent argued to the contrary, urging that ‘the court absolve the respondents [from the instance] “with cost[s]”’. From a reading of the record, nothing more on the issue of costs was debated. The application was dismissed⁴ ‘with costs’.

[5] The appellants thereupon applied for leave to appeal, *inter alia*, on the ground that the court *a quo* ‘erred in dismissing the [a]pplicants’ application to be absolved with a costs order against them’.

[6] The application for leave to appeal was granted ‘with costs’. In its reasons subsequently handed down, the court *a quo* acknowledged that an order dismissing an application for absolution from the instance is not appealable because it does not bring finality to the proceedings, but reasoned that the appellants should be granted leave to appeal ‘since exceptional circumstances exist to justify the matter to be considered by a full bench’.

[7] In arriving at its conclusion, the court *a quo* said:

‘[5] Mr *Mnyani* contended that I erred in awarding costs against the respondent in dismissing their application for absolution and in linking that award to an incorrect identification and application of principles regarding the burden of proof in relation to claims for malicious arrest.

[6] In dismissing the application for absolution, I relied on the submission of the respondent (plaintiff) regarding his claim for unlawful and malicious arrest and prosecution against the first applicant. In the instance of unlawful arrest, the burden to justify the arrest shifts to the defendant.

[7] Despite the argument directed at unlawful and malicious arrest, the claim the plaintiff instituted was in respect of malicious arrest. In such cases, the full onus rests on the plaintiff.

⁴ Much as I prefer ‘refused’, ‘dismissed’ and ‘refused’ have the same effect. (*Purchase v Purchase* 1960 (3) SA 383 (N) at 385A.

Since I accepted the argument as presented in resisting the application for absolution, I erred. The award of costs followed on that basis and was thus equally granted in error.’

[8] Uniform rule 49(4) requires a notice of appeal to state two things: (a) the part of the judgment or order appealed against; and (b) the particular respect in which the variation of the judgment or order is sought.

[9] On the authority of *Leeuw v First National Bank*,⁵ this Court is entitled to make findings in relation to ‘any matter flowing fairly from the record’.

[10] The appellants did not prosecute the appeal timeously. They now seek leave of this Court to condone the delay and reinstate the appeal which lapsed by operation of law. The application is not opposed, as indeed an acceptable explanation for the delay of approximately 32 days has been tendered. The explanation boils down to this: the transcribers struggled to obtain records of the proceedings. They initially advised the appellants’ attorney of record in one of many telephone calls that, according to the Registrar, the recordings were required by the presiding judge. Eventually, all the records for the relevant days were secured and the transcript was produced. Resulting from this delay, it became impractical to deliver the relevant notice to prosecute the appeal without the records, hence such delivery was made 32 days later.

[11] Considering the prospects of success and all other relevant factors,⁶ it is in the interests of justice to grant condonation and to reinstate the appeal.

[12] In my view, and regard being had to matters flowing fairly from the record, the two issues that are dispositive of this appeal are, first, whether the

⁵ [2009] ZASCA 161; [2010] 2 All SA 329 (SCA); 2010 (3) SA 410 (SCA) para 5.

⁶ Namely, the degree of non-compliance (and lateness), the importance of the case, the respondent’s interest in the judgment’s finality, the court’s convenience and avoidance of delays in the administration of justice (*United Plant Hire (Pty) Ltd v Hills and Others* 1976(1) SA 717 (A) at 720E-G).

order of the court dismissing the application for absolution from the instance is appealable and, secondly, whether the cost order in the application for leave to appeal by the court *a quo* was correct.

[13] The first issue is capable of speedy resolution. The test for an appealable judgment or order was succinctly stated by Harms AJA, in *Zweni v Minister of Law and Order of the Republic of South Africa*,⁷ as follows:

‘[F]irst, the decision must be final in effect and not be susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.’

[14] Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 is of relevance. It provides:

‘When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.’

[15] The test in *Zweni* is easier stated than applied, hence in *Cronshaw and Another v Coin Security Group (Pty) Ltd*⁸ the question regarding when a decision is ‘interlocutory’, and thus not appealable, or ‘final’, and thus appealable is ‘a question that has vexed the minds of eminent lawyers for many centuries, and the answer has not always been the same. The question is intrinsically difficult, and a decision one way or the other may produce some unsatisfactory results’.⁹

⁷ [1992] ZASCA 197; 1993 (1) SA 523 (A) at 531H-533E; also see *Government of the Republic of South Africa and Others v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA) para 17, where the court held:

‘It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.’

⁸ [1996] ZASCA 38; 1996 (3) SA 686 (SCA); [1996] 2 All SA 435 (A) at 690D-E.

[16] The common law test for appealability has since been denuded of its somewhat inflexible nature. Unlike before, appealability no longer depends largely on whether the order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All of this is now subsumed under the constitutional ‘interest of justice’ threshold.¹⁰

[17] In light of the principles set out above, the question to be posed and answered is whether an order refusing absolution from the instance is appealable.

[18] As far as I could have ascertained, the position relative to the refusal of an application for absolution from the instance, which is quintessentially interim in nature, has remained unchanged. In the words of Satchwell J, in *Sparks v Sparks*,¹¹ ‘[a]n order of absolution is ordinarily not decisive of the issue raised, it decides nothing for or against either party’.

[19] It is trite that a judgment given and an order made by a court refusing an application to absolve a defendant from the instance is not the final refusal of specific relief. The reason for this is not far to seek: the refusal amounts to no more than a direction or ruling that the case should proceed.¹²

[20] In *Liberty Group Limited t/a Liberty Life v K & D Telemarketing and Others*¹³ Ledwaba AJA cited, with approval, the remarks made by Lord De

⁹ Also see *Minister of Safety and Security and Another v Hamilton* 2001 (3) SA 50 (SCA) para 4, where Cameron JA stated that the question of which judgments, orders and rulings are appealable ‘has presented persisting complexity’.

¹⁰ *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) para 40.

¹¹ 1998 (4) SA 714 (W) at 721F.

¹² *Levco Investments v Standard Bank of South Africa Ltd* 1983 (4) SA 921 (AD) at 928.

¹³ (2020) ZASCA 41.

Villiers CJ in *Steytler v Fitzgerald*¹⁴ that ‘[the refusal] to grant absolution from the instance on the application of the defendant is purely interlocutory and has not the effect of the definitive sentence, in as much as the final word in that suit has still to be spoken’.

[21] In the instant matter, after absolution from the instance had been refused, the appellants approached the court *a quo* seeking leave to appeal, which was not the appropriate step to take, because an order refusing to absolve a litigant from the instance is a mere ruling with no practical effect or result.

[22] In terms of section 16(2)(a)(ii) of the Superior Courts Act, save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs. In my view, no exceptional circumstances justified a departure from the general rule. For reasons to be made clearer hereunder, not even the pronouncement on costs amounted to exceptional circumstances justifying such departure.

[23] The court *a quo* conflated the incidence of the onus of proof applicable to a claim for malicious arrest, which is different from that applicable to a claim based on unlawful arrest and where the burden to justify the arrest rests on the arrestor.¹⁵ That, however, is a different issue altogether, with no bearing on whether an order refusing absolution from the instance is appealable. The

¹⁴ 1911 AD 295 at 304.

¹⁵ In *Newman v Prinsloo and Another* 1973 (1) SA 125 (W) at 127H-128A, the distinction between wrongful arrest and malicious arrest was explained as follows:

‘Stated shortly, the distinction is that in wrongful arrest, or false imprisonment, as it is sometimes called, the act of restraining the plaintiff’s freedom is that of the defendant or his agent for whose actions he is vicariously liable, whereas in malicious arrest the interposition of a judicial act, between the act of the defendant and the apprehension of the plaintiff, makes the restraint on the plaintiff’s freedom no longer the act of the defendant but the act of the law. The importance of the distinction is that, in the case of wrongful arrest, neither malice nor absence of justification need be alleged or proved by the plaintiff, whereas in the case of malicious arrest it is an essential ingredient of the plaintiff’s cause of action, which must be alleged and proved by him, that the defendant procured or instigated the arrest by invoking the machinery of the law . . .’

impugned order, in so far as it dismisses the application for absolution from the instance, ought to stand.

[24] On behalf of the appellants, it was argued that this Court is at large to consider whether, on the facts of this case, absolution should nevertheless be granted. I disagree. We are being invited to consider the merits of a case that has yet to be finalised by the court *a quo*. The action deserves of being remitted to the court *a quo*; it is seized of the matter. At the resumed hearing, it will still be available to the appellants to elect either to close their case and, once more, apply for absolution from the instance or for judgment in their favour. The appellants could also lead evidence before closing their case, whereafter the question will be whether on all the evidence before it judgment should be granted for the respondent or the appellants, or whether absolution from the instance should be ordered with an appropriate order of costs.

[25] Therefore, the order of the court *a quo* refusing absolution from the instance is not appealable.

[26] The next question is whether costs should have been awarded in favour of the respondent when absolution from the instance was refused. Generally speaking, given that the refusal of absolution is a mere interlocutory ruling, costs in such an instance stand over for determination at the conclusion of the trial. It is trite law that an order for costs resulting from a wrong exercise of discretion or which was influenced by wrong principles and arrived at in a manner that could not reasonably be made by a court properly directing itself to all the relevant facts and principles is liable to be set aside.¹⁶

¹⁶ Compare *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR, 199 (CC) para 88.

[27] There is no doubt that the costs order under discussion, too, was granted erroneously. From a reading of the judgment on the application for leave to appeal, the court *a quo* conceded as much. The same error was committed in making costs follow the result of a successful application for leave to appeal. The parties have agreed, correctly so in my view, that this Court should exercise its inherent power and have it set aside.

[28] The appellants have attained partial success in that the costs order in the application for absolution from the instance is demonstrably liable to be set aside. The respondent has also attained success, to the extent that the order refusing absolution from the instance is extant. Where both parties have achieved partial success in an appeal, the court may order each party to pay its own costs of appeal.¹⁷ That is the way to go in this case.

[29] I, therefore, grant the following order:

- (1) The appellants' failure to timeously prosecute the appeal against the order of the court *a quo* dismissing the appellants' application for absolution from the instance is hereby condoned, with no order of costs.**
- (2) The appeal is hereby reinstated.**
- (3) The appeal against the dismissal of the application for absolution from the instance at the end of the respondent's case is dismissed.**
- (4) The appeal against the order directing the appellant to pay the costs of the application referred to in paragraph 3 of this order is upheld.**

¹⁷ *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* 1979 (1) SA 532 (T) at 539; *Southern Brake Co (Pty) Ltd v Assembly and Construction Electrical (Pty) Ltd* 1981 (1) SA 572 (N) at 577 (no order as to costs of appeal); *National Association of Broadcasters v South African Music Performance Rights Association and Another* [2014] ZASCA 10; [2014] 2 All SA 263 (SCA); 2014 (3) SA 525 (SCA) para 78.

(5) The costs order of the court *a quo* is set aside and substituted with the following:

‘The costs of the application for absolution from the instance, if any, shall stand over for determination at the conclusion of the trial.’

(6) The order of the court *a quo* granting the application for leave to appeal with costs is varied so as to reflect that the costs shall be costs in the appeal.

(7) Each party shall pay their own costs of the appeal.

(8) The matter is remitted to the court *a quo* for it to deal with the matter further.

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

BLOEM J:

I agree.

G H BLOEM

JUDGE OF THE HIGH COURT

RONAASEN AJ:

I agree.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the appellants : *M Mnyani*
Instructed by : The State Attorney
Gqeberha

C/o Yokwana Attorneys
Makhanda

Attorney for the respondent : *M Pangwa*

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Mthatha
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Makhanda

Heard on : 15 May 2023

Delivered on : 23 May 2023