IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32378/2016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

DATE SIGNATURE

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

MOLOKO BEVAN KABELO Respondent

JUDGMENT

Sardiwalla J

Introduction

[1] The applicant applied for reasons in terms of Rule 49(1)(c) pursuant to an order that I handed down on 5 November 2019 dismissing the application for leave to appeal. The applicant also seeks condonation of its failure to bring the application for leave to appeal in the time period required. The application for leave to appeal was against part of the order, appealing against the claim of malicious prosecution only.

[2] In the interest of brevity evidence led before the court a quo will not be repeated in this judgment in any great detail unless material to the conclusions reached.

Background

[3] On the 10 June 2015, the respondent was arrested in terms of S40 (1) (b) of the CPA by Constable Abel Sibanyoni and Sergeant Rebecca Mathlolokwgane when they received a complaint that a person was being attacked by a community mob. At the scene they were informed that the respondent had allegedly robbed and attacked the complainant. He was accosted by the complainant's husband whilst he was walking. Notwithstanding his explanations, the respondent was subsequently arrested on suspicion of armed robbery only as there was insufficient evidence to charge him with attempted rape.

[4] In due course the respondent was arraigned and after several appearances was released on 5 November 2015 on a Section 174 discharge as the prosecution failed to prove its case

against the plaintiff.

[5] On 7 August 2019 the respondent instituted action against the appellants for damages sustained as a result of what was alleged to be an unlawful arrest and malicious prosecution. After hearing the parties, I handed down the following order:

1. The defence of unlawful arrest is dismissed;
2. The defence of malicious prosecution is upheld;
3. The Plaintiff is entitled to such damages as he may be able to prove he sustained due to the malicious prosecution by Defendant; and
4. The Defendants are to pay the costs of this trial.

[6] On 5 November 2019 the applicant brought an application for leave to appeal, appealing against my finding of malicious prosecution. I dismissed the application with costs for the reasons provided below.

The legal framework and evaluation on condonation applications

[7] Condonation is not a mere formality and is not to be had "merely for the asking".[1] What is required is an explanation not only of the delay in the timeous prosecution but also the delay in seeking condonation for non-compliance.[2] The applicant must show that he or she did not willfully disregard the timeframes provided for in the Rules of Court.[3] He or she is obliged to satisfy the court that there is sufficient or good cause for excusing them from compliance.[4]

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[1] *Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) at para [6].*
[2] *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited 2017 (6) SA 90 (SCA) at para [26].*
[3] *Shabalala v Goudine Chrome (Pty) Ltd and Another, unreported, case no: M 342/2016, Northwest Provincial Division, Hendricks J, 2 November 2017, at para [3].*
[4] *Erasmus v Absa Bank Ltd and Others, unreported, case no: A/982/13, Gauteng Provincial Division, Pretoria, Full bench per Potteril J, at para [11].*

[8] Condonation may be refused where there has been a flagrant breach of the rules especially where no adequate explanation is proffered.[5] The applicant should convince the court to exercise its discretion in its favour.

[9] An application for condonation should be brought without delay and as soon as possible once an applicant realizes that it has not complied with a rule of court.[6] And it is not to say where non-compliance was due entirely to the neglect of the applicant's attorney, condonation will be granted.[7]

[10] In the *Mulaudzi* case the Supreme Court of Appeal set out the factors to take into account when considering an application for condonation:

> *"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.[8] 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.[9]*

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[5] *Erasmus supra at para [11].*

[6] *Mulaudzi supra at para [26].*

[7] *See Darries v Sheriff, Magistrate's Court, Wynberg and Another 1998 (3) SA 34 (SCA) at 40I—41D.*

[8] *Uitenhage Transitional Local Council supra at para [6].*

[9] *At para [26].*

[11] In the earlier case of ***Melane v Santam Insurance Co Ltd***[10] the then Appellate Division explained the broad approach to be adopted in such an enquiry:

> *"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. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."*

[12] The preceding judgment indicates that these factors should be considered cumulatively so the court can determine whether sufficient cause has been shown to grant condonation. However, for purposes of convenience, they are briefly set out individually below.

[10] *1962 (4) SA 531 (AD) at 532 B—E.*

Degree of lateness

[13] Judgment was delivered on 7 August 2019. In the current application, the application for leave to appeal by the applicant was brought outside the fifteen (15) day period prescribed in Rule 49(1)(b) of the Uniform Rules of Court and was only served on 11 September 2019. This is nearly a month after the judgment was delivered.

The explanation for the delay

[14] The applicant is required to provide a "full, detailed and accurate account of the causes of the delay and their effects … 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."[11] There must be an explanation for the entire period of the delay.[12]

[15] The applicant explains that she only became aware of the judgment on 22 August 2019 when a notice of taxation was delivered to her office. She subsequently requested a copy of the judgment. The applicant's entire cause is based on the fact that their attorney did not know that the judgment was delivered and therefore could not have been reasonably expected to be aware of the proceedings against them in order to challenge same.

[16] I must however respectfully disagree with the applicants. Even if the version of the applicants' is to be accepted, which in my respectful opinion cannot stand to be true, that they only became aware of the judgment on 22 August 2019 this does not explain

[11] *Uitenhage Transitional Local Council supra* at para [4].
[12] See *Darries supra* at 41A

why or if their attorney made an attempt at any stage to contact the respondent's attorney's or the Court to establish when the judgment was expected to be delivered. Further it is a standard practice of this court to notify parties when a judgment is to be delivered, requesting that all parties be present and written copies are given to the parties for further proceedings that may arise such as an application for leave to appeal. The applicants have not alleged that her attorney did not receive a notification and request by this court that the judgment was being delivered on 7 August 2019. It is the applicants' sole version that their inability to challenge any of the actions against them was due to the negligence of their attorney. It is apparent from the reasons proffered by the applicants' that their explanation is lacking in detail, and does not account for the delay.

Prejudice to the fourth respondent and his interest in the finality of the judgment

[17] One must not lose sight of the interest of the respondent in this matter specifically in the finality of the judgment. I am of the view that the respondent has already suffered undue prejudice as he was first arrested in June 2015 and that he has not received any substantial redress after 5 years. This court is aware that the applicants aver that it was always their intention to apply for an application for leave to appeal but it cannot be said that there will be no prejudice suffered by the respondent by accepting this application.

Avoidance of unnecessary delay in the administration of justice

[18] The administration of justice requires that matters be dealt with efficiently and without delay. Whilst it is in the interests of justice

that the matter be heard, the court is also aware that the applicant has shown a flagrant disregard for the court rules and processes without any reasonable explanation for the delay. This itself goes against the interests of justice. The applicants allege that it is merely 9 days late in filing this application, which is in fact incorrect, it is 11 days late in filing its applicant.

Prospects of success and importance of the case

[19] A court must assess the prospects of success unless the other facts, considered cumulatively, are such that it makes the application for condonation "obviously unworthy of consideration"[13]. This would be in instances of flagrant breaches of the rules, especially where there is no acceptable explanation for the breach.

[20] As already recorded above, if there are no prospects of success there would be no point in granting condonation; a slight delay and a good explanation may help to compensate for prospects of success which are not strong; and the importance of the issue and strong prospects of success may tend to compensate for a long delay.

[21] The time delay of approximately 11 days is not so egregious (meaning please) but the explanation is so unsatisfactory or incomplete that condonation should be refused out of hand. However, it is in the interests of justice in the circumstances of this case, to not refuse condonation without first considering the prospects of success, the importance of the case, and whether

[13] *Mulaudzi supra* at para [34]

there is some other compelling reason for the appeal to be granted, which I will do so below.

Leave to appeal

[22] With that background it is appropriate now to consider Section 17(1) of the Superior Courts Act 10 of 2013,which provides the test for an appeal as follows:

> *"(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..."*

[23] In considering the provisions of s 17(1)*(a)*(ii) of the Superior Courts Act which provide that leave to appeal may be granted, notwithstanding the Court's view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard. There is established jurisprudence in this Court that where an appeal has become moot the Court has a discretion to hear and dispose of it on its merits.

[24] The merits of the appeal remain vitally important and will often be decisive. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed previously before the Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal

issues as a court of both first and last instance. That is equally true of this Court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage.[14] But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.[15]

[25] The only ground of appeal is against my finding of malicious prosecution. The applicant submits that I erred in finding that the applicant acted without reasonable and probable cause. That the applicant had an honest belief that the facts available at the time constituted an offence and that a reasonable person could have concluded that the respondent was guilty of an offence. Further that it was not necessary for weapons to be found or to have exhibits in a matter in order to secure a conviction. The prosecutor was of the opinion that there was a prima facie case based on her version that the witness testimonies did not contradict each other and therefore did not deem it necessary to investigate the discrepancy relating to what the respondent was wearing as the complainant was adamant that the respondent was the perpetrator. The applicant contended that the fact that there

[14] *Van Rensburg v Van Rensburg & andere 1963 (1) SA 505 (A) at 510 A-C. The approach has been endorsed by the Constitutional Court. CUSA v Tao Ying Metal Industries & others (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68.*
[15] *Fischer & another v Ramahlele & others (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras 13 and 14.*

was an honest belief that the respondent was guilty should be enough to exclude the absence of reasonable and probable cause. The fact that the respondent was acquitted does not prove that the applicant acted with malice.

Malicious prosecution

[26] The requirements for a successful claim for malicious prosecution as set out by the Court in ***Minister for Justice and Constitutional Development v Moleko***[16] **para 8 were restated in *Rudolph & others v Minister of Safety and Security & another***[17] para 16:

"(a) that the defendants set the law in motion (instigated or instituted the proceedings);

(b) that the defendants acted without reasonable and probable cause;

(c) that the defendants acted with malice (or animo injuriandi); and

(d) that the prosecution has failed."

See also ***Moaki v Reckitt & Colman (Africa) Ltd* 1968 (3) SA 98 (A); *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA).**

[27] It is not in dispute in this matter that the first applicant instituted the criminal proceedings against the respondent and that those proceedings were terminated in his favour. What the first applicant is challenging is this court's finding that its decision to prosecute the respondent was without reasonable cause and malicious.

[16] [2008] 3 All SA 47 (SCA)
[17] 2009 (5) SA 94 (SCA)

Counsel for the first applicant submitted that in order for malice to be established the applicants must have foreseen the possibility that they were acting wrongfully but nevertheless continued to act. Counsel referred the court to the case of ***Minister of Justice and Constitutional Development v Moleko***[18]**.**

[28] The Court in ***Beckenstrater v Rottcher and Theunissen***[19] set out the test for "absence of reasonable and probable cause" as follows:

"When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause."

[29] The test contains both a subjective and objective element which means that there must be both actual belief on the part of the prosecutor and that that belief must be reasonable in the circumstances (J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* (2 ed, 2005) at 176).

[18] *supra*
[19] *1955 (1) SA 129 (A) at 136A-B*

[30] In my view it is common cause that there was no probable cause to prosecute the respondent because the respondent was discharged in terms of section 174 of the Act. Applying the above test, a reasonable person in the position of the applicants would have taken further steps to investigate the discrepancies in the witness's versions relating to what the respondent was wearing. The applicants' averment that the complainant was adamant that the respondent was the perpetrator cannot be sustained. If this was the only test or measure to be applied in prosecuting persons who committed offences then the prosecution would usurp the role the judiciary in determining the basis of an accused's person's guilt, not to mention it would create an opening for the public to abuse the court processes and many innocent people may be unjustly imprisoned. This is definitely a possibility the applicants should have foreseen, applied their minds to that further investigations were required before enrolling the matter. At the very least it should have been a precautionary measure against any issue of mistaken identity that may arise. This is also a possibility that the applicants should have foreseen. Therefore, the applicants could not have had an honest belief that the respondent was guilty of an offence without first taking those steps and the applicant failed to take those steps. Needless to say that respondent was discharged on the basis that the prosecution failed to prove its case. The only conclusion that one can therefore arrive is that prosecution of the respondent was malicious and without probable cause.

[31] **Accordingly, I order as follows:**

1. **The applicant's failure to bring the application within the time prescribed by Rule 49(1)(b) is granted.**
2. **The application for leave to appeal is refused.**
3. **The applicant is ordered to pay the costs of the application on an attorney and own client scale including the cost of counsel.**

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SARDIWALLA J

JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing	:	05 NOVEMBER 2019
Date of judgment	:	25 FEBRUARY 2020

Plaintiff's Counsel	:	Adv.: M Mthombeni
Plaintiff's Attorneys	:	Nobela Attorneys
Defendant's Counsel	:	Adv.: B Nodada
Defendant's Attorneys	:	State Attorney