

LORRAINE UITHALER (born BONAPARTE)

Petitioner

and

UITENHAGE PASSENGER TRANSPORT LIMITED

Respondent

IN THE SUPREME COURT OF SOUTH AFRICA  
(APPELLATE DIVISION)

In the matter between:

LORRAINE UITHALER (born BONAPARTE)                      Petitioner

and

UITENHAGE PASSENGER TRANSPORT LIMITED                      Respondent

CORAM:      KOTzé JA, GALGUT et SMUTS AJJA

HEARD:      24 February 1984

DELIVERED:      19 March 1984

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J U D G M E N T

GALGUT, AJA

During the night of 31 December 1977 and in

the .....

the Black area of Uitenhage, the petitioner, to whom I shall refer as the plaintiff, whilst a passenger aboard a bus owned by the respondent, sustained bodily injuries in consequence of stones being thrown at the bus by bystanders. The bus was being driven by an employee of the respondent. Plaintiff sued the respondent, to whom I shall hereafter refer as the defendant, in the South Eastern Cape Local Division for damages in the sum of R11 788.90. The parties later agreed the amount of damages. The figure so agreed was R8 500.

The action came before DE WET, J. On 10 November 1981 he handed in a judgment in which he ordered absolution from the instance with costs. The plaintiff was dissatisfied with the judgment and within

21 days .....

21 days, as required by rule 5(1) of the Appellate Division (AD) Rules of Court, noted an appeal to this Court, viz on 2 December 1981. She failed to lodge the record of the proceedings within three months of the judgment as required by AD rule 5(4)(b). In consequence the appeal is deemed to have been withdrawn. She wishes to proceed with the appeal but because of her financial position now seeks to do so in forma pauperis. In terms of AD rule 4(7)(a) a petition for leave to appeal in forma pauperis must be lodged not later than 21 days after the appeal has been noted. This was not done.

The relief which plaintiff now seeks from the Court is:

(i) condonation of her failure to timeously lodge her

petition .....

petition for leave to prosecute her appeal in forma

pauperis; and

(ii) condonation of her delay in prosecuting the appeal

and

(iii) if such condonation is granted, for leave to

prosecute the appeal in forma pauperis.

Plaintiff had brought her action in the Court  
a quo with the assistance of the Legal Aid Board (the  
Board). After the judgment was handed in, and the  
appeal duly noted on 2 December 1981, it was decided to  
again approach the Board for assistance to finance the  
appeal. In order to support the request a memorandum  
was obtained from Counsel in which he expressed the

view .....

view that plaintiff's chances of success on appeal were reasonable. Pursuant thereto the application to the Board was made on 11 January 1982. The application was refused. A further application for assistance was then made direct to the Chairman of the Board. This in turn was refused on 2 February 1982.

I pause to mention that on 2 December 1981, plaintiff's attorney had written to defendant's attorney requesting an extension of time for the lodging of the record pending the Board's decision. The defendant's attorney replied saying defendant was prepared to grant a reasonable extension and inquired what period was required. Further inconsequential correspondence followed causing .....

causing defendant's attorney on 12 February 1982 to write asking whether plaintiff intended proceeding with her appeal and if so requesting that the record be filed by 1 March 1982. Plaintiff's attorney did not reply to this letter.

After the aforesaid appeal to the Chairman of the Board had failed an unusual extra-judicial step was taken. It was decided to ask the local Member of Parliament to interview the Minister for Justice in the hope that the latter would persuade the Board to give financial assistance. After some delay, during which requests were made to the Member of Parliament to try and expedite the matter, the Minister, on 24 May 1982, advised that .....

that he could not aid plaintiff. For reasons which have not been satisfactorily explained, it was only at the end of June that it was decided to investigate the possibility of proceeding in forma pauperis.

As we have seen, because of the provisions of AD rule 5(4)(b) the appeal was, on 10 February 1982, deemed to have been withdrawn. On 13 July 1982, plaintiff's attorney wrote to defendant's attorney advising that plaintiff was contemplating proceeding in forma pauperis and asking defendant to agree to the appeal being reinstated. Defendant's attorney, on 2 August, advised plaintiff's attorney that defendant was not prepared to agree to that request. Thereafter

on .....



on 13 August 1982, plaintiff's attorney wrote asking whether the defendant was prepared to consent to plaintiff prosecuting her appeal in forma pauperis. Defendant's attorney, in a letter dated 8 September, for reasons therein set out, advised that defendant refused its consent.

The petition for the relief set out above, i.e. for condonation and for leave to proceed in forma pauperis was launched on 10 September 1982, i.e. some eight months late.

The inordinate delay is due to the following factors:

- (a) the decision, after the Board had refused assistance, to take the extraordinary extra-judicial step of asking .....

asking a member of parliament to approach the Minister of Justice, instead of then deciding to seek leave to proceed in forma pauperis;

(b) the unexplained delay from 24 May 1982 (when it was known the Minister could not assist) till 13 July when defendant was asked to reinstate the appeal.

(c) the delay from July 1982 till 10 September 1982. This delay was partly due to correspondence which passed between the attorneys.

The defendant opposes the grant of the condonation sought and also opposes the grant of leave to sue in forma pauperis. There can be no doubt that the delay is due in large measure to the misguided decision by the attorney .....

attorney to take the extra-judicial steps detailed above.

and to the unexplained delay from 24 May till 13 July.

This Court is always anxious that a poor person is not kept out of his rights; on the other hand, it must also see that his opponent is not put to needless expense; see MacRose v Robinson 1946 AD 1 at p8. It is well settled that, in considering applications for condonation, the Court has a discretion. In essence it is a matter of fairness to both sides. The relevant considerations have frequently been stated in this Court. There is no need to repeat them. They are set out in the cases cited below. The merits of the appeal may in some cases be very important. If there are no prospects of

success .....

success condonation will not be granted. See

Liquidators, Myburgh, Krone and Co. Ltd. v Standard Bank

and Another 1924 AD 226 at p231; Federated Employers

Insurance Co. v McKenzie 1969(3) SA 360(A) at p364;

Kgobane and Another v Minister for Justice and Another

1969(3) SA 365(A) at p370.

The relevant facts leading up to the unfortunate accident can be stated shortly. The Congregational Church in Uitenhage had arranged an Old Year's eve service for 11 pm in its Dale Street Church. The members of this Church lived in three coloured townships, Rosedale,

Thomas Gamble .....

Thomas Gamble and Gerald Smith. Three buses, to convey the congregants to church, were hired from the defendant. The buses started at Rosedale and en route picked up members of each township. After the service, members entered the buses for the return journey. Plaintiff entered a bus driven by one Rayibo. The passengers in his bus were going to Rosedale. No route was specified in Rayibo's waybill. There were two routes from the Church to Rosedale. The longer one was a winding one which passed first through the Gerald Smith township and then through Thomas Gamble to Rosedale. The other, a substantially shorter route, ran along Maduna Road through a Black township.

Plaintiff .....

Plaintiff, in her particulars of claim, alleged that Rayibo was acting in the course of his employment with defendant and that he owed a duty to the passengers to exercise reasonable care with regard to their safety. These allegations were admitted by defendant. Plaintiff further alleged that it was the duty of the driver, Rayibo, to avoid taking the bus through the Black residential area of Uitenhage; that it was reasonably foreseeable that if he did drive the bus through that area an incident such as stone throwing might occur resulting in possible injury to the passengers; that in breach of that duty he negligently drove the bus through the Black township with the result that plaintiff was injured by one of the stones .....

stones thrown at the bus.

Defendant, in its plea, made the admissions  
aforementioned and went on -

(aa) to deny that it was reasonably foreseeable that stones  
would be thrown at the bus as alleged; that the  
driver had been negligent as alleged or had acted in  
breach of his duty to the passengers. In an  
alternative plea defendant pleaded:

(bb) that plaintiff was being conveyed for reward in the  
course of the business of the owner (defendant);  
that the injuries sustained by plaintiff were caused  
by, or arose out of the driving of the bus; that  
accordingly the plaintiff should have sued the

authorised .....

authorised insurer of the vehicle in terms of section 27 of Act 56 of 1972 and not the defendant.

It appears from the judgment of the learned Judge a quo that a passenger, Jochens, testified that when he saw the bus take the turn off towards Maduna Road he shouted to Rayibo that that was the wrong road and was dangerous. A passenger, Brower, confirmed what Jochens had said, saying that passengers shouted and exclaimed that the route was dangerous. They both said that the words "dis gevaarlik" were used. A witness, Tshiko, testified that on New Year's eve the inhabitants of the Black townships expect to enjoy themselves and at midnight some of the rowdies interfere with cars and

sometimes .....



sometimes stone people and cars. That is a summary of the evidence for the plaintiff.

For the defendant Rayibo testified. He said he had been told by someone at the Church, and before the passengers had embarked, to take the Maduna road; that he was not told at any time, nor did he consider, that the route was dangerous; that he had often travelled the route without incident; that had he considered it dangerous he would not have taken it. A Lt. Annandale gave evidence. He said that he had been in Uitenhage 5<sup>1</sup>/<sub>2</sub> years and had often patrolled the township. He considered Maduna Road quite normal and had not found the Black township rowdy during the festive season.

The .....

The following extract from the judgment of the learned Judge a quo is significant:

"I am inclined to the view that Jochens and Brower exaggerated to some extent. I am prepared to accept that the passengers might very well have shouted that Rayibo was taking the wrong route, but I am not at all satisfied that passengers shouted that the route was dangerous. This allegation came too pat when these witnesses testified. These two witnesses gave me the impression that they were inclined to overstress this aspect. It must be born in mind that Rayibo is Xhosa speaking whereas the members of the congregation are coloureds and speak Afrikaans.

I am not satisfied that Rayibo understood the cries, if indeed there had been these warning shouts."

There was evidence that on occasions the buses had been stoned but these incidents did not follow any

pattern .....

pattern.

The Judge a quo found Rayibo to be a truthful witness. As we have seen he did not accept the evidence of Jochens or Brower. Whilst he did not comment adversely on the witness Tshiko, it is implicit from his judgment that he accepted Lt. Annandale's evidence.

The principles which guide an appellate court in an appeal on facts have so frequently been set out that they need not be repeated. It is sufficient to say that an appellate court will not lightly interfere with a trial court's findings of fact and credibility. It follows that the plaintiff failed to show that Rayibo was told that the route was dangerous or that he knew,

or .....

or had any reason to believe, that persons would throw

stones at the bus. I say this because that Judge a quo -

(aaa) did not believe Jochens and Bower;

(bbb) whilst not saying he rejected Tshiko's evidence,

accepted Lt. Annandale's evidence;

(ccc) accepted that Rayibo did not know, or have reason

to think, that the route was dangerous;

(ddd) even if Tshiko had knowledge of stone throwing

incidents on New Year's eve, this does not mean that

Rayibo had, or ought to have had, such knowledge.

The existence of negligence is ascertained by  
applying to the facts of each case the standard of conduct  
which the law requires. That standard is the degree of

care .....

care and skill which a reasonable man would exercise in the circumstances. In view of the fact that it was not shown that Rayibo knew or had any reason to believe that stones would be thrown at the bus, plaintiff failed to prove that Rayibo was negligent. It follows that plaintiff has failed to show any prospects of success on appeal. This Court would therefore not be justified in condoning the late lodging of the petition for leave to sue in forma pauperis. There is no need to discuss the defendant's alternative plea.

The application is accordingly dismissed with costs.

O. GALGUT, AJA

KOTZÉ, JA) Concur  
SMUTS, AJA)