

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Case Nr: 721/2007
Case Heard: 14/09/2009
Date delivered: 18/09/2009

In the matter between:

The Minister of Safety & Security
Constable Desmond Pofadder

1st APPLICANT
2nd APPLICANT

and

Christiaan Calitz van der Westhuizen
Martin Spangenberg

1st RESPONDENT
2nd RESPONDENT

JUDGMENT

Olivier J:

INTRODUCTION

1. This is an application for leave to appeal against the judgment which I granted against the first and second applicants, respectively the Minister of Safety and Security and Constable Desmond Pofadder, on 19 December 2008.
2. The application was only filed on 10 July 2009, almost seven months later, and the applicants are therefore also applying for condonation in this regard. Both applications are opposed by

the respondents, mr Christiaan Calitz van der Westhuizen en mr Martin Spangenberg, who were the plaintiffs in the action.

3. The printer's devil is to blame for the fact that the judgment signed by me (and handed down on 19 December 2008) does not fully correspond with the version which I had proofread and which, fortunately, is still saved on my secretary's computer.
4. The only differences are that paragraphs 55 and 63 were duplicated in the delivered version of the judgment, and that paragraph 57 (fortunately only the introductory part thereof, and not any of the subparagraphs thereto) was omitted from it.
5. The correct version of the judgment was made available to the representatives of the parties and the applications for condonation and for leave to appeal were argued on the basis thereof. For future reference a copy of the correct version (which I have marked "X") is annexed hereto.
6. The approach to be followed in applications for condonation is trite and was reaffirmed in **Van Wyk v Unitas Hospital** 2008 (2) SA 472 (CC) at 477:

"Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to 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."

DELAY AND EXPLANATION

7. The application for condonation is supported only by an affidavit by mr A S Basson, who describes himself as a legal administration officer in the South African Police Service and the head of the litigation division.
8. The reasons advanced by mr Basson for the failure to apply for leave to appeal timeously are as follows:
 - 8.1. Mr Basson stated that *"Die uitspraak is op 2009-01-14 deur die Staatsprokureur met die Suid-Afrikaanse Polisie bevorder"*.
 - 8.2. He furthermore declared that, *"onmiddellik na ontvangs van die uitspraak"*, the State attorney who had been involved with the matter was given telephonic instructions to file an application for leave to appeal.
 - 8.3. According to mr Basson those instructions were repeated in writing on 28 January 2009.
 - 8.4. Mr Basson furthermore made reference to several enquiries, dated 3 March 2009, 8 April 2009, 16 April 2009, 21 May 2009, 12 June 2009 and 16 June 2009, and stated that no written confirmation of the filing of an application for leave to appeal was ever received from the office of the State attorney.

- 8.5. He stated that assets of the first applicant were attached in execution on 18 June 2009.
- 8.6. Lastly mr Basson explained that State departments are compelled to make use of the services of the State attorney. He blamed the office of the State attorney for the failure and submitted that the applicants could not be held responsible.
9. The founding affidavit contains no allegation to the effect that there are reasonable prospects of success in the application for leave to appeal or on appeal.
10. Mr Basson declared that, when the State attorney was telephonically instructed to proceed with the filing of an application for leave to appeal, an instruction was also given that "*n volledige opinie ten opsigte van kwantum*" had to be furnished. There is no indication in mr Basson's founding affidavit that such an opinion had been obtained by the time that he deposed to the affidavit. It is therefore perhaps understandable that he was not prepared to make any allegation regarding the prospects of success.
11. The need for such advice at that stage does, however, raise the questions:
- 11.1. how an informed decision could have been taken (some seven months earlier) to concede the merits but to proceed to trial on precisely the issue of quantum; and

- 11.2. on what information the alleged instruction to file an application for leave to appeal would have been based.
12. Mr Basson annexed no proof of any of his allegations. What would have been easier than to annex a copy of the alleged written instruction?
13. Mr Basson chose not to inform the Court whether it was he who had given the alleged oral and written instructions and who had made the alleged enquiries, or some other police official. The way in which the allegations in his founding affidavit was framed makes it impossible to determine this.
14. Mr Basson furthermore neglected to say whether the alleged enquiries had been made in writing. If they had been made in writing, copies of the letters could have been annexed and, if any of those letters had been written by some other police official, the contents of those letters could have been confirmed on oath by the author/s thereof.
15. In terms of Uniform Rule 49 (1)(b) the application for leave to appeal should have been filed within 15 days after the judgment. It is against this background that the allegation that the judgment was received (if that is what "*bevorder*" means) by the South African Police on 14 January 2009 should be considered. The last-mentioned date was the 17th court day after the judgment had been delivered, and that means that the applicants would at that stage already have been late with an application for leave to appeal. The founding affidavit does not,

however, contain an allegation to the effect that the State attorney had also been instructed to apply for condonation.

16. The question would also be what the allegation that the instructions had been given "*onmiddellik na ontvangs van die uitspraak*" means. Would that mean on the same day, or perhaps shortly thereafter?
17. In my view vague and unsubstantiated allegations like these are simply not good enough where a party is seeking the indulgence of the Court.
18. The absence of any proof of the allegation that the telephonic instruction had been "*skriftelik herhaal*" on 28 January 2009 is also of importance because of the fact that an instruction to file an application for leave to appeal would at that stage have been well out of time, and the question whether the alleged document or letter at least contained an indication of an earlier oral instruction would have been crucial.
19. In an answering affidavit on behalf of the respondents their attorney made very clear and specific reference to the absence of any supporting documentation or details regarding the alleged enquiries.
20. No replying affidavit was, however, filed and neither the applicants nor the State attorney ever reacted to the implied invitation and challenge to produce such proof and to supply the details.

21. The State attorney is indeed still acting on behalf of the applicants, but no confirmatory affidavit from that office has been filed. Mr Rathidile, who appeared on behalf of the applicants in these applications, conceded that this would have been the obvious thing to do and that it should have been done, and was unable to explain the failure to do so. Mr Rathidile informed me from the bar that the particular State attorney who had been involved in this matter has passed away. He had to concede, however, that such an explanation should have been given on oath and that, in any event, nothing would have prevented someone else in that office from perusing the relevant file and from deposing to an affidavit regarding its contents.

CONDUCT OF STATE ATTORNEY

22. Even if it were to be accepted that mr Basson's allegations are sufficient to prove that the State attorney is to blame for the fact that the application for leave to appeal was filed after such a long delay, I am of the view that the applicants should not in this case be allowed to escape the consequences (see **Saloojee and Another NNO v Minister of Community Development** 1965 (2) SA 135 (A) at 141).
23. On mr Basson's version the State attorney would have been grossly negligent, if not reckless. It would mean that a telephonic instruction, a written instruction and numerous enquiries had simply been ignored. When this eventually resulted in the necessity of an application for condonation, the State attorney failed to furnish any explanation at all.

24. The absence of any explanation on the part of the State attorney would justify the inference that there simply is no *bona fide* explanation.
25. There is no indication that the State attorney, as the attorney representing the applicants, would not have been aware of the judgment on the day that it was delivered (compare **Finbro Furnishers v Registrar of Deeds** 1985 (4) SA 773 (AD) at 788D-F). This would mean that the State attorney had also failed to notify the applicants of the judgment within the period allowed for the filing of an application for leave to appeal.
26. Even if it is to be assumed that it was only at the stage when execution steps were taken that the applicants became aware of the fact that no application for leave to appeal had been filed (something that is not said in so many words by mr Basson), a further period of almost a month expired before mr Basson deposed to his affidavit and these applications were filed (see **De Beer en 'n Ander v Western Bank Ltd** 1981 (4) SA 255 (AA) at 256-257 and **Rennie v Kamby Farms (Pty) Ltd** 1989 (2) SA 124 (AD) at 129).

PROSPECTS OF SUCCESS AND ISSUES IN APPLICATION FOR
LEAVE TO APPEAL AND INTENDED APPEAL

27. One of the grounds of appeal in the notice of application for leave to appeal is that the damages awarded to the respondents are excessive and disproportionate to other rewards in similar matters.
28. Other grounds of appeal set out in the notice are that:

- "1.3 The Court misdirected itself and erred in comparing the Applicants' case to an unreported case of **Schabort**.*
- 1.4 The Court erred in finding that the Applicants' (sic) degraded the dignity (sic) of the Respondents in the Magistrate's Court.*
- 1.5 The Court erred in not attaching much weight to the evidence that the Respondents were in constant contact with their attorney and family members.*
- 1.6 The Court misdirected itself and erred in finding that the Second Applicant should have called the Respondents' attorney before effecting the arrest.*
- 1.7 The Court erred in attaching weight on (sic) the impact the arrest had on the Respondents' family."*
29. At the hearing of these applications mr Rathidile limited his arguments to the submission that the awards are excessive and disproportionate and it is therefore not necessary to discuss the other grounds in any detail.
- 29.1. There is no reason why regard should not have been had to the specific aspects of the unreported **Schabort** case that were dealt with in my judgment.
- 29.2. The unlawful arrest and detention of the respondents resulted in them being taken to the Magistrate's Court in a police vehicle, and then through a

courtroom in leg-irons and in public view. It was not found that the police had acted maliciously in this regard, but the fact remains that it had been experienced by the respondents as degrading, and understandably so.

- 29.3. There was no evidence to the effect that the applicants had been in “*constant contact*” with their attorney and family members. The only evidence of such contact during the period when they were detained in the police cells was that blankets were brought to them at some stage.
- 29.4. In my judgment I dealt with the second applicant’s attitude and conduct when the respondents’ attorney offered to take them to the police station should the second applicant decide to proceed with the arrests. No more need be said in this regard.
- 29.5. What was taken into account, as regards the impact on family, was the first respondent’s concerns regarding the impact of the arrest on his family, and not the impact on the family as such.
30. As regards the submission that the amounts of damages awarded to the respondents are excessive, mr Rathidile referred me to the unreported judgment of the Supreme Court of Appeal in **The Minister of Safety and Security v Tyulu** (case number 327/2008, 27 May 2009), and he simply made the submission that an amount of R15 000,00 was awarded on

appeal in circumstances where the person had also been detained for one day.

31. I have managed to obtain a copy of the **Tyulu** judgment. Not only are the facts of that matter completely distinguishable from those in the present matter, but mr Rathidile's submission regarding that case was in any event not correct.

31.1. The plaintiff in that matter, a magistrate, had actually been arrested twice. The facts were that the police were looking for a person who had fled the scene of a collision. They found the plaintiff, who apparently fitted the description given to them, and arrested him for being drunk in a public place.

31.2. The plaintiff was taken to the scene of the collision, where the other driver identified him as the person who had fled the scene. The plaintiff was then taken to the police station, where he was charged with and detained for drunken driving. According to medical evidence the plaintiff was at that stage moderately under the influence of alcohol, with a blood-alcohol concentration of 0.23 g/ 100 ml blood.

31.3. No criminal proceedings were instituted against the plaintiff.

31.4. The plaintiff was initially awarded damages in an amount of R280 000,00 on the basis that both the arrests (and subsequent periods of detention) had been unlawful.

- 31.5. On appeal to a full bench it was found that only the first arrest and detention (on the charge of being drunk in public) had been unlawful and damages in an amount of R50 000,00 were awarded in respect of that arrest (and the detention of the plaintiff until he was shortly thereafter charged with drunken driving and then detained on that charge).
- 31.6. In a further appeal the Supreme Court of Appeal interfered with this award and reduced it to R15 000,00.
- 31.7. One of the factors taken into account in this regard was that the plaintiff had only been detained, as a consequence of the first arrest, for about 15 minutes (and not one day, as submitted by mr Rathadile).
- 31.8. Although it was found that the police had actually on that occasion arrested the plaintiff with the *"improper motive ... so that he could be taken back to the scene of the accident"*, there was no finding of malice on the part of the police. In the present matter it was found that there was clear malice on the part of the police. This finding was not challenged by mr Rathidile. In fact, and as pointed out in my judgment, at the trial counsel for the applicants conceded that, should the second applicant's evidence be rejected, malice on the part of the police had been proved on a balance of probabilities.

- 31.9. Furthermore the respondents in this matter were detained for much longer than the plaintiff in the **Tyulu** case had been detained (after his first arrest). Also the plaintiff in the **Tyulu** case spent his 15 minutes of detention in the backseat of a police vehicle, and not in a police cell.
- 31.10. There are numerous other factual distinctions between the **Tyulu** case and the present matter.
32. Mr Rathidile did not refer me to any other case law in this regard and did not raise any other arguments that had not already been considered and dealt with in my judgment.
33. I am unpersuaded that there are reasonable prospects of leave to appeal being granted on any of these grounds of appeal. There is no merit in mr Rathidile's criticism, based as it is on the **Tyulu** case, and he did not submit that there was any misdirection in the exercise of my discretion.
34. What I have said is not, however, intended as a finding in the application for leave to appeal and I have only considered the merits of that application in order to decide whether the interests of justice would in the circumstances of this case be best served if condonation was granted (see **National Union of Metalworkers of South Africa v Jumbo Products CC** 1996 (4) SA 735 (AD)).

35. I may add that I would in any event have been of the view that, whatever the prospects of success may have been, the applicants should not be granted condonation:

"As far as the prospects of success on appeal are concerned, the appeal in the present case would not appear to be without merit. However, where the non-observance of the Rules has been as flagrant and gross as in the present case the application should not be granted, whatever the prospects of success might be ...".

See: **Ferreira v Ntshingila** 1990 (4) SA 271 (AD) at 281-282.

See also **National Union of Metalworkers of South Africa v Jumbo Products CC, supra**, at 741.

36. It is so that the first applicant and the State attorney are public institutions, but I do not think that that could in the circumstances of this case, and having regard to the relevant issues, excuse such blatant disregard of the Rules of Court or justify a further delay in the enforcement of the respondents' rights (compare **Administrateur, Transvaal v Van der Merwe** 1994 (4) SA 347 (AD) at 357H-I).

"The respondent's interest in the finality of his judgment is a factor which weighs with the Court. The fact that the time for noting an appeal has elapsed, prima facie entitles him to adjust his affairs on that footing."

See: **Ferreira v Ntshingila, supra**, at 281I.

Compare: **Van Wyk v Unitas Hospital, supra**, para [31].

COSTS

37. It follows that I am of the view that condonation should not be granted.
38. There is no reason why the costs of both these applications should not follow such a result, and none was suggested.

POSTPONEMENT

39. On 7 September 2009 both the applications were postponed to 14 September 2009. The issue of the costs wasted as a result of the postponement was reserved for later judgment.
40. It appears that both parties are to blame for the fact that the applications could not be proceeded with on 7 September 2009. The applications were set down for hearing by the respondents' attorney, but a typing error led to the application for condonation being set down for 7 September 2009, while the application for leave to appeal was set down for 14 September 2009. It goes without saying that the two applications had to be heard simultaneously.
41. On the other hand mr Rathidile informed me from the bar that the employee in the office of the State attorney who had received these notices of set down, in any event failed to bring

either of them to the attention of his/her superiors, and according to mr Rathidile this was the reason why no steps had been taken to brief counsel for 7 September 2009. Mr van Niekerk SC, who appeared on behalf of the respondents, submitted that the wasted costs of 7 September 2009 should be ordered to be costs in the applications, and mr Rathidile did not disagree. This would indeed be an appropriate order in the circumstances.

ORDERS

42. The following orders are therefore made:

- 1. The application for condonation is dismissed.**
- 2. The applicants are ordered to pay the respondents' costs in the application for condonation, as well as the respondents' costs in the application for leave to appeal, such costs to include the wasted costs occasioned by the postponement of the applications on 7 September 2009.**
- 3. The application for leave to appeal is struck from the roll.**

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

For the Plaintiffs:	Adv Rathidile
On behalf of:	State Attorney, KIMBERLEY
For the Respondents:	Adv J G van Niekerk, SC
Instructed by:	Duncan & Rothman, KIMBERLEY