

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A87/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
14/5/24	
DATE	SIGNATURE

In the matter between:

CENTRAL DRUG AUTHORITY

First Appellant

MINISTER OF SOCIAL DEVELOPMENT

Second Appellant

and

CLIVE PETER UCKO

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 14 May 2024.

Summary: Appeal against an exercise of discretion is circumscribed by whether a true discretion was exercised (a) non-judiciously; (b) capriciously; (c) in a *mala fide* manner; and (d) on application of wrong principles. An application involving an upliftment of a bar to deliver a plea, involves an exercise of true discretion.

A *bona fide* defence is one that answers the claim pleaded by a plaintiff. In order to succeed in the upliftment of a bar application, which is essentially an application for condonation, *good cause* (proper explanation and *bona fide* defence) must be demonstrated. Absent *good cause*, the application is bound to fail. Counsel who appears in a Court is not only an officer of Court but he or she is also an essential part of a Court. He or she facilitates the administration of justice. Counsel who arrives at Court at his or her own time stymies the administration of justice and also impacts on the constitutional duty of a Court as an institution. Held: (1) The lapsed appeal is revived, and condonation sought is granted. Held: (2) The appeal is dismissed. Held: (3) The appellant must pay costs on a party and party scale B.

JUDGMENT

Moshoana J (Mali J)

Introduction

[1] This is an appeal against the whole judgment and order of the learned Magistrate Truter ("the trial Court") sitting at Tshwane Central Magistrate's Court. The first respondent is a statutory body, the Central Drug Authority (CDA) under the authority of the second respondent, the Minister of Social Development ("the Minister"). The Minister is not a participant in this appeal. On 22 July 2022, the trial Court dismissed an opposed interlocutory application brought by the CDA, the only appellant before us. In the said interlocutory application, the CDA sought as a relief, an upliftment of a notice of bar and an opportunity to deliver a plea in the main action, which was instituted by Mr. Clive Peter Ucko (Ucko), the respondent before us.

Pertinent background facts to the present appeal

[2] Ucko was appointed as a member of the CDA effective January 2013 by the Minister, exercising powers contemplated in section 53(2)(u) of the Prevention of and

Treatment for Substance Abuse Act (PTSAA).¹ Ucko's appointment terminated in early 2021. In terms of section 53(6) of the PTSAA, Ucko may be paid such fees or travelling and subsistence allowance, while engaged on the business of the CDA. Such fees and allowances are determined by the Minister in concurrence with the Minister of Finance (MF). For the period October 2018 to November 2020, Ucko was indisputably engaged in the business of the CDA. However, despite a demand for the payment of fees and allowances, the CDA failed to pay Ucko. An amount of R 100 581.71 was due and payable to Ucko.

[3] On 28 September 2021, Ucko instituted an action against the CDA claiming the amount due. Having entered appearance to defend the action, the CDA failed to deliver its plea setting out its defence to the action. In terms of rule 19 of the Magistrate's Court Rules (Rules), if a person fails to deliver a plea within the required period, such a person may be issued with a notice to deliver such a plea within 5 days of being so notified, failing which such a person shall be barred from delivering a plea. It is common cause in *casu* that the CDA was accordingly barred to deliver its plea. Faced with such a situation, the CDA launched an application on 22 July 2022, seeking to have the bar uplifted. Such application was entertained by the trial Court and was duly dismissed. The CDA requested written reasons for the said dismissal and such written reasons were furnished on 11 August 2022.

[4] In terms of the Rules, 20 days after being furnished with written reasons, the CDA was required to note an appeal. The CDA only noted an appeal 16 days after the prescribed time period. The CDA was also required to prosecute an appeal within a specified period. That period lapsed without prosecuting the appeal and the appeal, defectively noted, had to lapse. This turn of events compelled the CDA to launch a condonation application and to seek a revival of the lapsed appeal. In so doing, the CDA failed to properly serve Ucko with those applications. At the appointed date of the hearing of the present appeal, an attempt was made to obtain an order condoning the non-compliance and reviving the lapsed appeal. Ucko forcefully offered resistance to this move.

Analysis

¹ Act 70 of 2008 as amended.

[5] Before this Court deals with the merits of the present appeal, a consideration shall be given to the revival and condonation applications.

Revival and condonation applications

[6] As indicated above, CDA launched an application seeking the revival of the appeal and condonation for the non-compliance with the rules. As a matter of law, condonation and revival of a lapsed appeal are not there for the mere taking². A party seeking an indulgence must demonstrate to a Court why such an indulgence must be afforded. A full and proper explanation is required.³ However, this Court, purely for pragmatic reasons, suggested to counsel for Ucko that the appeal must be argued as if the condonation and the revival were granted. This Court was more concerned with the finality of this matter. Once such finality is reached, this matter will by law become *res judicata*. As a matter of law, *res judicata* implies that (a) litigation is concluded; (b) between the same parties; (c) in relation to the same thing; and (d) based on the same cause of action.⁴ In order to reach finality within the contemplation of the principle of *res judicata*, and in the exercise of its discretion, this Court shall be compelled to revive the appeal and condone the non-compliance. Otherwise, this Court would be less empowered to dismiss the present appeal on its merits.

[7] Although this Court is not entirely convinced that the CDA has shown any *good cause* for the condonation and the revival sought, in order to reach finality, the CDA shall be so indulged. In our view, the interests of justice demand that the merits of this appeal be entertained without any further delay. This Court was reliably informed that Ucko is of an advanced age and was indisposed. A robust approach available to this Court was to dismiss both the condonation and the revival applications. Of course the practical implications thereof are that the judgment and order of the trial Court shall take effect. However, given the fact that this Court's judgment on the applications will be final in nature and appealable, taking that course would inevitably lead to piecemeal appeals and shall not properly serve finality. However, if the Court determines the merits of this appeal, further appeals, if any, will lie on the merits of the present appeal

² See *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and others* 2017 (5) SA 9 (CC).

³ See *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and others, National Director of Public Prosecutions and Another v Mulaudzi* [2017] 3 All SA 520 (SCA) (*Mulaudzi*)

⁴ See *Mulaudzi* at para 38.

as opposed to the interlocutory applications. This approach of entertaining the merits of the appeal resonated well for the present matter. For avoidance of doubt, this Court, in the exercise of its discretion, prefers this pragmatic approach given the view it takes on the merits of this appeal. This approach is unique to the circumstances of the appeal before us. As a word of caution, this approach should not be regarded as a licence for the flagrant disregard of the rules of this Court. If the circumstances were different, an order striking off this appeal would have been appropriate.

The Merits of the appeal

[8] Having crossed the interlocutory applications rubicon, I now turn to the merits of this appeal. Counsel for the CDA correctly conceded that in dismissing the application to uplift the bar, the trial Court exercised a true discretion. Where an exercise of true discretion is involved, a Court of appeal can only interfere if (a) the discretion was exercised not so judiciously; (b) the exercise was based on wrong principles of law; (c) the exercise was *mala fide* and capricious. The Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (Coalition)*⁵ aptly stated the law as follows:

“[11] A Court of appeal is not entitled to set aside the decision of a lower court granting or refusing postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judiciously, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. On its face, the complaint embodied in the ground of appeal sought to be introduced by the amendment does not meet this test because it alleges only an error in the exercise of its discretion by the High Court...”

[9] On proper consideration of the reasons availed by the trial Court, it is indeed correct that the CDA was required to demonstrate *good cause* why its non-compliance with the Rules must be condoned. The trial Court was not satisfied, correctly so, in my view, that the CDA was possessed of a *bona fide* defence to the claim as pleaded by Ucko. The only defence disclosed by the CDA against the pleaded claim of payment

⁵ 2000 (2) SA 1 (CC).

for services rendered, was that Ucko did not have a contract with the CDA to render those services. That defence was not only not *bona fide*, but it was completely misaligned to the pleaded claim by a proverbial mile. The claim of Ucko was self-evidently not predicated on any contract. The appointment to be engaged in the business of the CDA is a statutory one. Absence or presence of a contract, be it oral or written, is a red herring. During argument, counsel for the CDA confirmed with such temerity that the *bona fide* defence of the CDA to the claim of Ucko as pleaded is that of the non-existence of a contract. Without any further waste of time, the trial Court was entirely correct when it concluded that there was no *bona fide* defence disclosed. Accordingly, the application before it was correctly refused. In the premises, the appeal falls to be dismissed. What then remains is the issue of costs. However, before I turn my attention to that, I must deal with the conduct of counsel for the appellant.

The conduct of counsel for the appellant

[10] It suffices to mention that the present appeal was enrolled to be heard from 10:00 am on the day. Counsel for the CDA, without discussing with the opposing party and his instructing attorney from the office of the State Attorney, sought to be indulged until 11:30 am (after tea adjournment). The indulgence was sought through the secretary of the senior judge. Such an indulgence was granted, since counsel had indicated that he had a doctor's appointment that morning. After the Court concluded its admissions roll, the allocated judges were informed that counsel sought a further indulgence until 12:00 pm. Again, counsel was duly indulged. At around ten minutes to the hour, a message was relayed to the allocated judges that counsel shall be in Court at 12:30 pm.

[11] This, following a telephonic discussion with counsel for the respondent. This Court was not pleased with this perspicuous delay and commenced Court at 12:00 pm. Counsel for the respondent rose and narrated to the Court what counsel for the CDA conveyed to him telephonically. The State Attorney, present in Court at that time, also rose and informed the Court that he was unaware of the arrangements made by the counsel on brief. Under such circumstances, the Court was faced with a possibility of striking the appeal off the roll due to non-appearance of CDA and its counsel. However, counsel for the respondent submitted that a striking off shall not serve the

best interests of the already ailing and elderly Ucko, in the circumstances where the matter was already postponed once.

[12] Given the fact that the Court was prepared to hear the appeal, a further indulgence was afforded. This entire pantomime culminated in the Court hearing the appeal shortly before 13:00 pm and had to sit through the lunch hour. When the Court resumed, counsel for the CDA appeared and made an attempt to apologise for what was self-evidently an unbecoming conduct. However, it was indicated to him that the best place for him to fully explain himself is at the relevant professional body he belongs to.

[13] Accordingly, at the end, this Court shall direct that a copy of this judgment be placed before the secretary of the Legal Practice Council, to enable the Legal Practice Council to consider whether a professional misconduct was committed or not. It must be stated that when counsel accepts a brief to appear on behalf of a party before a Court of law, counsel is not only an officer of the Court but he or she forms an integral part of a Court as an institution. In terms of the Oxford dictionary of English, a Court, as a noun, means a body of people presided over by a judge, judges or magistrate and acting as a tribunal in civil or criminal cases.

[14] Counsel comprise of a body of people as such part of a Court. Therefore, in order for a Court to function optimally and administer justice as required, counsel must, as an integral part of the institution, demonstrate co-operation. The administration of justice shall be adversely stymied if all counsel would behave in the manner outlined above. Although, counsel profusely apologised for what was self-evidently an unbecoming conduct, he was not open and frank to this Court. At the bare minimum, he ought to have, instantly and without being probed by the bench, furnished the Court with proof that he had indeed attended the doctor's room to seek medical attention. Instead, the Court had to probe and extract such an elementary step from him, whereupon he produced no proof at all.

[15] A question lingers in the mind of this Court, did he truly have a doctor's appointment on the morning in question? Of course, should it turn out that counsel was malingering, then his professional conduct is put into question. It was for this reason that this Court had to defer this self-evidently troubling issue of conduct to the relevant professional body. Unlike this Court, at this stage, a professional body is better

suited and equipped to probe the conduct issue that pronounces itself so manifestly much more appropriately. For that reason, this Court shall direct that a copy of this judgment be placed before the Legal Practice Council for its consideration of the exposed conduct of its member.

The issue of costs

[16] Counsel for the respondent forcefully argued that this Court must make a punitive order as to costs. In support of this submission, it was stated that there was repeated reckless disregard of the Rules. The office of the State Attorney has been deliberately dilatory in many instances, so went the submission. Counsel for the respondent brought to our attention a judgment⁶ by the learned Sutherland DJP, who unwaveringly reproofed the conduct of the State Attorney in the matter before him. Counsel implored this Court to take a similar approach in this matter. Inasmuch as this Court shares the frustrations exposed by counsel for the respondent in this matter, a punitive cost order is appropriate in a situation of opprobrium of which the present situation is, in my considered view, not one.

[17] It occurred to this Court that counsel for the CDA did not, with respect, exhibit presence of litigation acumen. As an example, he suggested that when counsel hands up an authority he relied on during his submissions, he needed to show him the document first, otherwise such was unprocedural. Clearly that is not correct. Another example is his unrelenting perforce with an argument that the defence to the claim pleaded by Ucko is the presence of a contract, which presented itself as a “triable” issue. Based on these examples, this Court takes a view that the disregard of the Rules does not seem to be deliberate but seem to be actuated by dearth of capacity and the relevant skills.

[18] This Court is prepared to take judicial notice that the office of the State Attorney is infested with immeasurable challenges. Almost on a daily basis, judges of the higher courts express discontentment with regard to the conduct of the State Attorney. Serial

⁶ *Halstead v MEC for Public Transport and Road Infrastructure of the Gauteng Department (Halstead)* [2023] JOL 60295 (GJ).

imposition of punitive costs orders does not appear to be the answer to these apparent systematic vicissitudes. A solution seems to lie somewhere. This Court can only echo the same sentiments echoed in *Halstead*,⁷ in particular, that:

"[24] The disgraceful way in which this matter has been conducted by the State Attorney warrants investigation, and I shall be causing a report to be made to the Minister of Justice about how this case has indeed been conducted."

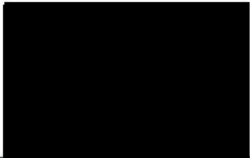
[19] In the present matter, what remains perspicuous is the apparent ineptness on the part of the team deployed to this matter. Resultantly, I take a fervent view that the appropriate costs order to make is that of party and party costs on a scale a little higher than normal of B. In summary, although this Court was tempted to accept a submission of making a punitive costs order, the circumstances of this case do not warrant a punitive costs order.

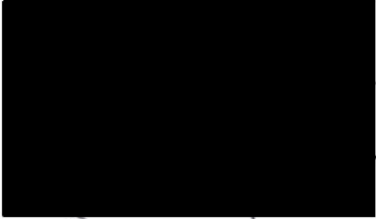
[20] For all the above reasons, I propose to make the following order:

Order

1. The lapsed appeal is hereby revived;
2. The condonation application for the late noting of the appeal and the prosecution thereof is hereby granted;
3. The appeal is dismissed;
4. The appellant is to pay the party and party costs to be taxed or settled on scale B.
5. The Registrar is directed to place a copy of this judgment with the Secretary of the Legal Practice Council for consideration.

⁷ Id.


GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA


N P MALI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
(I agree and it is so ordered)

APPEARANCES:

For Appellants:
Instructed by:

Mr N Makhani
State Attorney, Pretoria

For Respondent:
Instructed by:

Mr D Milne
Keyes Attorneys, Pretoria

Date of the hearing:
Date of judgment:

30 April 2024
14 May 2024