

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: MTHATHA)**

Case No: 5341/2018

In the matter between:

MINISTER OF POLICE

Applicant

and

MALWANDE NGOYO

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

BROOKS J

[1] This is an application for leave to appeal against the judgment and order delivered and issued by this court on 14 November 2022.

[2] The application for leave to appeal should have been filed by 5 December 2022. It was delivered only on 9 February 2024, just over fourteen months out of time. Of necessity, the application for leave to appeal is accompanied by an application for condonation for the late filing of the application for leave to appeal.

[3] Both applications are opposed. They are dealt with by a single exchange of founding, answering and replying affidavits. In my view the merits of each should be considered in conjunction with each other.

[4] The applications are supported by a founding affidavit deposed to by a member of the professional staff in the office of the State Attorney, Mthatha. It is apparent

therefrom that she joined that office on 18 September 2023 and took over the management of the file pertaining to this matter from Mr Mzileni, the attorney who had handled it prior to, during and after the proceedings that gave rise to the judgment and order that are the subject of these applications. The judgment and order pertain to the merits of the claim brought by the respondent.

[5] The deponent noted from the file that the matter was enrolled for the determination of the *quantum* of damages payable by the applicant to the respondent. The trial date was 17 October 2023. She saw that there was no request for instructions and no instructions noted from the applicant. She was unable to determine if and when General Billet, the provincial head of the Legal and Policy Service of the applicant, had been notified about the judgment or order. She approached a supervisor. He requested a list of required expert witnesses. She provided this on 4 October 2023. She later learnt from a candidate attorney that her supervisor had been in communication with General Billet, seeking instructions for the appointment of an intermediary. There was no response from General Billet and the date of the trial on quantum was fast approaching. An intermediary was appointed without any instructions from General Billet. The respondent was assessed by experts a week before the trial date.

[6] On the trial date, the matter was postponed to 16 November 2023 to allow the applicant time to file the reports of his expert witnesses. These were filed on 14 February 2024, after the filing of the application for leave to appeal.

[7] The deponent sent a memorandum to General Billet wherein counsel for the applicant had made a recommendation on the issue of *quantum*. On 6 November 2023 General Billet rejected the memorandum and gave instructions “to appeal the judgment.”

[8] On 22 November 2023 further instructions were received to appoint senior counsel and the deponent set about attending to the satisfaction of the internal tender

requirements for the briefing of senior counsel. It is apparent that senior counsel was only appointed and formally instructed on 2 February 2024 to draft the application for leave to appeal.

[9] A brief confirmatory affidavit was deposed to by the candidate attorney. A similar affidavit was deposed to by General Billet. Neither affidavit places any information before the court relating to the date upon which General Billet became aware of the existence of the judgment and order.

[10] It is remarkable that no affidavit was obtained from the applicant himself.

[11] It is also remarkable that no affidavit was obtained from Mr Hanise, the senior member of the office of the State Attorney, Mthatha, who was involved during the trial on the merits and under whose supervision the file would have remained thereafter.

[12] No affidavit was obtained from Mr Mzileni, although he works in the office of the State Attorney in East London. In the circumstances, there is no information placed before the court to explain the delay from 14 November 2022 up to 18 September 2023.

[13] An important fact emerges from the answering affidavit deposed to by the *curator ad litem* who was appointed to assist the respondent with his action. This fact is that on 20 September 2023 the applicant paid the legal costs due to the respondent. Those costs were identified in a bill of costs that had been prepared pursuant to the judgment and order in favour of the respondent and had been taxed by the taxing master. The observation made in the answering affidavit is that the payment of the taxed costs payable to the applicant demonstrated unequivocal conduct that demonstrated that the applicant has acquiesced in the judgment and order and thereby preempted his right to appeal against it.

[14] In *Gentiruco AG Firestone SA (Pty) Ltd*,¹ Trollip JA stated as follows:

¹ 1972 (1) SA 589 (A) at 600 A – B.

“The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be preempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that he acquiesces in the judgment or order.”

[15] To the payment of the costs due signifying acquiescence one may add the steps taken to prepare for the trial on *quantum* before General Billet rejected counsel’s memorandum on *quantum* and gave instructions to “appeal the judgment.” Such conduct may be equated to the conduct on the part of the President that was found by the full court to amount to preemption of his right to appeal in *President of the Republic of South Africa v Public Protector*.²

[16] In the replying affidavit, the correctness of these conclusions is simply denied.

[17] In my view, the simple denial in the replying affidavit is insufficient to meet satisfactorily the allegations made on behalf of the respondent to support the conclusion that the applicant had preempted his right to appeal against the judgment and order. At the very least one would have expected General Billet to file an affidavit dealing with the circumstances surrounding the payment of the costs due to the respondent with sufficient explanation to render inappropriate the conclusion that the applicant had thereby preempted his right to appeal. No such affidavit was filed.

[18] The unavoidable conclusion reached is that no explanation has been given by the applicant or General Billet, who is responsible for giving instructions on behalf of the applicant, for the delay of fourteen months beyond the date upon which an application for leave to appeal against the judgment and order should have been filed. Partial explanation has been given by the current professional in the office of the State Attorney, Mthatha, for the delay between 18 September 2023 and 9 February 2024. It is partial in that it cannot speak for the relevant circumstances known only to General

² 2018 (2) SA 100 (GP) at 143 F – 146 H.

Billet and surrounding the all important issues of knowledge of the judgment and order. Only he knows why he gave instructions on behalf of the applicant to seek leave to appeal against the judgment and order only on 6 November 2023 and he has remained silent on the point.

[19] Although the application for condonation is woefully deficient, it is incumbent upon the court, in the interests of justice, to consider also the prospects of success in the contemplated appeal.

[20] The combined summons in the matter was issued on 12 October 2018 and served on the applicant on 16 October 2018. Therein the respondent claimed damages arising from an incident on 2 June 2015 when he was shot in the head by a member of the South African Police Services who was on duty at the time. The claim was met with two special pleas. The first alleged that the respondent had not complied with the provisions of section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. The second alleged that the respondent's claim prescribed on 2 June 2018 prior to the service of the summons on the applicant.

[21] The first special plea was abandoned by counsel for the applicant who appeared in the trial on the merits. In such circumstances, it does not call for further comment when considering the prospects of success in the contemplated appeal.

[22] The second special plea was not included in the initial plea that was filed on 18 June 2020. It was introduced in an amended plea that was filed on 7 November 2022. It finds expression as follows:

“7. In his particulars of claim the plaintiff makes the following allegations:

‘3. On or about 02 June 2015 and at or near Kutela Village, Mount Alyiff, the plaintiff was shot on the forehead with live ammunition by a

member of the South African Police Service whose identity is to the plaintiff unknown.

5. As a result of the shooting, the plaintiff:

5.1 Was hospitalized for a period of two months;

5.2 Had to undergo further medical treatment;

5.3 Will suffer a loss of income;

5.4 Suffered a loss of amenities of life and will suffer further loss of amenities of life;

5.5 Experienced pain and suffering, will experience further pain and suffering and is disfigured.'

8. It is therefore apparent from the above averments that the debt arising from the delict from the alleged shooting fell due on the 02 June 2018, alternatively the plaintiff's cause of action was complete on the 02 June 2018. (sic)

9. Plaintiff's summons was served on the defendant on 15 October 2018, which is more than 3 years after the date on which the claim arose.

10. In the premises, plaintiff's claim has prescribed in terms of section 11 of Act 68 of 1969, as amended, and is therefore unenforceable."

[23] The undisputed evidence from the respondent revealed that the bullet that struck him in the forehead put him in a comatose state. He spent two months in hospital.

When he was discharged from hospital he was unable to speak and was suffering from neurocognitive impairment.

[24] An application had been brought under the same case number for the appointment to the respondent of a *curator-ad-litem*. It was not opposed by the applicant and Advocate Mdeyide was appointed as *curato-ad-litem* to the respondent. The medical reports that were used in support of that application and were accepted by the court that heard the application and can not be ignored. They reveal that the respondent had sustained a severe traumatic brain injury which resulted in him having residual slurred speech requiring a speech therapist and neurocognitive impairment.

[25] The wording of the second special plea is very specific. In the result it is restricted to an allegation that on 2 June 2015 the respondent had knowledge of all the facts that he would have to prove in order to succeed in a claim for damages. The undisputed evidence reveals that this could not have been the case. The severe traumatic brain injury that produced a comatose state, months of hospitalisation, cognitive impairment and slurred speech militates unequivocally against such a position. There is no alternative wording to the second special plea and it could only fail on the facts. See *Truter and Another v Deyse*³ and *Links v MEC for Health Northern Cape Province*.⁴

[26] Even if the second special plea is capable of interpretation that the respondent's claim had prescribed somewhere between 2 June 2018 and the date of service of the summons upon the applicant, no evidence was placed before the court to support such a conclusion.

[27] It follows that I am of the view that there are no prospects of another court coming to a different conclusion on the second special plea.

³ 2006(4) SA 168 (SCA) para 16.

⁴ 2016(4) SA 414 (CC) para 31.

[28] Both counsel referred the court to the decision of the Constitutional Court in *Grootboom v National Prosecuting Authority and Another*⁵ where the following is stated:

“In this court, the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.”

[29] In *Melane v Santam Insurance Co. Ltd*⁶ the court held as follows:

“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

⁵ 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC) para 50.

⁶ 1962 (4) SA 531 (A) 532 C – E.

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 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."

[30] In *Van Wyk v Unitas Hospital*⁷ the Constitutional Court held that:

"An applicant for condonation must give a full explanation for the delay. The explanation must cover the entire period of the delay. Moreover, the explanation must be reasonable."

[31] In *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*⁸ the Constitutional Court confirmed that the court has a discretion to overlook peremption if it is in the interests of justice to do so.

[32] Upon a consideration of all the relevant factors in this matter, the legal principles set out in the preceding paragraphs as well as the relevant facts in the matter, the court concludes as follows. No explanation has been given by the applicant, and by a senior member of staff of the office of the State Attorney, Mthatha, and a limited explanation has been given by others in respect of only a portion of what is a considerable period of delay in lodging an application for leave to appeal. The prospects of success in the contemplated appeal are negligible. The respondent has a keen interest in finality in the matter and steps have been taken by both parties towards the finalization of the *quantum* leg of the trial. No acceptable basis has been laid for this court to overlook the

⁷ 2008 (2) SA 472 (CC) 477 E – F.

⁸ 2017 (1) SA 549 (CC) paras 24 – 28.

peremption of the applicant's right to appeal by his acquiescence in the costs order issued pursuant to the impugned judgment and his preparation for the trial on *quantum*.

[33] The following order will issue:

1. The application for condonation for the late filing of the application for leave to appeal referred to in paragraph 2 of this order is dismissed with costs, such costs to include the costs of two counsel where two counsel were so employed.
2. The application for leave to appeal against the judgment and order of this court issued on 14 November 2022 is dismissed with costs, such costs to include the costs of two counsel where two counsel were so employed.

RWN BROOKS
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant

Instructed by:

Adv L Haskins
The State Attorney
94 Sissons Street
Fortgale
Mthatha

For the Respondent:

Instructed by:

Adv L Mthimkhulu
Cingo Attorneys
c/o Mkata Attorneys

77 Nelson Mandela Drive
MTHATHA

Date heard:

25 October 2024

Date delivered

05 November 2024