



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO.: CA 109/2025

In the matter between:

AYANDA RUDOLPH MLAMBO

Appellant

and

MINISTER OF POLICE

Respondent

APPEAL JUDGMENT

Brown AJ:

- [1] This is an appeal against an order of the Magistrate's Court of New Brighton dismissing, with costs, an action brought by the appellant seeking damages arising from his arrest and detention by members of the South African Police Service ("SAPS").

Condonation

- [2] Before turning to the appeal it is necessary to deal with a belated application brought by the appellant, in which he seeks, *inter alia*, that his appeal be “*reinstated/revived*” together with condonation for his non-compliance with Magistrate’s Court Rule 51 and Uniform Rule 50 by failing to both note and to prosecute his appeal within the prescribed timeframes. The condonation application is opposed by the respondent, who has filed an answering affidavit and a supplementary answering affidavit thereto.
- [3] It is worth emphasising the most unsatisfactory manner in which the condonation application has been brought and, indeed, opposed.
- [4] It is apparent from the papers, that the condonation application was brought in reaction to points taken in the heads of argument filed on behalf of the respondent, rather than as a matter of course. This despite the fact that it is also clear from the founding affidavit that the appellant and his representatives should have been aware of the failures for some time.
- [5] The condonation application was served on the respondent on 30 April 2026 and filed on 5 May 2026, two days prior to the hearing of the appeal. The founding papers in the application consist of approximately 50 pages. The answering affidavit is approximately 40 pages and was filed on 6 May 2026 with a supplementary answering affidavit filed later of a further 10 pages.

- [6] The result of all of this is that the condonation application, taken together with the averments contained in respect thereof in the heads of argument, has resulted in almost doubling the material in the record of appeal.
- [7] At the hearing of the appeal it was put to both counsel, given the relatively short time periods in respect of which condonation was sought and the fact that there appeared to be no substantial prejudice to the respondent, whether it was not appropriate to grant condonation, and that the appellant, be ordered to pay some of the costs related thereto. Both counsel agreed that this was an appropriate course.
- [8] In the face of that ready concession on the part of both parties, one is left to ask why the parties deemed it appropriate to so significantly increase the volume of documentation necessary for the court to consider. This particularly in circumstances where, as appeared from the respondent's heads of argument, the condonation application could – if opposed – have been opposed and argued on a substantially narrower basis.
- [9] In justification of his failures,¹ the appellant claims that he did not receive timely notification of the fact that the Magistrate's Court had handed down judgement, resulting in the late filing of the notice of appeal. The notice of appeal was delivered 6 days late as taken from the date on which the appellant obtained a copy of the judgement and only after the appellant had sought further written reasons in terms of Magistrate's Court Rule 51(1). Quite why the

¹ These failures include the late filing of the appeal record, including in the appeal record unnecessary documents and the late filing of heads of argument.

appellant believed it necessary to request reasons in circumstances where a comprehensive written judgement had been delivered, is not clear.

[10] Insofar as the late prosecution of the appeal is concerned, the notice of prosecution was filed 2 days out of time. Moreover, the notice of prosecution was filed without the appeal record, which was ultimately filed substantially out of time on 22 January 2026. Both of these delays, according to the appellant, are ascribable to difficulties in obtaining a typed copy and transcript of the proceedings *a quo*.

[11] A court may grant condonation upon good cause shown. The applicant for condonation seeks an indulgence and the court has a discretion as to whether to grant condonation.²

[12] In *United Plant Hire (Pty) Ltd v Hills*³ the Appellate Division, as it then was, confirmed that in considering applications for condonation at the appeal stage, the court has a discretion to be exercised judicially upon consideration of all the relevant facts which may include, *inter alia*, the degree of non-compliance, the explanation provided therefor, the importance of the case, the respondent's interest in the finality of the judgement, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.⁴

² *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at para 20.

³ *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A).

⁴ *Supra* at 720E – G.

- [12] These factors were echoed by the Constitutional Court in *Van Wyk v Unitas Hospital*⁵ in which the court moreover confirmed that the standard for considering condonation is the interests of justice.⁶
- [13] Where an appellant has not complied with the time frames, he is compelled to seek condonation from the court and in doing so is required, *inter alia*, to fully explain the reasons for his failures. A litigant is entitled to oppose such an application, particularly where the failings have resulted in prejudice to that party.
- [14] However, the raising of technical objections simply because they are available, rather than to achieve the purposes of the rules and law to which they relate, must be depreciated. Adopting a strategy which simply seeks to raise every available point, whether there is substantive reason to do so, does nothing more than to overburden the court, and indeed the parties. It also serves to distract attention from what is in fact at issue.
- [15] An opposing party is expected to consider and to evaluate its position to avoid simply quibbling about trivialities. In this regard, the issue of real prejudice must be properly considered and engaged with.
- [16] Parties, guided by their legal representatives who are officers of the court, are expected to take a pragmatic approach to litigation and to utilise the available procedures to advance their case where there are justifiable reasons for doing so.

⁵ *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) also *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited* [2013] 2 All SA 251 (SCA) at para 11

⁶ *Supra* at 477A - B

- [17] As I have stated above, the notice of appeal and the notice of prosecution were delivered 6 days and 2 days out of time respectively. The notice of prosecution was delivered without a copy of the record. It was explained by the appellant that this was as a result of difficulties in obtaining the typed copy of the transcription of the proceedings of the trial court.
- [18] Although the appellant's conduct in prosecuting the appeal is hardly exemplary, on considering the factors relevant to condonation at the appeal stage and the concessions made in argument, it is my view that it is in the interests of justice to grant the condonation relief.
- [19] The general rule is that an applicant who seeks an indulgence pays the costs of the application, including the costs "*reasonably incurred*" in opposing the application.⁷ However, where such opposition is unreasonable, frivolous, vexatious or unmeritorious there is no reason to adhere stringently to the general rule.⁸
- [20] What in my view undermines the approach adopted by the respondent is not only the fact that he was not able to set out any significant prejudice caused by the delays, but also the unnecessarily lengthy papers filed in opposition to the condonation application.
- [21] In the face of these concerns, during argument it was asked of the counsel for the respondent whether, in assessing the costs relating to the condonation application, it would not be appropriate to deny the respondent a portion of the

⁷ *Dobsa Services CC v Dlamini Advisory Services (Pty) Ltd* 2016 JDR 1786 (SCA) at para 11.

⁸ *Meyers v Abramson* 1951 (SA) (3) SA 438 (C) 455F – H; *Dimension Data Middle East Africa (Pty) Ltd and others v Ngcaba* 2022 JDR 3826 (GJ) at para 41.

costs. The respondent's counsel, quite properly in my view, accepted that this may be justified in the circumstances.

- [22] Insofar as the costs relating to the condonation application are concerned then, the appellant is to pay those costs on the scale as between party and party. However, as a mark of the court's disapproval of the respondent's conduct with respect to the condonation application, it is appropriate to limit the respondent's recovery of such costs to 70 percent of the costs so incurred.

The appeal

- [23] As I have adverted to above, the present appeal is against an order of the magistrate *a quo* dismissing an action brought by the appellant for damages arising out of his arrest and detention at the hands of members of the SAPS.

- [24] The following material facts are not in dispute:

24.1 The appellant was arrested, without a warrant of arrest, on the evening of Friday, 28 October 2022 at 3[...] S[...] Street, Kwazakhele, Gqeberha. I will refer to these premises as "3[...] S[...] Street".

24.2 3[...] S[...] Street is a premises on which a shebeen is operated and at which alcohol is sold.

24.3 The attendance by the police officers at 3[...] S[...] Street took place pursuant to a search and seizure warrant, with which I will deal in more detail below.

24.4 After his arrest, the appellant was transported to Kwazakhele Police Station where he was detained until Monday, 31 October 2022 to appear at the New Brighton Magistrate's Court.

24.5 On arrival at the police station the appellant was charged with the possession of illegal drugs.

24.6 On Monday, 30 October 2022 the prosecutor at the New Brighton Magistrate's Court declined to prosecute and the appellant was released from custody.

The appellant's evidence

[25] During his evidence, the appellant testified that he was at 3[...] S[...] Street on the night of 28 October 2022, where he was drinking liquor with some friends.

[26] At approximately 19h00, police officers arrived at 3[...] S[...] Street and conducted a search of the property. After engaging with other persons at 3[...] S[...] Street, the police officers approached the appellant and asked if they could search him. He testified that he agreed and a cell phone, house keys and R28.00 were found in his possession.

[27] At this stage, a police officer approached him holding an ice-cream container. The police officer said that the ice-cream belonged to the appellant.

[28] The appellant had not seen the police officers before and did not know them. They arrested him and transported him to Kwazakhele Police Station where the

ice-cream container was opened revealing illegal drugs including tik, dagga and mandrax tablets. The appellant was charged and placed in a holding cell.

[29] The appellant denied that the ice-cream container was found on him, that he had any knowledge thereof or of what was contained therein and denied that he was selling illegal drugs at 3[...] S[...] Street.

[30] Finally, the appellant testified that the reason for his arrest was never explained to him and that he was never read any of his constitutional rights.

The evidence for the respondent

[31] Before I engage with the evidence given at the trial by Constable Hefke on behalf of the respondent, it is necessary to deal with the statement of the arresting officer, Constable Majoka.

[32] Constable Majoka did not testify during the trial. This, according to the evidence of Constable Hefke, was because Constable Majoka had been dismissed from the SAPS after being detained pursuant to allegations that he had murdered his girlfriend.

[33] During the evidence on behalf of the respondent by Constable Hefke, the statement of Constable Majoka dated 28 October 2022 was referred to and, prior to the cross-examination of Constable Hefke commencing, the respondent's representative brought an application from the bar for the admission of Constable Majoka's statement in terms of section 3 of the Evidence Amendment Act 45 of 1988 (*"the Evidence Amendment Act"*).

- [34] On being asked by the presiding magistrate whether the appellant objected to the admission of the statement, the representative for the appellant confirmed that the appellant had no objection to the admission of the statement. Constable Majoka's statement was duly admitted into evidence.
- [35] Section 3(1) of the Evidence Amendment Act provides that subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings. However, the subsections of section 3(1) provide certain exceptions in this regard. Relevant to this matter is section 3(1)(a) which provides that hearsay evidence will be admitted as evidence where *"each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings."*
- [36] Section 3(4) of the Evidence Amendment Act defines *"hearsay evidence"* to mean evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence.
- [37] In the matter of *Congola v S*,⁹ the court per Moseneke and De Villiers JJ confirmed that the express agreement of the legal representative of an accused was sufficient to render admissible hearsay evidence which would have otherwise been inadmissible in terms of section 3(1) of the Evidence Amendment Act.¹⁰

⁹ *Congola v S* [2004] JOL 13371 (T) at pages 5 to 7.

¹⁰ The admission of such evidence is limited in criminal cases where the consideration of the potential prejudice of the evidence to the accused must be considered. This is not relevant in the present matter.

[38] The admission of hearsay evidence by agreement was also considered, on appeal, in *Witthuhn v Road Accident Fund*¹¹ where the court, with reference *inter alia* to *Thoroughbred Breeders Association of South Africa v Price Waterhouse*,¹² accepted, *obiter*, that where agreement had been reached the court was entitled to have regard to evidence which may otherwise have been inadmissible on the grounds of hearsay.

[39] The reason this is important in the context of the present matter is because the crux of the appellant's case before the court *a quo*, and before this court, rested on the contention that the jurisdictional facts justifying an arrest in terms of section 40 of the Criminal Procedure Act, 51 of 1977 (*"the CPA"*) had not been met.

[40] It was further argued on behalf of the appellant that without the evidence of the arresting officer, Constable Majoka, there could be no evidential basis on which to properly weigh the probabilities in respect of the lawfulness of the arrest. It was also suggested that Constable Majoka's statement "*does not constitute evidence in the trial.*"

[41] Given that the appellant's legal representative expressly agreed to the entering of Constable Majoka's statement into evidence, these contentions are unfounded. In my view the admission of Constable Majoka's statement met the requirements for its admission in terms of section 3(1)(a) of the Evidence Amendment Act. In any event, as I will detail below, Constable Hefke was

¹¹ (A5046/2015) [2017] ZAGPJHC 285 (14 September 2017) at para 24.

¹² 1999 (4) SA 968 (W) at page 1015.

present throughout the arrest and provided first hand evidence as to what transpired.

[42] The statement of Constable Majoka, accepted to be properly admitted by agreement into evidence, largely corroborates the evidence given by Constable Hefke and there is no basis to suggest that the statement should not be taken into account in assessing the probabilities.

[43] The evidence for the respondent then, as provided by Constable Hefke in person and as adduced from Constable Majoka's statement was as follows:

43.1 On 28 October 2022, members of the SAPS, including Constable Hefke and Constable Majoka executed a search and seizure warrant issued in respect of 3[...] S[...] Street.

43.2 The search and seizure warrant identified as the "*target*" a Ms Nomhle, but empowered the SAPS members to search the premises and "*any person found upon or at such premises*" for the articles listed in the warrant. The listed articles included illegal drugs.

43.3 I pause to record that, importantly, the validity of the warrant of search and seizure has not been challenged by the appellant before this court and it was not challenged in the proceedings *a quo*.

43.4 In the execution of the warrant, Constable Hefke was with Constable Majoka at all relevant times.

43.5 Upon entering the premises at 3[...] S[...] Street, Constable Hefke and Constable Majoka saw a male sitting with a container on his lap. The male later became known to Constable Hefke as the appellant.

43.6 Constable Majoka introduced himself as a police officer and inspected the container and found it to contain illegal drugs.

43.7 Constable Majoka thereafter arrested the appellant, explaining the reasons for doing so and together with Constable Hefke transported the appellant to Kwazakhele Police Station. The arrest was made without a warrant for the arrest of the appellant.

43.8 At the police station the appellant was read his constitutional rights. Also, the contents of the container was inspected and found to contain significant quantities of tik, mandrax tablets and dagga.

43.9 The appellant was not previously known to Constable Hefke and he had no prior dealings with the appellant.

The findings of the magistrate

[44] It is against this matrix of facts, conflicting and undisputed, that the magistrate was called on to balance the probabilities in determining whether the appellant's arrest was lawful.

[45] In doing so, the magistrate correctly recognised that the *onus* rested on the respondent to demonstrate, on the probabilities, that the arrest was lawful and that the subsequent detention was justified.

- [46] In assessing the evidence, the magistrate found the evidence of the appellant to be riddled with improbabilities which impacted negatively on his credibility. In the magistrate's view, the conspectus of the evidence favoured the respondent's version.
- [47] In arriving at this conclusion, the magistrate had particular regard to the fact that a search and seizure warrant had been issued to search 3[...] S[...] Street and any person found there, that the search and seizure warrant expressly contemplated a search for unlawful drugs on the premises and that the appellant was not previously known to either Constable Hefke or Majoka.
- [48] The action was accordingly, dismissed with costs.

Analysis

- [49] The onus of proof in respect of the lawfulness of an arrest, is borne by the person who arrested, or caused the arrest, in this case the respondent. This is because an arrest constitutes an interference with the liberty of the individual concerned.¹³

- [50] Sections 40(1)(a) and 40(1)(h) of the CPA provide that:

"40 Arrest by peace officer without a warrant

(1) A peace officer may without a warrant arrest any person –

(a) Who commits or attempts to commit any offence in his presence.

...

¹³ *Minister of Safety and Security v Sekhoto and another* 2011 (1) SACR 324 (SCA) at para 16.

(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence producing drugs or the possession or disposal of arms or ammunition.”

[51] To justify an arrest under section 40(1)(a) it is trite that three jurisdictional facts must exist:¹⁴

51.1 Firstly, the arrestor must be a peace officer. That is common cause in the present matter.

51.2 Secondly, the offence must have been committed or there must be an attempt to commit the offence.

51.3 Finally, the offence or attempted offence must have been committed in the presence of the peace officer.

[52] As to the conclusion that an offence is being committed, the question to be asked is whether the arresting officer had direct personal knowledge of sufficient facts at the time of the arrest on the strength of which it can be concluded that the arrestee *prima facie* committed the offence.¹⁵ The test is an objective one.

[53] The aim is not to determine whether the arrested person is guilty of the offence on which he or she is arrested and it accordingly matters not whether or not the arrestee was not prosecuted or was subsequently acquitted.¹⁶

¹⁴ *Twebe v Minister of Safety and Security and others* (CA68-2023) [2024] ZAECKMHC 74 (25 June 2024) at para 5; also *Van Wyk and another v Minister of Police and another* (A617/15) [2016] ZAGPPHC 942 (17 November 2016) at para 16.

¹⁵ *Scheepers v Minister of Safety and Security* 2015 (1) SACR 284 (ECG) at para 18 to 19.

¹⁶ *Supra* at para 18 to 19.

- [54] Insofar as section 40(1)(h) of the CPA is concerned, a “*reasonable suspicion*” is considered objectively, and is determined by considering whether a reasonable person with the knowledge and experience of a peace officer, based on the facts before him or her, could have come to that conclusion.¹⁷
- [55] In the judgement, the magistrate made no direct reference to the admitted evidence of Constable Majoka. This, it was urged on behalf of the appellant, wholly undermined the judgement.
- [56] In particular, what was contended in argument before this court was that to conclude that the jurisdictional facts for an arrest, required in terms of section 40(1)(a) of the CPA, had been met, the evidence of the arresting officer, Constable Majoka, was a prerequisite.
- [57] That contention is not sustainable in light of the authorities. An omission by a trial court to refer to some fact which is relevant is not necessarily a circumstance which will entitle a court on appeal to disregard entirely the findings of the trial court.¹⁸ In any event, where an appeal court is of the view that the reasons given by the trial court are not satisfactory, it is entitled to have regard to the evidence to come to its own conclusions, bearing in mind the advantages that the trial court has, which an appeal court does not have, in seeing and hearing the witnesses and being steeped in the atmosphere of the trial.¹⁹

¹⁷ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 812H – 813B.

¹⁸ *R v Dhlumayo and another* 1948 (2) SA 678 (A) at page 681.

¹⁹ *Supra* at pages 697 and 700.

[58] Secondly, and fatally, the contention wholly ignores the fact that Constable Majoka's statement was admitted into evidence, without objection and in terms of section 3(1) of the Evidence Amendment Act.

[59] What the court *a quo* was required to do, and did, was to assess the probabilities on the evidence before it. In doing so it preferred, on the probabilities, the evidence of Constable Hefke and thus the case relied on by the respondent. In my view, the approach adopted by the court *a quo* and the conclusions it came to cannot be faulted.

[60] This is particularly so when the evidence of Constable Hefke is considered in the light of what is contained in the statement of Constable Majoka. As to the finding by the magistrate that the appellant's evidence was riddled with improbabilities, this is justified. A particular example is that, in cross-examination the appellant conceded that he had in fact signed a document headed "*Notice of Rights in Terms of the Constitution*" confirming that his rights had been explained to him and that he understood their contents. This materially contradicted his evidence in-chief and indeed allegations in his pleadings.

[61] Given that it is not in dispute that the arresting officer was a peace officer, on the probabilities the appellant was found at 3[...] S[...] Street, with an ice-cream container which contained what appeared to Constable Majoka and Constable Hefke to be illegal drugs. On the probabilities then, the jurisdictional facts required to justify an arrest without a warrant in terms of section 40(1)(a) of the CPA were satisfied.

[62] It follows too, that the prerequisites for an arrest in terms of section 40(1)(h) of the CPA were also satisfied.

[63] In the circumstances, the respondent has discharged the onus it bears to establish on the probabilities that the arrest was lawful and the appeal must fail. In my view there is no basis to diverge from the normal principle that the costs must follow the result.

[64] The following order is accordingly made:

- 1. The appellant's non-compliance with the provisions of Magistrate's Court Rule 51 and Uniform Rule 50 in respect of the time periods applicable to the noting of and prosecution of the appeal is condoned;**
- 2. The appellant's appeal is reinstated;**
- 3. The appellant is to pay 70 percent (70%) of the costs occasioned by the respondent in opposing the condonation application on the scale as between party and party, including counsel's costs on Scale A;**
- 4. The appeal is dismissed with costs on the scale as between party and party, including counsel's costs on Scale A.**

G W W BROWN

ACTING JUDGE OF THE HIGH COURT

I agree:

G H BLOEM

JUDGE OF THE HIGH COURT

Appearances:

Counsel the appellant : *Adv. C Mzamo*

Instructed by: : Magqabi Seth Zitha Attorneys,
Gqeberha

Counsel for the respondent : *Adv. N Karsan*

Instructed by: The State Attorney
Gqeberha

Matter was heard on : 08 May 2026

Judgment delivered on : 19 May 2026