CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 24/08
[2009] ZACC 9

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — First Applicant

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Second Applicant

DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA HIGH COURT — Third Applicant

versus

NELLO QUAGLIANI — Respondent

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — First Applicant

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Second Applicant

DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA HIGH COURT — Third Applicant

versus

STEPHEN MARK VAN ROOYEN — First Respondent

LAURA VANESSA BROWN — Second Respondent

and

Case CCT 52/08
[2009] ZACC 9

STEVEN WILLIAM GOODWIN — Applicant

versus

DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT First Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA HIGH COURT Third Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Fourth Respondent

together with

SPEAKER OF THE NATIONAL ASSEMBLY First Intervening Party

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES Second Intervening Party

Decided on : 1 April 2009

JUDGMENT

SACHS J:

[1] Should a punitive costs order be made in connection with wasted costs occasioned by a last-minute application for postponement of delivery of a judgment? The judgment,[1] in case CCT 24/08 and CCT 52/08 delivered on 21 January 2009, dealt comprehensively with the enforceability of the South Africa-United States Extradition Agreement, leaving just this one question undecided. The application for

[1] *President of the Republic of South Africa and Others v Quagliani; President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development and Others* [2009] ZACC 1.

postponement was made by one of the parties in the case, Mr Quagliani (the applicant).

[2] The last-minute application for postponement was made in the following circumstances:

- On 10 December 2008, the Court issued notice that judgment in this matter would be handed down the next day. On the morning of 11 December 2008, however, it was decided for technical reasons to postpone delivery of judgment until 17 December 2008.
- On that same morning the Court received an application from Mr Stratton, who faced extradition from Australia to South Africa. Mr Stratton was at that time awaiting a decision in separate proceedings on whether this Court would grant him direct access to get a ruling on the enforceability in South Africa of the South Africa-Australia Extradition Agreement. In his application of 11 December 2008 he sought to join the Speakers of the provincial legislatures in his direct access application.
- A short while before judgment in the present applicant's matter could be delivered on 17 December 2008, applicant's legal representative made a similar, last-minute application to join the Speakers of the provincial legislatures. He submitted that Mr Stratton's matter was in many respects identical to his, and that his matter should be postponed until after the question of mandates had been fully explored in Mr Stratton's matter.

- On 17 December 2008, further directions were issued by this Court requiring the applicant to lodge a substantive application by 5 January 2009 for postponement of delivery of judgment. Any party wishing to respond was given until 13 January 2009 to do so.

[3] This Court finally handed down judgment on this application on 21 January 2009. It dismissed the application for the postponement of the delivery of judgment to enable joinder of the Speakers of the provincial legislatures. In the course of doing so it made the following observations:

> "The application for the postponement of the delivery of judgment as it was about to be handed down, can only be described as inappropriate. Legal representatives are entitled, even obliged, to defend the interests of their clients with vigour and panache. Yet there must be limits to their ingenuity. Stretching the bounds of appropriate forensic procedure beyond breaking-point is not permissible. The delays and inconvenience that have been caused in this matter are unacceptable. In *Metrorail* O' Regan J pointed out that—
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> > 'it has become regrettable practice in this Court that affidavits are tendered on appeal often only days before an appeal hearing, if not on the day of the appeal itself. This is unacceptable practice which must be discouraged. The late filings of affidavits in circumstances which do not meet the stringent test for admission set out in this judgment will not be permitted by this Court. Attorneys should take care to consider the test for the admission of late affidavits and satisfy themselves before filing the affidavits that they do qualify for admission in terms of the rules of this Court and the principles elucidated in this judgment.'
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> The application for the postponement of the delivery of the judgment and the joinder of the Speakers of the provincial legislatures must accordingly be dismissed. The question of the wasted costs of 17 December 2008 and the costs occasioned by the application for the postponements of the delivery of judgment dated 5 January 2009 are reserved.

> The parties, if they so wish, may lodge affidavits with this Court by no later than 9 February 2009, on the question of what order, if any, this Court should make concerning the reserved question of the wasted costs occasioned by the postponement of 17 December 2008 and the costs of the application, including the question whether a punitive costs order is appropriate in the circumstances."[2] (Footnotes omitted.)

[4] Affidavits were in fact filed by the applicant and by the Speaker of the National Council of Provinces.

[5] Applicant's legal representative submits that there is no basis for a punitive costs order. He contends that he personally acted on legal advice from counsel, seeking only to advance as best he could the interests of his client. Conversely, his client should not be penalised because there was no fault on the client's part.

[6] The Chairperson of the National Council of Provinces points out in response that the litigation started as long ago as 2004; that proceedings had since then been undertaken in the High Court and this Court without an application for joinder being made; and that an application for postponement on the eve of the judgment being delivered was unheard of, amounting to an abuse of the process of the Court that called for a punitive costs order.

[7] The application for postponement was undoubtedly inappropriate. Proper respect for court proceedings always imposes reasonable limits to a litigator's zeal. It is particularly inapposite to bring an application to postpone delivery of judgment well

[2] Above n 1 at 41-2.

after all the evidence has been looked at and argument completed. There might, of course, be circumstances where new, substantial and credible evidence first comes to light only at a very late stage. In the present matter, however, it is not even fresh evidence that was sought to be tendered. Rather, a procedural application was made to facilitate the search for new evidence. And the only explanation for the extraordinary lateness of the application boiled down to a fear by the legal representatives that they might have paid insufficient attention during the four years of the litigation to the need to comply with certain procedural requirements. If the advantages of hindsight were allowed to prevail, litigants anticipating defeat would have second, third, and even fourth or fifth bites of the cherry. The litigation would be endless, court planning would be impossible and legal representatives would be rewarded for inadequate preparation.

[8] In the present matter, even though he had failed in all the legal challenges he had brought to the enforceability in South Africa of the country's extradition agreement with the United States, the applicant was not ordered to pay any of the state's costs. This was because he had raised important constitutional issues, and the state and all of our society benefitted from the ensuing legal clarifications. The extraordinary application for postponement of a judgment about to be delivered cannot, however, be regarded as part of a legitimate effort to secure constitutional rights. It was so manifestly out of line with proper respect for court processes that a special adverse costs order is called for.

[9] It appears that at the very last moment in the prolonged litigation, what had until then been commendable eagerness to serve the best interests of his client, transformed itself into excess of zeal. As I have pointed out, it is quite unacceptable for a legal representative to clutch at each and every straw, giving false hope to a client, even if the motive is to do one's best on behalf of the client. The failure of the attorney to acknowledge the utter inappropriateness of the application is most unfortunate. It evinces a lapse of professional judgment rather than firmness of purpose.

[10] Yet looked at in all the circumstances, I do not believe that the attorney's conduct was so vexatious, grossly negligent or in any other way professionally wayward that he should be ordered to pay the wasted costs from his own pocket. The applicant in this matter had secured his services as his agent and in so doing authorised the last-minute application, which, if it had been successful, would have enured to his benefit. Similarly, the authorisation by him to launch the last-minute application also carried with it a real possibility of the matter being unsuccessful, with the consequence of a punitive costs order being made against him. It must accordingly be accepted that that risk was understood by him when he authorised his attorney to bring a highly inappropriate application for postponement of judgment on his behalf.

[11] It would, of course, be quite unfair to expect the state to bear any of the costs occasioned by a totally unmeritorious application. Fairness requires that costs in

favour of the state resulting from the postponement of the delivery of the judgment that was due to be delivered on 17 December 2008, including the costs occasioned by the abortive application of 5 January 2009, be paid by the applicant on an attorney and client scale.

[12] In the circumstances, the following order is made:

> The applicant is ordered to pay on an attorney and client scale the costs occasioned by the postponement in this matter of the judgment due to be delivered on 17 December 2008, as well as the costs occasioned by the application for postponement.

Langa CJ, Moseneke DCJ, Mokgoro J, Ngcobo J, O'Regan J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Sachs J.

Counsel for Mr Quagliani:	Advocate D Melunsky and Advocate M du Plessis instructed by Errol Goss Attorneys.
Counsel for the Government:	Advocate PJJ de Jager SC and Advocate MD Mohlamonyane instructed by the State Attorney, Pretoria.
Counsel for the Intervening Parties:	Advocate RT Williams SC and Advocate K Pillay instructed by the State Attorney, Johannesburg.