
SOUTH AFRICA / JUDGMENT

Minister of Police v PJ ; PJ v Minister of Police (CA308/2019) [2021] ZAECHGHC 27 (16 March 2021) [2021] ZAECHGHC 27

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe

CASE / FILE NUMBER

CA308/2019

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IN THE HIGH COURT OF

SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO: CA308/2019

Date

heard: 11

March 2021

Date

delivered: 16

March 2021

In

the matter between: MINISTER
OF POLICE
Applicant
and
P[...]
J[...]
Respondent
AND
P[...]
J[...]
Applicant
MINISTER
OF POLICE
Respondent

JUDGMENT

LOWE, J:

INTRODUCTION

- [1] In this matter I will refer to the parties by their description as follows: The Minister of Police as “the Minister” and P[...] J[...] as “J[...]” in order to avoid any confusion as there are two applications before me, one by each litigant.
- [2] J[...] instituted action against the Minister for two claims, Unlawful Search (Claim 1) and Wrongful Arrest and Detention (Claim 2).
- [3] The Regional Court Magistrate found for James on both claims ordering the Minister to pay damages in the sum of R200,000.00 on Claim 1 and R80,000.00 on claim 2, in both cases with interest from demand to payment.
- [4] The origin of the claims is the allegation that on 8 January 2017 and at an “old age home” J[...] was unlawfully (and indecently) searched by an unknown female member of the South African Police Services, she alleging an unlawful arrest and detention the following day until she was released on bail.
- [5] The search, it was found, involved her being undressed down to her underclothes in humiliating circumstances including the touching of her breasts and whilst this search was in a room with only herself and the female officer, there was a camera in the room visible on a screen in another office occupied by a Mr Macky and another police officer – she being led to say they saw her “naked”.
- [6] The Minister in the pleadings and in evidence denied the search on 8 January 2017.
- [7] The arrest and detention is common cause.

[8] The Minister has appealed to this Court:

[8.1] Against the finding of the unlawful search alleged (Claim 1);

[8.2] If confirmed, that the damages awarded for Claim 1 are excessive:

[8.3] In respect of the interest award as to its commencement date, being demand.

[9] The crux of the Appeal on the merits on claim 1 turns on what is alleged to have been a misdirection of the Magistrate refusing the Minister's application to re-open the case on claim 1 in order for a further evidence to be led in this regard, that witnesses then present and available.

[10] As to quantum it is alleged that the award of R200,000.00 was grossly excessive and markedly different from what an Appeal Court would award.

[11] The applications for Condonation related to:

[11.1] The Minister's late prosecution of the Appeal.

[11.2] The late filing by J[...] of her replying affidavit in opposition to the Minister's application for Condonation.

[12] Sensibly, and in the interests of the proper determination of the matter (and eventually well into argument) the Minister, through counsel, finally conceded condonation to J[...] (through not accepting that there was in fact merit therein) and abandoned the argument made that the disputes of fact in the Minister's Application, as to what had passed between the parties respective attorneys, was such as to be referred to the hearing of oral evidence.

[13] In my view, both concessions were well made and this leaves only for me to consider the Minister's condonation Application.

[14] I may say that in considering all of this, two Applications had to be pursued, each more than 100 pages in length, as well as a four Volume record, including heads of argument in each and oral argument lasting many hours.

[15] J[...] resisted any suggestion that the condonation matter be left to the Appeal Court for hearing (which is set down two weeks hence on 26 March 2021) the Appeal Court being steeped in the merits of the matter.

CONDONATION APPLICATIONS

[16] The principles to be applied in condonation applications are well known.

[17] The Court has a discretion which must be exercised judicially on the facts of each case, it being in essence a matter of fairness to each side. This discretion is to be exercised in accordance with the relevant principles – but the discretion is extensive.

[18] The factors relevant are not individually decisive but should be viewed cumulatively and weighed the one against the other. For example good prospects of success may compensate for a weaker explanation or vice versa.

[19] The factors relevant may be summarised as follows and include:

[19.1] The degree of non-compliance;

[19.2] The explanation for it;

[19.3] The importance of the case;

[19.4] Whether the fault was that of the client or his legal team;

[19.5] Respondent's interest in finality;

[19.6] The convenience of the Court;

[19.7] The nature and purpose of the remedy sought;

[19.8] The avoidance of unnecessary delay in the administration of justice;

[19.9] The prospects of success[1].

[20] I accept that where the rule breach is unacceptable and wanting (egregious) the prospects will usually not save the day[2].

[21] Prospects however are a relevant factor[3].

THE CONDONATION SOUGHT

[22] The late prosecution of the Appeal by the Minister arose from facts which can be shortly summarised.

[23] The judgment was given in May 2019.

[24] On 26 June 2019 the Minister served his Notice of Appeal. Notice of Opposition was given dated 26 June 2019.

[25] On 1 July 2019 James issued a Notice in terms of Magistrate's Court Rules Rule 60A(2)(b) claiming that the Notice of Appeal was an irregular step, being, so it was claimed, out of time, with no Condonation Application.

[26] In fact this was almost at first glance entirely erroneous.

[27] Correspondence in this regard was exchanged between the parties.

[28] The Minister's representative proposed to J[...] attorney, the withdrawal of the said notice (and some associated issues) and says that a reply from the said Attorney was awaited (by the Minister's legal representatives the Assistant State Attorney, S Sidloyi).

- [29] Mr Sidloyi says that he then erroneously did not proceed to have the Appeal prosecuted (as he was awaiting the reply) until discussing this with Counsel (on 26 November 2019) who informed him not to wait and to immediately proceed.
- [30] He did so in fact on 25 November 2019 and later alleges that his discussion with Counsel was on 25 November 2019.
- [31] He concedes to an error on his part (not the Minister's) and that it was intended at all times that the Appeal would proceed.
- [32] The delay was from approximately 19 September 2019 to 26 November 2017, the prosecution of the Appeal allegedly 47 days out of time (and certainly no more than 2 months).
- [33] It is alleged that there is no prejudice to J[...] were condonation to be granted and good prospects of success in the Appeal.
- [34] In answer prejudice is alleged, due to the Minister's tardiness, and that Mr Sidloyi is said to have been "disingenuous".
- [35] In essence the allegation of falsehood surrounds the issue of Mr Sidloyi having alleged that he was waiting for a reply to the Rule 60 issue.
- [36] Mr McKenzie, for J[,], alleges that he informed Mr Sidloyi verbally early on that he would not proceed with the Rule 60 Notice.
- [37] He alleges further that he in fact informed Mr Sidloyi later, also verbally, on 18 November 2019 that he was issuing a warrant of execution in the matter and that it was this that jolted Mr Sidloyi into action. It is said that Mr Sidloyi has made a "blatant" attempt to mislead.
- [38] I intend to decide this matter on the case at its most adverse basis to the Minister (this in J[...] favour), and I can certainly draw no conclusion as to the true position on the papers (nor is it necessary to do so having regard to my approach).
- [39] Mr Sidloyi is a busy Assistant State Attorney with many files to handle he says, which cannot be gainsaid.
- [40] That he erred in not prosecuting the Appeal timeously cannot be doubted, which led to the delay referred to above.
- [41] That this caused delay and inconvenience to J[...] is accepted.
- [42] That Mr Sidloyi erred, and at best, overlooked the prosecution of the Appeal is clear.
- [43] That the Minister wished to proceed therewith is also clear, it being the State Attorney's omission and not his.
- [44] That the Appeal is to be argued on 26 March 2021 is established and the parties are ready to so argue. It is only absent condonation that the Appeal will not proceed.

PROSPECTS OF SUCCESS

- [45] The parties reciprocally argue, with considerable conviction, that there are, so says J[...], no prospects of success at all, and the Minister argues that these are well established. Indeed a good deal of time was spent in arguing same in considerable detail.
- [46] I am most certainly not required to finally determine the issue as to whether the Appeal on its three points should fail or succeed. What I am required to do is to form a view of the parties' respective prospects as to success or failure.
- [47] It would be inappropriate to set out the basis for my conclusion in this regard in any detail, as to do so would be to impinge on the jurisdiction of the Appeal Court hearing.
- [48] It suffices to say the following.
- [49] The critical issue of whether the Magistrate should have allowed the Minister to re-open its case to lead a then available witness is relevant to the central issue on Claim 1. The principles relevant are well known and in this matter there is quite a considerable history to the application which was fully canvassed in argument and in the Heads of Argument. It suffices to say that a Court will be slow to refuse to re-open a case for further available relevant evidence (in this case to hear the relevant evidence of Constable Cambelele as to the day of the alleged search), if it is in the interests of justice to do so, and a proper explanation has been given for that failure.
- [50] On the facts of this matter this issue enjoys a reasonable prospect of success in the Appeal and more than warrants the attention of the Appeal Court. It is crucial evidence which could have been led and there seems to be reasonable prospects of the explanation for not having done so being more than reasonably arguable.
- [51] As to the quantum argument it is true that, where the quantum of damages is a discretionary estimation, a Court of Appeal will be slow to interfere. However once it has concluded that there has been a misdirection, or that no sound basis for the award exists, or that there is a striking disparity between the trial courts award and that an Appeal Court considers ought to have been made, the Appeal Court will usually intervene. This latter aspect is sometimes referred to as a "substantial variation"[4].
- [52] In this matter having carefully considered the facts and authorities, I am easily persuaded that in respect of the quantum of damages awarded on Claim 1, there are good prospects that an Appeal Court will, in making its own assessment, find there to be such striking disparity such as to interfere therewith.
- [53] It is unnecessary to consider the interest issue having regard to the above conclusions.

THE RESULT

[54] Having carefully considered and weighed the factors referred to in paragraph [19] above, I am satisfied that, viewed on the J[...]’ version of the explanation for non-compliance, the explanation for this, and having regard to the degree of non-compliance, the importance of the case, that the fault was clearly that of Mr Sidlayi and not the Minister, the nature and purpose of the remedy sought and the prospects of success, that condonation should be granted.

[55] I have carefully weighed all factors relevant which could possibly disturb the above particularly the J[...]’ interest in finality, the Court’s convenience and the avoidance of delay in the administration of justice and consider these not to be such as to disturb the above.

COSTS

[56] As to costs the parties accepted that should condonation be given both ways a just and equitable order would be that each party pay their own costs. I agree.

ORDER

[57] In the result the following order is made:

1. The late filing and service of Applicant’s Replying Affidavit (J[...]) to the Minister’s Application for Condonation, is condoned.
2. The Minister’s late prosecution of the Appeal, is condoned.
3. Each party is to pay their own costs in each of the two Condonation Applications referred to above.

M.J. LOWE

JUDGE OF THE HIGH COURT

Appearances

Obo Applicant:

Adv F Petersen

Instructed by:

Dold & Stone Attorneys, Grahamstown

Obo Respondent:

Adv M Du Toit

Zilwa Attorneys, Grahamstown

- [1] Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others [2013] 2 All SA 251 (SCA) [11]; Federated Employess Fire and General Insurance Co Ltd & Another v McKenzie 1969
- (3) SA 360 (A) 362 F – G; Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi 2017
- (6) SA 90 (SCA) [26]; Beira v Raphaely Weiner and Others
- [1997] ZASCA 59; 1997
- (4) SA 332 (SCA); Darries v Sheriff, Magistrate's Court, Wynberg 1998 3 SA 34 (SCA) 40 – 41; Mtshali NO and Others v Buffalo Conservation 97 (Pty) Ltd (250/2017) [2017] ZASCA 127 (29 September 2017).
- [2] Commissioner for the South African Revenue Service v Van der Merwe [2015] 3 All SA 387 (SCA).
- [3] Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) [11].
- [4] Road Accident Fund v Guedes 2006
- (5) SA 583 (SCA) 586 – 7.

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