

SOUTH AFRICA / JUDGMENT

Minister of Police v Toloane (A127/2023) [2025] ZAFSHC 139 (15 May 2025)

[2025] ZAFSHC 139**COURT**

Free State High Court, Bloemfontein

BEFORE

Daffue, Daniso, Buys

CASE / FILE NUMBER

A127/2023

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IN THE HIGH COURT OF
SOUTH AFRICA,
FREE STATE DIVISION,
BLOEMFONTEIN
NOT REPORTABLE

Appeal

Case Number: A127/2023

Court

a

quo

Case Number: 433/2019

In the matter between:

THE
MINISTER OF POLICE
APPELLANT
and
TSHEDISO
PAUL TOLOANE
RESPONDENT
Neutral
Citation: The
Minister of Police v Toloane (A127/2023)
[2025]

Coram:

Daffue et Daniso JJ et Buys AJ

Heard:

29 April 2025

Delivered:	15 May 2025 This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 12H00 on 15 May 2025.
Summary:	Application for reinstatement of appeal – interests of justice – appeal reinstated. ORDER 1. The appeal is reinstated. 2. The cross-appeal is reinstated. 3. The appellant is to pay the costs of the reinstatement application inclusive of the fees of counsel on Scale B.

JUDGMENT

Daffue and Daniso JJ and Buys AJ:

Introduction

- [1] This is the court's judgment in the opposed application in terms of which the appellant seeks an order to reinstate the appeal under case number A127/2023 which has lapsed and a further order that the respondent should pay the costs of the application if the application for reinstatement is opposed.
- [2] On 13 January 2023 the court a quo delivered its judgment in terms whereof the appellant, cited as defendant, was held liable to pay damages to the respondent as plaintiff in the amount of R250 000 in respect of his detention post his first appearance in court following his arrest by employees of the appellant on 10 July 2018. On 21 July 2023 the court a quo granted the appellant leave to appeal the judgment and simultaneously granted the respondent leave to cross-appeal.
- [3] The appellant filed his notice of appeal a day late, namely on 22 August 2023, and only launched his condonation application for the late filing thereof on 25 April 2025. The respondent did not oppose this application for condonation. The late filing of the notice of appeal was condoned at the commencement of the hearing.
- [4] The appellant not only failed to prosecute the appeal within sixty days after the notice of appeal was filed as required by rule 49 (6)

- (a) of the Uniform Rules of Court (the rules), but also failed to file copies of the record at the same time as required by rule 49 (7) (a). The record was only filed nine months later, namely on 30 August 2024, whereafter the application for reinstatement of the appeal was filed on 15 November 2024.
- [5] It should be mentioned from the onset that the respondent also failed to set down the appeal and/or his cross-appeal within ten days after the expiry of the period of sixty days referred to supra.[1] The appeal and the cross-appeal are deemed to have lapsed as a result of the failure to prosecute the appeal and the cross-appeal.

Appellant's case

- [6] The appellant failed to explicitly deal with the reasons why the application for reinstatement was not filed timeously. His attorney offered the following vague explanations in support of the failure to prosecute the appeal within the time period provided in rule 49(6)(a):
- (a) the transcribed record was requested from the transcribers (Gauteng Transcribers) on 23 August 2023;
 - (b) after alleged numerous telephone calls to unidentified personnel a written enquiry via electronic mail was made regarding the request for the transcribed record on 8 May 2024;
 - (c) in response to the enquiry of 8 May 2024 (annexure DM2 attached to the founding affidavit in support of the application for reinstatement) Gauteng Transcribers requested assistance from the appellant's attorney relating to the case number to enable them to trace the matter on their system;
 - (d) the transcribed record was only received on 4 June 2024, whereafter it was sent to the transcribers for binding purposes on 2 July 2024;
 - (e) confirmation to bind and copy the record was only given to Gauteng Transcribers on 13 August 2024;
 - (f) the record of appeal was filed on 30 August 2024, whereafter a date for hearing of the appeal was only applied for on 26 September 2024;
 - (g) lastly, it is alleged on behalf of the appellant that the delay in prosecuting the appeal was not because of a lack of interest in the appeal, but due to a systemic delay; furthermore it would be in the interests of justice that reinstatement be granted.

Respondent's opposition

- [7] In opposing the application for reinstatement, the respondent relies primarily on the appellant's failure to furnish a satisfactory explanation for his inordinate delay in applying for a date of hearing of the appeal and the filing of the record of proceedings.

Principles applicable

- [8] In terms of rule 49(6)(b), '[t]he court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed'.^[2]
- [9] The party seeking reinstatement of an appeal shall show good cause, the effect whereof is that the principles applicable to condonation applications apply *mutatis mutandis*. It is well settled that, in considering applications for condonation, the court has a discretion, to be exercised judicially upon consideration of all the facts, to grant condonation where the principles of justice and fair play demand it. In essence, it is a question of fairness to both sides.
- [10] The principles upon which the court exercises its discretion have been stated by the Appellate Division in *United Plant Hire (Pty) Ltd v Hills*^[3] as follows:
- 'It is well settled that, in considering applications for condonation, the court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.'
- [11] In *Van Wyk v Unitas Hospital*^[4] the Constitutional Court held that 'the standard for considering an application for condonation is the interests of justice'. The relevant factors to be considered by a court include, but are not limited to 'the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issues to be raised in the intended appeal and the prospects of success'.^[5]
- [12] Not only is it required from an applicant in an application for condonation to give a full explanation for the delay, namely to explain the entire period of delay,^[6] but it is also required from an applicant to seek condonation without delay.^[7]
- [13] A refusal of an application for reinstatement of an appeal would result in the court of appeal being deprived of the opportunity of setting aside a clearly wrong judgment and order of the court *a quo*. It is consequently in the interests of justice that a court shall grant condonation in such cases.
- [14] An important consideration in considering an application for condonation is whether or not the respondent will be adversely affected thereby to any substantial degree.

Analysis

- [15] The appellant did not deal extensively and satisfactorily with the period between noting of the appeal and the request for a date of the hearing of the appeal. Over and above the delay in prosecuting the appeal, no explanation has been provided as to the reasons why this

application for reinstatement was not brought without delay. There are various gaps in the appellant's explanation for his delay and much of the delay remains unexplained.

Accordingly, we align ourselves with the respondent's contention that the appellant failed to satisfactorily and in detail explain the delay in prosecuting the appeal. However, this failure by the appellant is not the end of the matter.

- [16] Although the appellant incorrectly relies on the provisions of rule 42 (1), the appellant's contention is that the court a quo erred in awarding the respondent compensation. In support of the above, the following findings made by the court a quo are of importance:
- (a) in dealing with the arrest of the respondent, it stated that the arrest was lawful in that the appellant 'established all the jurisdictional facts based on Section 40(1)(b) and that as the arresting officer properly exercised his discretion to arrest the Plaintiff [the respondent] and this Court will not interfere with that discretion to arrest';
 - (b) in dealing with detention of the respondent, it stated as follows: 'Mokone as an employee of the Defendant [the appellant], was legally justified to arrest and detain the Plaintiff [the respondent] in terms of Section 50(1)(a) of the CPA until his first appearance. . . . If the Plaintiff [the respondent] failed to show that any exceptional circumstances existed during the bail application, it is not the Defendant [the appellant] that has to be held liable after the bail was denied. The court had a discretion to keep the Plaintiff [the respondent] in custody and not the Defendant [the appellant]. Therefore the authority to detain a suspect further is within the discretion of the court';
 - (c) regardless of the findings made supra, the court a quo found: 'Having considered the facts as well as the circumstances of the Plaintiff [the respondent] post the first appearance in my view an amount of R250 000 would be fair and appropriate to compensate the Plaintiff [the respondent]'.
- [17] In *De Klerk v Minister of Police*[8] (*De Klerk*) the Constitutional Court held the Minister of Police liable for the whole period of detention, the reason being that the constable in charge of the investigation subjectively foresaw that a mechanical remand would take place after the plaintiff's first appearance in the criminal court. The constable knew that the accused's further detention would be the consequence of the unlawful arrest.[9]
- [18] In *Mahlangu v Minister of Police*[10] (*Mahlangu*) members of the South African Police Service relied on a confession which they knew was obtained unlawfully. The case was remanded

several times and when the real perpetrators were apprehended, the two plaintiffs were released and the National Director of Public

Prosecutions declined to prosecute them. The Minister of Police was held liable for the full period of detention.[11]

- [19] Without going into the merits of the appeal, we are of the view that:

- (a) the facts in casu are distinguishable from *De Klerk and Mahlangu* in the sense that no case has been made out by the respondent that the detention post first appearance was unlawful and/or as a result of an unlawful arrest.
- (b) the findings made by the court a quo relating to the damages awarded to the respondent are contrary to its findings referred to supra, namely that the arrest and consequent detention of the respondent were lawful. The court a quo did not rely on any authority or facts to conclude that the lawful detention became unlawful post the first appearance.
- [20] The appellant's attorney of record has handled the appeal process in a clearly dissatisfactory manner. This not only resulted in the lapsing of the appeal, but an unnecessary delay in finalising the appeal process. Even though the application for reinstatement falls short of all the requirements in respect of condonation, this court cannot turn a blind eye to the prospects of success the appellant may have in the appeal. In the premises, we are of the view that the appellant has good prospects of success in the appeal. Therefore, it is in the interests of justice to reinstate the appeal.
- [21] Mr Bomela on behalf of the appellant correctly tendered the wasted costs of the reinstatement application during argument and further submitted that the appellant had no objection if the court would also reinstate the cross-appeal of the respondent in the event the court decides to reinstate the appeal. This submission is fair, just and equitable to the respondent. Both parties shall be given an opportunity to argue their appeals.

Order

[22] Accordingly the following order is made:

1. The appeal is reinstated.

JP DAFFUE J

et

NS DANISO J

JJ BUYS AJ

Appearances For appellant: Adv L Bomela Instructed by State Attorney Bloemfontein
For respondent: Adv MS Mazibuko Instructed by: Mokhomo Attorneys Bloemfontein

- [1] As required by rule 49(6)(a).
- [2] *Aymac CC and Another v Widgerow* 2009
- (6) SA 433 (W), para 37.
- [3] 1976
- (1) SA 717 (A) at 720E-G.

[4]

[2007] ZACC 24; 2008

(2) SA 472 (CC) at para 20.

[5] Ibid, para 20.

[6] Ibid, at para 22.

[7] Malaudzi v Old Mutual Assurance Co (SA) Ltd 2017

(6) SA 90 (SCA) at para 26.

[8] 2020

(1) SACR 1 (CC).

[9] At para 86.

[10] 2021

(2) SACR 595 (CC).

[11] At paras 34-49.

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