

SOUTH AFRICA / JUDGMENT

NDPP v SP Randall & 2 others (992/2020) [2021] ZAFSHC 76 (25 March 2021)

[2021] ZAFSHC 76

COURT

Free State High Court, Bloemfontein

BEFORE

C.S. Parks

CASE / FILE NUMBER

992/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

no: 992/2020

In the matter

between:

THE NATIONAL
DIRECTOR OF
PUBLIC
PROSECUTIONS
Applicant
and
STEPHANUS
PHILLIPUS RANDAL
1st
Respondent
RONALD
PETER CLAASSEN
2nd
Respondent
JACQUES
HAUMAN
3rd Respondent

JUDGEMENT

BY: PARKS, AJ

HEARD ON: 11 MARCH 2021

DELIVERED ON: 25 MARCH 2021

INTRODUCTION:

- [1] This is an application by the applicant who is the 2nd defendant in the main action. The relief sought is for upliftment of bar and secondly condoning the late filing of applicant's (2nd defendant's) plea.
- [2] 1st – 3rd respondents opposed this application.
- [3] The respondent also raised a point in limine challenging the founding affidavit of the applicant.

POINT IN LIMINE

- [4] The point in limine relates to the date which is not included in the commissioning paragraph of the said founding affidavit.
- [5] The respondents in addition thereto also requested condonation for the late filing of their intention to oppose this application, which was not opposed by the applicant.
- [6] The applicant's argument pertaining to the point in limine was that the omission of the date does not render the affidavit null & void since the month is included on the affidavit. The applicant further submitted that there is substantial compliance with Regulation 4 of the Justice of the Peace and Commissioners Oath Act 16 of 1963 and the court has a discretion to condone any non-compliance.
- [7] The applicant in support of their argument on the point in limine relied on the following authorities :
 - Standard Bank of SA Limited v Redmond (unreported, Gauteng Provision with case no 80438/2015 dated 2 June 2016), the High Court rejected the respondent's contention that the affidavit was defective due to the fact that the place of commissioning the affidavit did not correspond with business address of Commissioner. The court held that the business address 'has got nothing to do with the manner, place and date of taking the declaration'.
 - Broodie NO v Maposa 2018
- (3) SA 129 (WCC), there was an objection to a further affidavit because the qualifications of the Commissioner did not appear on the face of the document, it was dismissed by the court

- [8] The respondents have objected to the applicant's request for the court to condone non-compliance of Regulation 4 since no application for condonation had been filed.

MAIN APPLICATION

- [9] The applicant argued on the issue raised by the respondents that the deponent does not have knowledge nor the authority to depose to said the affidavit, that

- Rule 7(5)(a) of the Uniform Rules of Court stipulates that no power of attorney shall be required to be filed by the State Attorney and the purpose of a power of attorney was briefly discussed.

- Section 3 of the State Attorney Act 56 of 1957 allows the State Attorney to litigate on behalf of a state official/institution without a power of attorney.

- [10] The applicant submitted that the deponent is the most suitable person to depose to such affidavit since deponent been the attorney of record since inception of the matter. Various emails were exchanged between deponent and respondents' attorney pertaining to extensions, which confirmed the former. Therefore the deponent is fully acquainted with the facts of the matter and is it within the deponent's personal knowledge to depose to said affidavit.

- [11] The applicant's reason for the delay was that on 14th of August 2020 when a consultation occurred they realised that a conflict of interest arose which necessitated the appointment of a second counsel to represent the applicant.

- [12] The claim in the main action is against the Minister of Police as the 1st defendant for unlawful arrest whilst the NDPP (National Director of Public Prosecutions) is the 2nd defendant for malicious prosecution. Each party plays a different role within the legal system such as South African Police Service

effecting arrest and National Prosecuting Authority decides to prosecute or not.

- [13] The applicant had to comply with their internal processes to secure the services of a second counsel, which caused a further delay. Permission was obtained and a consultation occurred between the relevant counsel and the Prosecutor who dealt with the matter and on 28th August 2020 the applicant filed/tried to file the plea of applicant to which they have been barred from doing.

- [14] The applicant is of the view that the delay is reasonable and acceptable for the mere reason that they were aware that they were out of time with the filing of the plea, which prompted a request by the applicant for an extension from respondents' attorney and therefore have not disregarded the rules of the court.

- [15] The defence raised by the applicant is not ill founded since the prosecutor had a reasonable belief that the prosecution would be successful and seeks therefore an opportunity to defend the action.

- [16] Section 34 of the Constitution allows any party the opportunity to fully ventilate a matter and have access to courts.
- [17] The applicant in conclusion submitted that good cause was shown by indicating the prospects of success, was the delay not merely to frustrate proceedings and requests that the application to uplift the bar should be granted.
- [18] The respondents' argument to oppose the application was that the applicant's founding affidavit is hearsay evidence and no confirmatory affidavits were filed to verify what has been stated by applicant.
- [19] The applicant has no regard for the court rules. Summons was issued in February 2020 and notice of intention to defend filed in May 2020 only after respondents' attorney made an enquiry.
- [20] Notice of bar was served in July 2020 and a request for extension to file the plea was granted until 14th August 2020. On this day applicant again had an excuse for their inability to file their plea and request an extension, which was denied.
- [21] A telephonic consultation occurred between applicant and the relevant prosecutor, which resulted in applicant's plea being filed on 28 August 2020. A consultation, which in their view could have been held before in order to file the plea on time.
- [22] The respondents were also of the view that a plea could have been filed earlier and later amended but none was done.
- [23] There was an issue of conflict of interest raised by applicant but the applicant nevertheless undersigned both pleas.
- [24] The defence disclosed by the applicant is ill founded and the respondents are being prejudiced because of the delay in filing the applicant's plea.
- [25] Respondent relied on the well-known authority of *Smith v Brummer* and *Melanie v Santam Insurance* to substantiate their argument.
- [26] The respondents in conclusion requested that the application be dismissed with costs.
- [27] It is common cause that the summons was served on 28 February 2020. Notice of intention to defend was filed on 22 May 2020. Notice of bar was served on 28 July 2020. 1st defendant's filed their plea by agreement on 14 August 2020. On 21 August 2020 applicant requested an extension to file applicant's plea. On 22 August 2020 respondent's attorney notified applicant that they have been barred and on 28 August 2020 the applicant eventually filed and/or attempted to file the plea.
- [28] I'm called upon to adjudicate on the issues which are in dispute namely :

- a) Firstly, whether the founding affidavit has been properly commissioned.
- b) Secondly, whether good cause shown by applicant is sufficient to grant the removal of bar and condoning the late filing of applicant's plea.

LAW

- [29] Uniform Rule 27 – Subsect (1) stipulates - in the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time; Subsection (3) – condone any non-compliance with these rules
- [30] Good cause shown has been expressed in *Du Plooy v Anwes Motors (Edms) Bpk* 1983
- (4) SA 212 (O) the court held that in addition to showing “good cause” for the delay an applicant also should disclose a defence. The applicant had to furnish a reasonable explanation for the delay. The applicant had to show that the application had been made bona fide without the intention of delaying the action.
- [31] The aspect of good cause was reiterated in *Dalhousie v Bruwer* 1970
- (4) SA 566 (C) by adding two requirements. Firstly, the applicant should file an affidavit satisfactorily explaining the delay. Secondly, the applicant should satisfy the court on oath that he has a bona fide defence. A third requirement has been added by authorities namely, the granting of the indulgence sought must not prejudice the plaintiff.
- [32] In *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at p358, five factors were highlighted where the courts have a tendency to grant a removal of bar.
- [33] In *Ferris v FirstRand Bank Ltd* 2014(3) SA 39 CC the Constitutional Court held that lateness is not the only considering factor. The test for condonation is whether it is in the interest of justice to grant it, which includes factors such as applicant's prospects of success and the importance of the issue to be determined.
- [34] In *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008
- (4) SA 312 SCA, the Supreme Court of Appeal upheld an appeal which was lodged against a refusal to condone the late filing of a notice on intention to institute legal proceedings against the Minister as specified in section 3(2)(a) of Act 40 of 2002. The court held that the determination of good cause entails considering all the factors, which had a bearing on the fairness of granting condonation and affecting the proper administration of justice. Factors such as i) prospects of success, ii) the reasons for the delay, iii) the sufficiency of the explanation offered, iv) the bona fides of the applicant and v) any contribution by other parties to the delay. Lastly, when determining prejudice, a common sense analysis of the facts is required.

- [35] It can be gleaned from the papers that the founding affidavit is initialled on each page and signed on the last page by deponent and Commissioner. The particulars of the Commissioner on the last page are handwritten. The place where the affidavit was commissioned is Bloemfontein. The month of September 2020 is included in the commissioning paragraph. The date of the Notice of Motion is 29th September 2020. It is averred that instructions were received on 29th September 2020. The notice of motion for upliftment of bar was served on 30th September 2020 at 12h45 by respondents' attorney.
- [36] The only inference from the above is that the affidavit could have only been properly commissioned on 29th September 2020 if the notice of motion that accompanies the affidavit is dated 29th September 2020 and served on 30th September 2020, which is the following day. The details of the Commissioner were handwritten which shows a little bit more effort than inclusion of details with a stamp.
- [37] Cases alluded to in Para [7] where the Commissioner omitted business address and qualifications, the High Court found nevertheless compliance with the regulations.
- [38] In a wealth of cases it was held that the provisions of regulation 4 of the Justice of the Peace and Commissioners Oath Act 16 of 1963 are directory and not peremptory[1]
- [39] In *Tuhf Limited v Emelia Court (Pty) Ltd and 4 others*, Case Nr 2097/2020 of the Free State Division, Naidoo J held that the affidavit substantially complies with the regulations even though it was not signed by the deponent.
- [40] I therefore find that there is substantial compliance with Regulations 4 of the Justice of the Peace and Commissioners of Oaths Act 16 of 1963 and dismiss the point in limine raised.
- [41] I do not agree with the averment made by the respondent that the content of the founding affidavit is based on hearsay. The deponent avers that a consultation occurred between him and counsel on 14 August 2020. On 25 August 2020, another consultation occurred between him, the prosecutor who dealt with the matter and counsel. This is a clear indication that the deponent has first-hand knowledge of the facts and is able to depose the founding affidavit.
- [42] In deciding whether good cause was shown by the applicant, I have considered the fact that emails were sent to respondents' attorney explaining the predicament in which the applicant found himself such as delays caused by the covid-19 pandemic and the reason why applicant's plea could not be filed.
- [43] The fact that extension(s) were requested and communication occurred between applicant and respondents' attorney cannot be seen as the demeanour of applicant's reckless and intentional disregard of the court rules.
- [44] The eventual filing of the applicant's plea on the 28 August 2020 even though being barred from doing so, cannot be seen as a party delaying the opposing party's claim.

- [45] The applicant has disclosed his defence in par [13] of the founding affidavit, which in my view contains the grounds for the defence raised.
- [46] The argument of severe prejudice raised by the respondents, was clarified during argument in that the delay incurred costs and that judgment in respect of claim 2 which relates to the applicant could have been finalised.
- [47] I however do not agree with this argument and find that this application is not prejudicial to the respondents. If the respondent had agreed to an extension to file the plea, which was previously granted, the main action could have been enrolled already.

COSTS

- [48] The general rule is that costs follow the successful party.
- [49] This application is because of a delay caused by the applicant.
- [50] I find it therefore prudent to deviate from the general rule.

ORDER

[51] In conclusion, I make the following order:

1. The application to uplift the bar is granted.
2. Condonation for the late filing of the applicant's plea is granted and applicant is ordered to file same within 5days of this order.
3. The applicant to pay the respondents' costs.

C.S. PARKS, AJ

For the applicant: Adv

Macakati

Instructed by:

State Attorney's Office

BLOEMFONTEIN

For the 1st,

Mr Peyper

2nd & 3rd Respondent: Peyper Lessing Attorneys

- [1] Mndiyata and Others v Umgungundlovu CPA and Others (1606/20) delivered 28January 2021 ;
Adriaan Jurgens Basson and Another v On-Point

Engineers (Pty) Ltd and Others dated 7 November 2012

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Prepared on 11 October 2026 · Esheria