

SOUTH AFRICA / JUDGMENT

# Slabbert v Pretorius and Another (2683/2012) [2012] ZAWCHC 363 (28 November 2012)

[2012] ZAWCHC 363

## COURT

Western Cape High Court, Cape Town

## BEFORE

Henney, Dlodlo

## CASE / FILE NUMBER

2683/2012

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 2683/2012

In the matter between:

DEIDRE SLABBERT .....Appellant

And

R PRETORIUS NO .....1st Respondent

THE DIRECTOR PUBLIC PROSECUTIONS

WESTERN CAPE .....2nd Respondent

JUDGMENT DELIVERED ON 28 NOVEMBER 2012

HENNEY, J:

## Introduction

- [1] The Applicant was convicted in the Magistrate's Court at Mossei Bay on 17 September 2009 after she pleaded guilty to a charge on Contravening Section 65 (1)(a) read with Section 89(1), 89(2) and 34 of the National Road Traffic Act 93 of 1996 she was sentenced to a fine of R6 000,00 or six (6) months imprisonment.

- [2] During the proceedings in which she pleaded guilty, she was legally represented by attorney JC Ellis ("Ellis") who advised her to plead guilty because she had no valid defence. She was further advised that the plea of guilty and sentence would have no effect on her criminal record.
- [3] The Applicant at a later stage, during November 2011, found out that she was wrongly advised to plead guilty and that she learnt that she has a criminal record.
- [4] She then approached this court to have the proceedings which led to the conviction and sentence, reviewed and set aside in terms of Rule 53 of the Uniform Rules of Court. The relief she seeks contained in the Notice of Motion is the following:
- (a) That the late filing of her Application for Review be condoned;
- (b) That the proceedings before the First Respondent under Magistrate's Court Mossel Bay case number A334/2008 in which the First Respondent convicted the Applicant of driving a motor vehicle while under the influence of intoxicating alcohol (Section 65(1)(a), read with Sections 89(1), 89(2) and 34 of the National Road Traffic Act 93 of 1996) and sentenced the Applicant to a fine of R6 000,00 or six (6) months imprisonment, be reviewed and set aside;
- (c) That the conviction and sentence in the aforesaid proceedings be set aside;
- (d) That the matter be referred back to the aforesaid Magistrate's Court for rehearing on the basis that Sections 112(2) and 113(1) of the Criminal Procedure Act 51 of 1977 has to be complied with.
- [5] The First Respondent is the presiding magistrate and the Second Respondent is the Director of Public Prosecutions. The First Respondent does not oppose this application. The Second Respondent opposes the application. FACTS UPON WHICH THE APPLICATION IS BASED
- [6] The Applicant deposed an affidavit wherein she sets out her case upon which she basis her claim for relief. She further states in her Affidavit that when she pleaded guilty to the offence she trusted her attorney Ellis with the advice he gave her. She believed that he would act in her best interest. For this reason she decided to plead guilty to the charge. The whole incident was very traumatic for her and her family that is why she decided to plead guilty.
- [7] One of the main reasons as she stated earlier on that convinced her to plead not guilty and to finalize the matter was because of the advice Ellis gave her namely that the conviction and sentence will have no effect on her criminal record. As a lay person not schooled in law she thought that her rights as an accused would be protected and to plead guilty was the right thing to do under the circumstances at that point in time and with the advice given to her by Ellis. Prior to the trial at that stage her whole family already resided in New Zealand and she also decided to immigrate to New Zealand. After the trial, she was informed that the conviction and sentence will not appear on her record. She thereafter applied for a clearance certificate from the South African Police Services with the aim to submit all the

required documentations in support of her emigration. After making this request she was informed that she has no criminal record and she therefore,= believed that the advice she received from Ellis was

indeed the correct advice.

- [8] It was never her intention to plead guilty because she had a valid defence. Ellis advised her otherwise and the fact that she was advised that the guilty finding will have no effect on her criminal record she pleaded guilty. A further reason why she pleaded guilty was that she wanted the case to be finalized without delay.
- [9] As a result of the clearance certificate she received which stated she had no criminal record. She obtained a work permit in New Zealand and immigrated to: New Zealand on 4 October 2008. Since then she had been staying and working in New Zealand.
- [10] When she however, during June/July 2011 decided to apply for a permanent work permit and was once again required to obtain a clearance certificate from the South African Police Services.
- [11] To her surprise during July/September 2011T when she received the clearance certificate, it stated contrary to what she believed that she had a criminal record for driving a motor vehicle whilst under the influence of intoxicating alcohol recorded against her name. At that stage, she realized that she had been wrongly advised by Ellis, when he advised her to plead guilty. She then realized that she should have pleaded not guilty.
- [12] Whilst she was uncertain initially as to how to deal with this situation, after consulting with various family members, she was referred to a Mrs Elaine York an ; attorney. This eventually led to her bringing this application.
- [13] Her defence at the trial had it not been for the fact she had been wrongly- advised, was that during the time of the incident, she suffered depression, had no sense of right and wrong, which was increased as a result of anti-psychotic medication which caused her to feel drowsy. This medication caused her to be disorientated, emotionally unstable and mentally confused.
- [14] On the day in question, due to her emotional state of mind, which was at a : low level, she contemplated committing suicide. She had no control over her emotions and actions. She decided to end her life by driving off a cliff. After she had consumed alcohol and further medication whilst not knowing what she was doing, she decided to follow through with her plan to commit suicide. She got into her vehicle and drove to the nearest mountain. She was involved in an accident which resulted in her being arrested and charged.
- [15] Subsequent to the incident she was informed by a different medical practitioner that the medication: she had been using: for her condition was too; strong which resulted in her having no control over her actions.

- [16] Only after she had consulted with Mrs York and Counsel was she advised, having regard to her condition and the situation she was in, she should not have pleaded guilty. She was informed she had a strong case and was not criminally liable. EVALUATION
- [17] The Second Respondent opposed the application. In an Affidavit by one of the Deputy Directors of the Second Respondent, it cannot refute any of the allegations made by the Applicant, except to say that it is improbable that what she states in her Affidavit could have happened. The Court should therefore make a factual finding on the probabilities and reject her claims. In *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 at para [26], it was stated by Harms DP how facts should be adjudicated in motion proceedings : where he says: “Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances; are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that wherein motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's

version consists of bald or uncreditworthy denials, raises fictitious : disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without

rejecting the NDPP's version”.

- [18] The Second Respondent cannot put up a different version when the Applicant states that she was wrongly advised by her attorney, Ellis, that it would- be better to plead guilty and that she would not have any criminal record if she pleaded guilty.
- [19] It is also not for this Court to decide whether the defence she had raised in these proceedings stand up to scrutiny that is for a trial court if she is subsequently criminally charged after her defence had been tested. This being motion proceedings all the Applicant had to do was to satisfy the court that on the papers before it she had made out a case for the relief she seeks as set out in the Notice of Motion. [20] CONDONATION The Second Respondent did not oppose the Application for Condonation and it is therefore granted. COSTS As to the prayer for an order of costs, we are not inclined to grant an order for costs against a state institution such as the Director of Public Prosecutions, where it was in the public interest, for them to defend an application such as this. In the result therefore I make the following order:

1. That the late filing of Appellant's Application for Review is condoned;

2. That the proceedings before the First Respondent under Magistrate's Court Mossel Bay case number A334/2008 in which, the First Respondent convicted the Applicant of driving a motor vehicle while under the influence of intoxicating alcohol (Section 65(1)(a), read with Sections 89(1), 89(2) and 34 of the National Road Traffic Act 93 of 1996) and sentenced the Applicant to a fine of R6 000,00 or six (6) months imprisonment, is set aside;
3. That the matter be referred back to the aforesaid Magistrate's Court for rehearing on the basis that Sections 112(2) and 113(1) of the Criminal Procedure Act 51 of 1977 has to be complied with.
4. No order as to costs is made. HENNEY, J Judge of the High Court I agree, and it so ordered DLODLO, J Judge of the High Court
- (b) That the proceedings before the First Respondent under Magistrate's Court Mossel Bay case number A334/2008 in which the First Respondent convicted the Applicant of driving a motor vehicle while under the influence of intoxicating alcohol (Section 65(1)(a), read with Sections 89(1), 89(2) and 34 of the National Road Traffic Act 93 of 1996) and sentenced the Applicant to a fine of R6 000,00 or six (6) months imprisonment, be reviewed and set aside;
- (c) That the conviction and sentence in the aforesaid proceedings be set aside;
- (d) That the matter be referred back to the aforesaid Magistrate's Court for rehearing on the basis that Sections 112(2) and 113(1) of the Criminal Procedure Act 51 of 1977 has to be complied with.
- [5] The First Respondent is the presiding magistrate and the Second Respondent is the Director of Public Prosecutions. The First Respondent does not oppose this application. The Second Respondent opposes the application.

#### FACTS UPON WHICH THE APPLICATION IS BASED

- [6] The Applicant deposed an affidavit wherein she sets out her case upon which she basis her claim for relief. She further states in her Affidavit that when she pleaded guilty to the offence she trusted her attorney Ellis with the advice he gave her. She believed that he would act in her best interest. For this reason she decided to plead guilty to the charge.

The whole incident was very traumatic for her and her family that is why she decided to plead guilty.

- [7] One of the main reasons as she stated earlier on that convinced her to plead not guilty and to finalize the matter was because of the advice Ellis gave her namely that the conviction and sentence will have no effect on her criminal record. As a lay person not schooled in law she thought that her rights as an accused would be protected and to plead guilty was the right thing to do under the circumstances at that point in time and with the advice given to her by Ellis. Prior to the trial at that stage her whole family already resided in New Zealand and she.

also decided to immigrate to New Zealand. After the trial, she was informed that the conviction and sentence will not appear on her record. She thereafter applied for a clearance certificate from the South African Police Services with the aim to submit all the required documentations in support of her emigration. After making this request she was informed that she has no criminal record and she therefore believed that the advice she received from Ellis was

indeed the correct advice.

- [8] It was never her intention to plead guilty because she had a valid defence. Ellis advised her otherwise and the fact that she was advised that the guilty finding will have no effect on her criminal record she pleaded guilty. A further reason why she pleaded guilty was that she wanted the case to be finalized without delay.
- [9] As a result of the clearance certificate she received which stated she had no criminal record. She obtained a work permit in New Zealand and immigrated to: New Zealand on 4 October 2008. Since then she had been staying and working in New Zealand.
- [10] When she however, during June/July 2011 decided to apply for a permanent work permit and was once again required to obtain a clearance certificate from the South African Police Services.
- [11] To her surprise during July/September 2011 when she received the clearance certificate, it stated contrary to what she believed that she had a criminal record for driving a motor vehicle whilst under the influence of intoxicating alcohol recorded against her name. At that stage, she realized that she had been wrongly advised by Ellis, when he advised her to plead guilty. She then realized that she should have pleaded not guilty.
- [12] Whilst she was uncertain initially as to how to deal with this situation, after consulting with various family members, she was referred to a Mrs Elaine York an ; attorney. This eventually led to her bringing this application.
- [13] Her defence at the trial had it not been for the fact she had been wrongly- advised, was that during the time of the incident, she suffered depression, had no sense of right and wrong, which was increased as a result of anti-psychotic medication which caused her to feel drowsy. This medication caused her to be disorientated, emotionally unstable and mentally confused.
- [14] On the day in question, due to her emotional state of mind, which was at a : low level, she contemplated committing suicide. She had no control over her emotions and actions. She decided to end her life by driving off a cliff. After she had consumed alcohol and further medication whilst not knowing what she was doing, she decided to follow through with her plan to commit suicide. She got into her vehicle and drove to the nearest mountain. She was involved in an accident which resulted in her being arrested and charged.

- [15] Subsequent to the incident she was informed by a different medical practitioner that the medication: she had been using: for her condition was too; strong which resulted in her having no control over her actions.
- [16] Only after she had consulted with Mrs York and Counsel was she advised, having regard to her condition: and the situation she was in, she should not have pleaded guilty. She was informed she had a strong case and was not criminally liable.

#### EVALUATION

- [17] The Second Respondent opposed the application. In an Affidavit by one of the Deputy Directors of the Second Respondent, it cannot refute any of the allegations made by the Applicant, except to say that it is improbable that what she states in her Affidavit could have happened. The Court should therefore make a factual finding on the probabilities and reject her claims.

In *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 at para [26], it was stated by Harms DP how facts should be adjudicated in motion proceedings : where he says:

*“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances; are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that wherein motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's*

version consists of bald or uncreditworthy denials, raises fictitious : disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without

rejecting the NDPP's version”.

- [18] The Second Respondent cannot put up a different version when the Applicant states that she was wrongly advised by her attorney, Ellis, that it would- be better to plead guilty and that she would not have any criminal record if she pleaded guilty.
- [19] It is also not for this Court to decide whether the defence she had raised in these proceedings stand up to scrutiny that is for a trial court if she is subsequently criminally charged after her defence had been tested. This being motion proceedings all the Applicant had to do was to satisfy the court that on the papers before it she had made out a case for the relief she seeks as set out in the Notice of Motion.

- [20] CONDONATION

The Second Respondent did not oppose the Application for Condonation and it is therefore granted.

#### COSTS

As to the prayer for an order of costs, we are not inclined to grant an order for costs against a state institution such as the Director of Public Prosecutions, where it was in the public interest, for them to defend an application such as this.

In the result therefore I make the following order:

1. That the late filing of Appellant's Application for Review is condoned;
2. That the proceedings before the First Respondent under Magistrate's Court Mossel Bay case number A334/2008 in which, the First Respondent convicted the Applicant of driving a motor vehicle while under the influence of intoxicating alcohol (Section 65(1)(a), read with Sections 89(1), 89(2) and 34 of the National Road Traffic Act 93 of 1996) and sentenced the Applicant to a fine of R6 000,00 or six (6) months imprisonment, is set aside;
3. That the matter be referred back to the aforesaid Magistrate's Court for rehearing on the basis that Sections 112(2) and 113(1) of the Criminal Procedure Act 51 of 1977 has to be complied with.
4. No order as to costs is made.

HENNEY, J

Judge of the High Court

I agree, and it so ordered

DLODLO, J

Judge of the High Court

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