

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, GQEBERHA)**

Case No.: 97/2021

In the matter between:

DARRYL NATHAN UITHALER

Applicant

and

THE MINISTER OF POLICE

First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Respondent

JUDGMENT IN AN APPLICATION FOR LEAVE TO APPEAL

ZIETSMAN AJ:

[1] This is an application for leave to appeal the judgment of this court dismissing applicant's application for condonation in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act").

[2] It is by now trite that leave to appeal may only be given where the court is of the opinion that the "appeal would have a reasonable prospect of success", or when there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.¹

[3] Applicant relies on 21 grounds of appeal. The grounds may, for ease of consideration, be summarised as follows. The first relates to the finding that applicant failed to show good cause.

¹ Section 17(1)(a) of the Superior Court's Act 10 of 2013.

- [4] The second concerns the finding that applicant's constitutional rights were read to him since it is common cause that he signed the notice of rights. The third, that the court erred in finding that the reasons for the delay were not fully explained.
- [5] With regard to good cause, applicant contends that the court misdirected itself by only criticising applicant for not attaching various statements to his founding affidavit and not placing a copy of the docket before court. Also, that the warning statement made by applicant did not amount to an exculpatory statement and that the factual allegations with regard to prospect of success were, according to applicant, not challenged by the respondents.
- [6] Applicant elected not to attach the statements on which he relied. Applicant did so at his own peril. This was once again raised in argument, however, once again, applicant's counsel conceded that the trial bundle (which would have included the statements) did not form part of the record.
- [7] Applicant contends that the factual allegations relating to prospects of success were not challenged by the respondents, however this is not borne out by the papers filed on behalf of the respondents. Applicant applied for condonation and the onus was on him to show good cause, as is required in terms of the provisions of section 3(4)(b) (ii). Applicant cannot rely on the respondents' failure to challenge allegations, which is in any event not the case, to prove that he has satisfied the requirements as set out in section 3(4)(b) of the Act.
- [8] I agree with the respondents' counsel that a court of appeal will be equally left in the dark as to the prospects of success on the merits and will be expected to resort to speculation and conjecture.
- [9] With regard to the notice of rights, applicant contends that the court erred in failing to *"draw a distinction between the legal requirement that applicant's constitutional rights had to be read to him at the time of his arrest directly from the arresting officer's pocket book, which is unchallenged by the first respondent, from the constitutional rights which were required to be read to applicant later at the Police*

*Station, as per the notice of rights.*² Applicant further contends that he was “instructed to sign the notice of rights without it being explained to him”.

- [10] Applicant’s counsel submitted that what is meant by the above, is that applicant had to be informed of the reasons for his arrest and that he had to be informed of his constitutional rights. In this regard applicant’s counsel referred to the judgments of *Mothibedi v Minister of Safety and Security and Another*,³ *Small v Smith*⁴ and *Minister van Veiligheid en Sekuriteit v Rautenbach*.⁵ These judgments do not assist applicant.
- [11] It is in common cause that applicant signed the notice of rights, wherein the reason for his arrest is embodied. I am not persuaded that a court of appeal will interfere with this finding.
- [12] Lastly, applicant contends that the reason for the delay were fully explained. However, during argument applicant’s counsel conceded (correctly so) that the entire period of delay was not explained.
- [13] As was submitted by the respondents’ counsel, applicant was obliged to explain what had transpired in the six-month period between 29 January 2018, when the cause of action arose in respect of his arrest and initial detention, and 28 July 2018 when the notice was due (“the first period”), and the six-month period between 30 October 2018, when the cause of action arose in respect of his further detention, and 29 April 2019 when the notice was due (“the second period”). No explanation whatsoever was given for the delay in respect of the first period. Applicant’s explanation only commences after his release and, consequently, after the first period. It was further submitted that the explanation in respect of the second period also only commences, with his return from Cape Town in July 2019, which is after the expiry of the second period.

² Notice of application for leave to appeal at para 9.

³ (1680/2009) [2013] ZAECHMHC 17 (6 September 2013) at paras 24 to 27.

⁴ 1954 (3) SA 434 (SWA) at 438 E – F.

⁵ (368/95) [1996] ZASCA 11 (13 March 1996) at par 29.

[14] I am not convinced that there exists any reason to conclude that the finding that the delay was not sufficiently explained is incorrect, or that it should be interfered with on appeal.

[15] Having considered all of the above, I am of the view that there are no reasonable prospects that a court of appeal will come to a different conclusion on any of the grounds raised, or that there is some other compelling reason why the appeal should be heard. There is no reason why costs should not follow the result.

[16] In the result, the application for leave to appeal is dismissed with costs.

T. Zietsman

ACTING JUDGE OF THE HIGH COURT

Appearances:

For applicant: Adv. M. du Toit, instructed by Peter McKenzie Attorneys, Gqeberha

For the respondents: Adv. A. Barnett, instructed by the State Attorney, Gqeberha

Date heard: 24 June 2022

Date delivered: 6 September 2022