CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/07
[2007] ZACC 24

M M VAN WYK — Applicant

versus

UNITAS HOSPITAL — First Respondent

DR G E NAUDÉ — Second Respondent

and

OPEN DEMOCRATIC ADVICE CENTRE — Amicus Curiae

Decided on : 6 December 2007

JUDGMENT

THE COURT:

Background

[1] Three interrelated applications are involved in this case. The first is an application to re-enrol an application for leave to appeal which was struck from the roll because there was no appearance for the applicant on 21 August 2007. The second is an application for leave to appeal against the judgment of the Supreme Court of Appeal holding that the applicant is not entitled to a certain report which she sought

from Unitas Hospital, the first respondent (the hospital).[1] The third application is an application for condonation of the late filing of the application for leave to appeal.

[2] The background to these applications is this. The applicant's husband died while he was a patient at the hospital. The applicant believed that the death of her husband had been brought about by the negligence of the hospital staff and that she had an action for damages against the hospital. Dr Naudé, a specialist physician, the second respondent, who was one of the medical doctors who had treated her deceased husband, had prepared a report on the nursing conditions at the hospital. He did this in his capacity as the director of the multi-intensive care unit at the hospital and as chairperson of the hospital board. The applicant believed that this report could help her to establish negligence on the part of the hospital staff.

[3] The applicant approached the Johannesburg High Court for, amongst other things, an order directing the hospital to make the report available to her. She alleged that she was entitled to the report under the provisions of section 50(1)(a) of the Promotion of Access to Information Act, 2000 (PAIA).[2] This section entitles any person, upon request, to have "access to any record of a private body if that record is required for the exercise or protection of any rights".[3]

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[1] *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA).

[2] Act 2 of 2000.

[3] Section 50(1)(a) of PAIA provides:

> "A requester must be given access to any record of a private body if that record is required for the exercise or protection of any rights".

PAIA was enacted to give effect to the right of access to information guaranteed by section 32(1)(b) of the Constitution which provides:

[4] The High Court held that the applicant was entitled to the report and granted her the relief sought. On appeal, at the instance of the hospital, the majority of the Supreme Court of Appeal held that the applicant was not entitled to the report.

[5] Eleven months after the decision of the Supreme Court of Appeal, the applicant approached this Court seeking leave to appeal against the decision of the Supreme Court of Appeal. As this application was out of time, she also applied for condonation of the late filing of the application for leave to appeal. Both these applications were set down for hearing at 10h00 on 21 August 2007.

[6] When the case was called at 10h00 on 21 August 2007, there was no appearance for the applicant. The case was stood down to enable the Registrar to enquire why there was no appearance. When the matter was recalled later, we were informed that the applicant's attorneys had confused this case with another matter which was to be heard in the Pretoria High Court on 29 August 2007.

[7] Counsel for the first respondent did not, as he was entitled to do, ask for the dismissal of the applications. Instead he asked for wasted costs, including costs consequent upon the employment of two counsel.

"Everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights."

[8] In the event the Court made an order (a) striking the applications from the roll and (b) calling upon the applicant's attorneys to show cause on affidavit not later than 7 September 2007 why they should not be ordered to pay *de bonis propriis* (out of their own pocket) the wasted costs of the appearance on 21 August 2007, including the costs of two counsel.

[9] The applicant's attorneys subsequently filed an affidavit in which they gave the reason for non-appearance. The explanation amounted to this. On 13 August 2007, someone telephoned their office to notify them that the matter would be heard on 29 August 2007. They were under the impression that the telephone message came from this Court and that the message related to the present case. It only transpired on 21 August 2007, presumably upon enquiries made by the Registrar of this Court, that the telephone message had come from the office of the Registrar in Pretoria and that it related to another matter which was an appeal that was due to be heard in the Pretoria High Court.

[10] Having considered this explanation, the Court ordered the applicant's attorneys to pay *de bonis propriis* the wasted costs of the appearance on 21 August 2007 including costs of two counsel.

[11] The applicant now seeks an order re-enrolling the application for leave to appeal. The basis of this application is that the matter was struck from the roll due to no fault on her part and that the application for leave to appeal raises important

constitutional issues concerning the right of access to information. In support of the importance of the constitutional issues involved, the applicant has attached an affidavit on behalf of the Open Democracy Advice Centre, the amicus curiae. This affidavit emphasises the importance of access to information.

[12] The applicant, however, only seeks to enrol the application for leave to appeal. Nothing is said about the application for condonation. Notwithstanding this glaring omission which would ordinarily be fatal to the application for leave to appeal, we will assume in favour of the applicant that she seeks to have re-enrolled both the application for leave to appeal and the application for condonation of the late filing of the application for leave to appeal. In effect the applicant seeks to have these applications set down for the hearing of oral argument.

[13] Against this background, we turn to consider first the application to re-enrol.

The application to re-enrol

[14] Applications to this Court are generally governed by Rule 11, except where the rules of this Court provide otherwise. This Rule requires that once all the papers are lodged, the application must be placed before the Chief Justice who is required to deal with the matter in terms of Rule 11(4). That Rule provides:

> "When an application is placed before the Chief Justice in terms of subrule (3)(c), he or she shall give directions as to how the application shall be dealt with and, in particular, as to whether it shall be set down for hearing or whether it shall be dealt

> with on the basis of written argument or summarily on the basis of the information contained in the affidavits."

[15] It is plain from the provisions of Rule 11(4) that an application can either be dealt with in chambers, when the matter is dealt with summarily or on the basis of written argument, or in open court when the matter is set down for the hearing of oral argument. Rule 19(6)(b) which deals with applications for leave to appeal contemplates a substantially similar procedure. In each case, the matter must either be placed before the Judges of this Court for consideration in chambers when the matter is to be disposed of summarily, or on the basis of written argument, or be placed on the roll of the matters in which oral argument would be heard.

[16] It is apparent from the provisions of Rule 11(4) that the Court has a discretion on how to dispose of an application before the Court. It is equally clear from these provisions that the fact that the Court has called for written argument does not necessarily mean that the Court will set the matter down for the hearing of oral argument. It may, in an appropriate case, dispose of the matter on the basis of written argument only. How an application shall be dealt with depends on the complexity of the issues involved and what the Court considers necessary to enable it to deal with a matter. When the allegations made in the affidavit require amplification by written argument, the Court will call for written argument. And if written argument raises debatable issues the Court will set down the matter for hearing of oral argument.

[17] The practice that this Court generally follows is either to dispose of the matter summarily on the information contained in the affidavits, or issue directions requiring written argument and at the same time setting the matter down for oral argument. This practice does not however prevent the Court, in an appropriate case, from disposing of a matter on the basis of written argument should the matter not proceed on the date on which it was set down for oral argument. In each case, however, the question is whether the matter is one that can be dealt with on the basis of written argument without the need for oral argument. This, in turn, depends on whether there is sufficient material before the Court to enable it to dispose of the matter without oral argument. In accordance with this practice, once an application is lodged and a response to it is filed, the matter is placed before the Judges in chambers to be dealt with in accordance with Rule 11(4).

[18] When the Court decided to set these applications down for hearing, all that we had before us were the applications and a response to them by the hospital. Since then and pursuant to the directions of this Court, the record has been filed and both sides, including the amicus curiae have filed written arguments. In these circumstances, the Court was placed in a better position to decide whether these applications should be re-enrolled for oral argument in the light of all the additional material and written arguments that have since been placed before it. In particular the Court had to decide whether there was enough material to dispose of these applications without hearing oral argument. In the light of all the material available, the Court decided that these applications should be dealt with on the basis of written argument and the other

documents filed of record. In the event the application to set the matter down for hearing had to fail.

[19] Pursuant to this decision, and in accordance with Rule 11(4), the Chief Justice issued directions indicating that the application will be dealt with summarily in chambers on the basis of all the papers lodged including the written argument filed in relation to both the application for leave to appeal and the application for condonation. Pursuant to those directions, these applications have since been placed before us for consideration. In the view we take of the application for condonation it will be convenient to deal with the application for condonation first.

Condonation

[20] This Court has held that the standard for considering an application for condonation is the interests of justice.[4] Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry 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 issue to be raised in the intended appeal and the prospects of success.[5]

[4] See *S v Mercer* 2004 (2) SA 598 (CC); 2004 (2) BCLR 109 (CC) at para 4; *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and Others* 2003 (11) BCLR 1212 (CC) at para 11 and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[5] See *Brummer* id.

[21] The main issue to be raised in the intended appeal concerns the right of access to information which is guaranteed by section 32(1)(b) of the Constitution and which has been given effect to by section 50(1)(a) of PAIA. The importance of this issue cannot be gainsaid. The right of access to information is crucial to the exercise or protection of the rights guaranteed in the Constitution. The issue that the applicant intends to raise in this case is therefore ordinarily an issue on which obtaining the views of this Court would be desirable. This much is apparent from the written submissions of the amicus curiae. But there are other considerations that are relevant.

[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing. It amounts to this. During the entire period of approximately eleven months she was considering whether or not to appeal the decision of the Supreme Court of Appeal. During this period she sought advice from a number of individuals whom she has not disclosed. In addition she alleges that she does not have unlimited funds although she admits that this is not a compelling reason for the delay. She has not furnished any explanation as to why it took approximately eleven months for her to decide whether or not to appeal. Nor has she furnished any explanation how she overcame her funding difficulty.

[23] It is apparent from her affidavit, however, that the delay was interrupted by the threat of execution to recover the taxed costs awarded against her by the Supreme Court of Appeal. In this regard she says that matters came to a head when she received the threat of execution to recover taxed costs. This apparently prompted her to seek advice on how to avoid the payment of costs. She was advised that if her claim against the hospital is successful, her claim may well be attached to pay the hospital's taxed costs. It therefore appears from this explanation that but for the threat of execution, the applicant would probably not have appealed the decision of the Supreme Court of Appeal.

[24] The inference that the applicant had decided not to pursue this matter is irresistible. By the time the applicant approached this Court, she had not only issued summons against the hospital but the trial date had been set for 15 March 2007. There were prospects of obtaining the report through the rules relating to the discovery of documents. The inordinate delay in appealing against the decision of the Supreme Court of Appeal is, in our view, inexplicable except on the basis that the applicant had no intention to pursue this matter. This explains the attitude of the applicant in not proceeding with the matter until she was confronted with a threat of execution to recover taxed costs.

[25] There is a further consideration that is relevant to this case. The applicant's affidavit was sworn to on 23 February 2007. The application was served on the hospital three days later, that is, on 26 February 2007. And in view of a prior request

for discovery by the applicant's attorneys under the High Court rules, on 1 March 2007 the hospital discovered the report sought by the applicant in these proceedings. However, the application for leave to appeal was only lodged with the Registrar of this Court on 13 March 2007, almost two weeks after the report had been discovered under the rules and made available to the applicant. There is no explanation why it took more than two weeks after the service of the application on the hospital before the application was lodged with this Court.

[26] When the applicant approached this Court the report that she sought had been discovered under the rules relating to the discovery of documents and was therefore available for her inspection. The applicant did not disclose this fact when she lodged the application for leave to appeal in this Court. The application created the impression that the applicant still desperately needed the report claiming that it "will undeniably be of great assistance to [her] in enforcing [her] right to claim damages from the First Respondent." It is understandable that the applicant could not have disclosed in her founding affidavit the fact that the report had been made available to her as it only became available after she had deposed to the affidavit. However, when she lodged the application for leave to appeal in this Court, the report had been made available to her. This fact should have been disclosed by way of a supplementary affidavit. It goes to the question of mootness of the underlying issue as between the parties.

[27] By the time the matter reached this Court therefore, litigation had already commenced. The applicant had been offered the report that she required. In fact the civil action had been set down for hearing. The resolution of the main issue therefore has no practical effect on the parties, save in relation to the issue of costs. The only reason why she is seeking to appeal is apparently to avoid a costs order awarded against her by the Supreme Court of Appeal. The main issue between the parties has therefore become moot.

[28] The amicus curiae submitted that it is nevertheless in the public interest that the main issue be resolved. It submitted that issues relating to the right of access to information are, as a general matter, a moving target. This is so because the time taken for the court process to take its course is so long that people who seek information will no longer be in a position to use the information to their advantage by the time the proceedings (including any appeal) are finalised. Or by the time the matter comes on appeal, the information would have been obtained through the rules relating to discovery and therefore arguably render the matter moot. Therefore, the argument goes, issues relating to the right of access to information will invariably be moot by the time they reach this Court. These submissions are not without force.

[29] It is by now axiomatic that mootness does not constitute an absolute bar to the justiciability of an issue. The Court has a discretion whether or not to hear a matter. The test is one of the interests of justice.[6] A relevant consideration is whether the

[6] *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 22.

order that the Court may make will have any practical effect either on the parties or on others.[7] In the exercise of its discretion the Court may decide to resolve an issue that is moot if to do so will be in the public interest. This will be the case where it will either benefit the larger public or achieve legal certainty.[8]

[30] If the only hurdle that the applicant had to surmount was mootness, the position would have been entirely different. Here the applicant has to surmount two hurdles, the first being the inordinate delay coupled with a lack of a reasonable explanation for the delay. Mootness adds a further hurdle and renders the first hurdle insurmountable. Mootness is but one of the factors that must be taken into consideration in the overall balancing process to determine where the interests of justice lie. It assumes a particular significance in this case where there was an inordinate delay of some eleven months and the absence of a reasonable explanation. In the circumstances of this case it would be unfair to the hospital to compel it to incur more costs simply to resolve an issue in the public interest.

[31] There is an important principle involved here. An inordinate delay induces a reasonable belief that the order had become unassailable. This is a belief that the hospital entertained and it was reasonable for it to do so. It waited for some time before it took steps to recover its costs. A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on

[7] *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 9.

[8] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 27 and *Radio Pretoria* above n 6 at para 22.

with their lives. After an inordinate delay a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further. To grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interests of justice.

[32] It is true the case raises an important question concerning the constitutional right of access to information. This in itself is no reason to come to the assistance of a litigant who has been dilatory in the conduct of litigation. This Court has previously refused to come to the assistance of litigants where there was a delay of some nine months regardless of the issue raised.[9]

[33] The applicant has submitted that her application for leave to appeal bears prospects of success. Prospects of success pale into insignificance where, as here, there is an inordinate delay coupled with the absence of a reasonable explanation for the delay. And the issue is moot. There is now a growing trend for litigants in this Court to disregard time limits without seeking condonation. Last term alone, in eight out of ten matters, litigants did not comply with the time limits or the directions setting out the time limits. In some cases litigants either did not apply for condonation at all or if they did, they put up flimsy explanations. This non-compliance with the time limits or the Rules of Court resulted in one matter being postponed and the other

[9] *Settlers Agricultural High School* and *Brummer* above n 4.

being struck from the roll. This is undesirable. This practice must be stopped in its tracks.

[34] In arriving at this conclusion, we have not given much weight to the prospects of success. We therefore express no opinion on that issue. While we consider the underlying issue between the parties moot, we do not find it necessary to decide whether it is in the public interest to consider the underlying issue between the parties. We reach our conclusion based on the inordinate delay of some eleven months and the absence of a reasonable explanation for the delay viewed against the fact that the applicant has obtained the report that she has been seeking.

[35] For all these reasons, it is not in the interests of justice to grant condonation.

[36] This is not a case that warrants a costs order. The Supreme Court of Appeal ordered costs. That costs order is beyond our reach. Prior to the hearing of the matter, the hospital had offered to abandon its costs order against the applicant. We can only express the hope that the offer still stands.

[37] In the event the following order is made:

(a) The application to condone the late filing of the application for leave to appeal is dismissed.

(b) The application for leave to appeal is refused.

(c) There is no order for costs.

Langa CJ, Moseneke DCJ, Madala J, Mpati AJ, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J.