



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **AR241/2022**

In the matter between:

SIYABONGA NDLOVU

APPELLANT

and

MINISTER OF POLICE

RESPONDENT

Coram: Mossop J and Singh AJ

Heard: 18 August 2023

Delivered: 18 August 2023

ORDER

On appeal from: Durban Regional Court (sitting as the court of first instance):

1. Condonation for the late delivery of the appeal is refused with costs.
 2. The appeal is struck from the roll.
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JUDGMENT

Mossop J (Singh AJ concurring):

[1] On 7 June 2014, the appellant was shot by a member of the public, who I shall refer to as 'the complainant', who believed that the appellant had robbed him of his banking card whilst the complainant was attempting to perform a transaction at an automatic telling machine (ATM) in Mobeni, Durban. The appellant was subsequently pursued by the complainant and was shot by him. The South African Police Services (SAPS), and an ambulance, were summoned to the scene and the appellant was arrested and removed to King Edward VIII Hospital where he remained for some six weeks recovering from his injury. For a portion of that time, he was guarded by members of the SAPS and secured to his bed to prevent him from leaving both his bed and the hospital. The appellant never appeared in court for some unexplained reason and ultimately the criminal offence for which he was arrested was withdrawn.

[2] The appellant chose to sue not the complainant who shot him, but rather the Minister of Police. He claimed in his particulars of claim that he was unlawfully arrested and detained by members of the SAPS at King Edward VIII Hospital. To this the respondent pleaded, in an amended plea, that the SAPS members involved in the arrest of the appellant had a reasonable suspicion that the appellant had committed a Schedule 1 offence, namely attempted murder and attempted armed robbery. Thus, so it was pleaded, the arrest of the appellant was justified and lawful in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act).

[3] On 26 March 2021, the appellant's claim against the respondent was dismissed in the Durban Regional Court. It is against this decision that the appellant brings this appeal. In furtherance of this appeal, on 7 April 2021, the appellant's attorneys requested the regional magistrate to provide reasons for his judgment. On 17 May 2021 those reasons were provided. The appeal, however, was only noted on 27 July 2022, some 14 months later.

[4] Rule 51(3) of the Magistrates' Court Rules provides as follows:

'An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer.'

From the brief narration of facts referred to above, it is apparent that this appeal was not noted within 20 days of the regional magistrate delivering his reasons.

[5] The appellant has brought an application that seeks to condone his delay in noting this appeal. The appellant's explanation for not bringing this appeal timeously encompasses a large variety of factors. They range from the appellant's attorney not attending the trial in the regional court and therefore not being 'familiar' with what transpired at the trial, to a delay in obtaining the trial transcripts. Interspersed with these allegations are further allegations that the counsel instructed by the appellant's attorney contracted Covid-19. So severe was the unidentified counsel's encounter with Covid-19, that she developed problems with her finger joints and 'typing and working on my documents became difficult'. Compounding this unfortunate state of affairs, was that no other counsel could be located who was prepared to work at the low rates quoted by the afflicted counsel. Added to these reasons was a further smorgasbord of social issues:

'... the Pandemic, loss of economy due to looting, the exaggerated rise in the cost of living and the latest floods made placing my attorneys in funds almost impossible.'

However, from this extract it appears that the true reason for the appellant's delay begins to emerge, namely a lack of funds.

[6] The condonation application is not overburdened with dates. That having been said, in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others*,¹ the court held that:

¹ *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others* (2010) 31 ILJ 1413 (LC) para 13.

'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

[7] It is, nonetheless, appropriate to mention the few dates that are provided by the appellant in his condonation application. The commencement point must be the regional magistrate's reasons for his judgment which, as previously stated, were delivered on 17 May 2021. The next date mentioned by the appellant is 'in or around October 2021', five months later, when the transcripts were allegedly received by the appellant's attorney from the transcribers. In 'early January 2022', the appellant's attorney attempted to contact counsel. 'Sometime in the latter part of January early February' a brief was 'dropped off' with counsel. No further dates are mentioned. The final date that can be accepted is the date of service of the appellant's notice of appeal, namely 27 July 2022 because there is a stamp on that document signifying receipt thereof by the respondent's attorneys. This court is asked to accept that these brief, scattered islands of facts are sufficient to justify condonation being granted. For it cannot seriously be disputed that the time limits imposed for the noting of an appeal have egregiously been exceeded.

[8] A court has a discretion to grant condonation.² Court rules are not immutable and are not always cast in stone. They exist to provide a framework to be employed in the conducting and expeditious resolution of litigation. Where court rules are not complied with such non-compliance may, in appropriate cases, be condoned upon an adequate explanation

² *PAF v SCF* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) para 15.

being provided. In *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*,³ the Constitutional Court expressed itself as follows on the issue of condonation:

‘This court has held that the standard for considering an application for condonation is the interests of justice. 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.’ (Footnote omitted.)

[9] The Constitutional Court went on to say:

‘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.’⁴

[10] The grant or refusal of condonation is not a mechanical process but one that involves the balancing of often competing factors. Accordingly, ‘very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong prospects of success may excuse an inadequate explanation for the delay (to a point)’.⁵ A combination of an inadequate explanation and poor prospects of success would hold limited prospects of condonation being granted. It is into that latter category that this application falls, in my view.

[11] It is by now well-established that an applicant for condonation, particularly where the delay is significant, must provide a full explanation with regard to the time which has elapsed, and the steps taken to bring the matter to court. The appellant has not given a full and complete explanation for the delay in progressing his appeal. The entire period of

³ *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 20.

⁴ *Ibid* para 22.

⁵ *Valor IT v Premier, North West Province and others* [2020] ZASCA 62; 2021 (1) SA 42 (SCA) para 38. See also *United Plant Hire (Pty) Ltd v Hills and others* 1976 (1) SA 717 (A) at 720E-G; *Darries v Sheriff, Magistrate’s Court, Wynberg, and another* 1998 (3) SA 34 (SCA) at 40H-41E.

delay covers some 14 months, but very little specific detail is provided regarding those months of delay. Insofar as there may have been difficulties acquiring the transcript of proceedings, dates and actions taken by the appellant's attorney and responses received from the transcriber should have populated the condonation affidavit, but they do not. No explanation at all is provided for the period after receipt of the transcript until January 2022, when attempts were apparently made to contact counsel. Difficulties with the health of counsel are mentioned without confirmation by counsel of those facts alleged. The allegations are thus hearsay in the mouth of the appellant. Large chunks of time are simply glossed over. General societal issues are raised, presumably as a sop for any inadequacies in the appellant's version. In short, the explanation provided is vague and unsatisfactory.

[12] In addition, the appellant appears not to have brought the condonation application at the earliest opportunity available to him.⁶ A delay in seeking condonation must itself be explained.⁷ Given the difficulties that the appellant allegedly immediately faced concerning the acquisition of the record, it must have been patently obvious to him and his attorney, almost from the moment that the regional magistrate provided his reasons, that he would not be able to adhere to the prescribed time limits. He ought at that early stage to have sought condonation but did not do so.

[13] As was stated in *Van Wyk*:

'There is an important principle involved here. An inordinate delay induces a reasonable belief that the order had become unassailable. ... A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on 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.'⁸

⁶ *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G-H.

⁷ *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and others* [2017] ZASCA 88; 2017 (6) SA 90 (SCA) para 26.

⁸ *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 31.

[14] The appellant mentions in his condonation application that his prospects of success on appeal are 'more than favourable' but says no more than that. I shall consider those prospects in greater depth.

[15] The complainant was attempting to perform a transaction at an ATM, when the appellant allegedly intervened and informed him that the machine was defective and that the bank card should be inserted into the ATM in a particular fashion. The appellant then grabbed hold of the card being held by the complainant and somehow slipped it into the cuff of his shirt. The appellant allegedly, nonetheless, convinced the bewildered complainant that he had inserted the card into the ATM and urged the complainant to enter his pin code into the machine, which the complainant in his confusion then did. After the code had been inserted, the appellant fled and was hotly pursued by the complainant. He still had the complainant's bank card, and he now knew his pin code. As he pursued the appellant, the complainant noticed a motor vehicle slowly driving along the road next to which they were running. The motor vehicle was proceeding in the same direction that the appellant and the complainant were running. Running next to the driver's side of the motor vehicle was a third person with a firearm. The third person fired at the complainant and the appellant allegedly turned to face the complainant and also fired at him. The third person then got into the motor vehicle. The complainant fired back at the appellant with his firearm and hit him. The appellant then attempted to get into the motor vehicle through the left rear passenger door but fell and was left lying in the road where the complainant found him and held him until the SAPS arrived. The motor vehicle left the scene with the third person inside. The complainant found his ATM card with the appellant. Upon the arrival of the SAPS members at the scene, the complainant explained his version of events and then deposed to an affidavit in which he again repeated those allegations under oath. The appellant was consequently arrested and taken to King Edward VIII Hospital.

[16] There was no evidence to gainsay the presence of the motor vehicle or the active involvement of the third person in the events. The fact that the third person involved himself in the events is a strong indication that the appellant was part of a scheme to rob unsuspecting persons at the ATM. And it allays any doubts that may exist about the identity of the person who attempted to rob the complainant: that person was the person who was shot and who tried to get into the motor vehicle. There can be no other explanation for the involvement of the third person other than that he was interceding to assist the appellant to escape from the complainant.

[17] There was also nothing to gainsay the fact that the complainant informed the SAPS under oath what had allegedly happened. Indeed, the appellant's legal representative himself introduced the complainant's sworn statement as an exhibit whilst he was cross-examining the complainant. The affidavit was thus before the court a quo and revealed that it had been deposed to by the complainant at 10h20 on the day of the incident. According to the content of that affidavit, the incident had occurred at 10h15. The affidavit was accordingly deposed to almost immediately after the incident occurred.

[18] The respondent relied upon the provisions of section 40(1)(b) of the Act in resisting the appellant's claim. That section reads as follows:

'(1) A peace officer may without warrant arrest any person-

(a) ...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;'

The offence of robbery appears in Schedule 1.

[19] In *Duncan v Minister of Law and Order*,⁹ it was held that the following jurisdictional facts must exist before the power confirmed by section 40(1)(b) of the Act may be invoked:

- (a) the arrestor must be a peace officer;
- (b) the arrestor must entertain a suspicion;
- (c) the suspicion must be that the person arrested committed an offence referred to in Schedule 1 of the Act; and
- (d) this suspicion must be formed and held on reasonable grounds.

[20] As to the test to be applied, *Duncan* explains that the test is an objective one: '[a]nd it seems clear that the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion.'¹⁰

What section 40(1)(b) requires is suspicion and not certainty.¹¹

[21] I am mindful of the fact that the arresting officer was not called to testify in the court a quo. A reason was advanced for this by the investigating officer who testified at the trial: the arresting officer was a Constable Nora Ndlovu who, subsequent to arresting the appellant, had retired from the SAPS and her whereabouts were unknown to him.

[22] When the SAPS arrived at the scene, they were confronted with the appellant lying injured as a result of being shot by the complainant. The complainant testified that he told the SAPS members what had happened. He was then asked to immediately make a written statement under oath, which he did at the scene. That statement included his version of events. The SAPS members thus had the complainant's sworn version of events, the recovered bank card, and the fact of the wounding of the appellant upon which to form a view. In my view, the reasonable grounds required by the SAPS members to arrest the appellant without a warrant of arrest were satisfied.

⁹ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H.

¹⁰ *Ibid* at 814D-E.

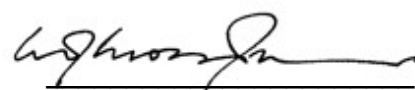
¹¹ *Mabona and another v Minister of Law and Order and others* 1988 (2) SA 654 (SE) at 658H-I.

[23] It therefore appears to me that the appellant has weak prospects of succeeding on the merits of the appeal. To grant condonation in the absence of a satisfactory explanation after such an inordinate delay in progressing the appeal would undermine the principle of finality and cannot be in the interests of justice. It seems to me that the appropriate order in the circumstances is to strike the matter off the roll.¹²

[24] It is trite that '[t]he general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so'.¹³ No such grounds exist in this matter.

[25] I would accordingly propose the following order:

1. Condonation for the late delivery of the appeal is refused with costs.
2. The appeal is struck from the roll.



MOSSOP J

¹² *Muller v Sanlam* [2016] ZASCA 149; *SA Express Ltd v Bagport (Pty) Ltd* [2020] ZASCA 13; 2020 (5) SA 404 (SCA).

¹³ D E van Loggerenberg *Erasmus: Superior Court Practice* (RS 21, 2023) at D5-8.

I agree:

SINGH AJ

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Date of argument : 18 August 2023

Date of Judgment : 18 August 2023