IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

09 JUNE 2014
DATE

SIGNATURE

CASE NUMBER: 32962/11

9/6/2014

In the matter between:

C.P. CAU	APPLICANT
And	
THE MINISTER OF POLICE	FIRST RESPONDENT
COMMISSIONER OF POLICE	SECOND RESPONDENT
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	THIRD RESPONDENT
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	FOURTH RESPONDENT

JUDGMENT

MAVUNDLA J;

[1] This Court on the 23 May 2014 dismissed the applicant's application for condonation of the late delivery of his notice of intended proceedings against the respondents as required in terms of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

[2] The applicant now seeks leave to appeal to the Supreme Court of Appeal alternatively the Full Bench of this Division against the whole of the judgment and order referred to herein above.

[3] The grounds upon which leave to appeal is sought are that this court erred by failing:

3.1 to take into consideration the extremely good prospects of success on the merits of the matter, bearing in mind that the applicant was incarcerated for a period of 47 months and then released after all the charges were withdrawn against him. The respondents did not oppose the application for condonation;

3.2 to take into consideration that the period that the applicant was out of time with his letter of demand in terms of Act 40 of 2002 was not inordinate;

3.3 to consider the matter in accordance with the approach advocated in *Melane v Santam Insurance Co Ltd.*[1]

[1] 1962 (4) SA 531 (A) at 532.

3.4 to hold that the inordinate delay transpired before the application for condonation was launched when this is not a criterion.

3.5 to consider that in terms of the maxim *lex non cogit ad impossibilia*, prescription had not run against the applicant in respect of the arrest for so long as he was being detained. The applicant was released.

[4] It was submitted on behalf of the applicant, inter alia, that in respect of the third and fourth respondents, the court should have granted condonation because there were no opposing papers filed on their behalf. It was further submitted that the applicant's claim against these two respondents had not prescribed. It was submitted that the applicant's cause of claim is premised on the failure of the prosecution to properly apply its mind and withdrew the charges against the applicant much earlier than was done. In support of this contention reliance was made on the matter of *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA) at 225.

[5] It is common cause that the applicant was arrested on 14th April 2005. He was in custody since then, and appeared at court on several occasions until when his case was withdrawn on the 9 the March 2007. In the matter of *Minister of Police v Du Plessis* 2014

(1) SACR 217 (SCA) at 225 it was held that: "[28] Once an arrestee is brought before a court, in terms of s50 of the Criminal Procedure Act 51 of 1977 (CPA), the police's authority to detain, inherent in the power of arrest, is exhausted. In this regard see *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) (2011 5 (5) SA 367; [2011] 2 ALL SA 157) para 42. As pointed out by Campbell AJ in the court below, before the court makes a decision on the continued detention of an arrested person comes the decision of the prosecutor to charge such a person. A prosecutor has a duty not to act arbitrarily. A prosecutor must act with objective and must protect the public interest." Therefore the applicant's claim against the first and second respondents, if the arrest was at all unlawful, would be for the first few hours of detention until his first appearance at court. Beyond the first appearance, his claim can only be against the third and fourth respondents. It stands to reason that the substantial damages suffered by the applicant, if any, can only be claimed against the third and fourth respondents.

[6] It is trite that the consideration in an application for leave to appeal is whether there are reasonable prospects of success on appeal. *Vide Botes and Another v Nedbank Ltd*[2] *et Pharmaceutal Society of SA v Minister of Health.*[3]

[7] It needs repeating that the applicant was arrested on 14th April 2005. He appeared at court on several occasions and eventual

[2] 1983 (3) SA 27 (AD) at 28C.

[3] *2005 (3) SA 231 (SCA) at 237.*

released when the charges were withdrawn against on the 9th March 2009. He only saw his attorney on the 21st June 2010 (15 months after his release). The notice of intention to institute an action was only served upon the respondents in August 2010 (17 months after his release). He issued and served summons upon the respondents in June 2011 (24 months after his release); He approached this court for condonation only in 2014 (five years after his release.). This court found that there was an inordinate delay on the part of the applicant and was also not satisfied with the explanation proffered.

[8] Once the applicant was released, assuming (without deciding this issue), that his incarceration lent itself to the maxim *lex non cogit ad impossibilia*, however, after his release on the 9th March 2009 this maxim no longer applied[4].

[9] In the matter of *Shaik and Others v Pillay and Others*[5] Nicholson J held that:

[4] *Lombo v African National Congress* 2002 (5) SA 668 (SCA).
[5] 2008 (3) SA 59 (N) at 62.

"[8] It is also important to remember what was said in *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G where Centlivers CJ remarked that:

> Whenever an applicant realises that he has not complied with a Rule of Court he should, without delay, apply for condonation."

[9] The Supreme Court of Appeal has pointed out that an unacceptable explanation remains just that, whatever the prospects of success on the merits. *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 768B-C. "

[10] The courts have held that the greater the degree of delay the less are the prospects of success regardless of the strength of the grounds upon which the appeal is premised; *vide Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*[6] also *Immelman v Loubser*[7]. I am of the view that there are no reasonable prospect that another court would condone a delay of five years, as in casu.

[6] 2008 (2) SA 472 (CC) at 477A-B.
[7] 1974 (3) SA 816 at 824B-C.

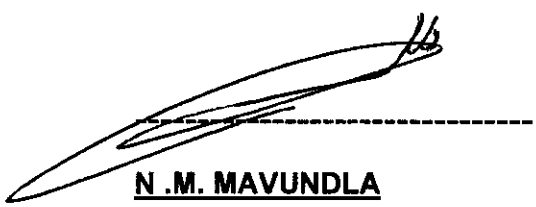
[10] It brooks no argument that the incarceration of the applicant for 47 months violated his rights to dignity (s10), to liberty (s12 (1)(a) 7(b), to a speedy (35 (3)(d)), as guaranteed in the Bill of Rights. However, the legislature deemed it appropriate that where a person seeks compensation for the violation of any of his rights by an organ of the State, he must comply with the provisions of Act 40 of 2002. The mere fact that the third and fourth respondents are not opposing the application is no licence to an aggrieved party to march into court without compliance of the basic requirements. An inordinate delay of five years, would course more prejudice to the respondents, in my view, because it might be difficult for the respondents to trace their necessary witnesses. I am further of the view that it would not be in the interest of the administration of justice, in the circumstances, and that therefore leaves to appeal, in the exercise of my discretion should be refused[8].

[12] With regard to costs, I take note of the fact that the applicant is an indigent Mozambican who had come to work in the mines in this country. The founding affidavit in the main application was deposed to by his attorney. The probabilities are that the applicant

[8] *Vide e Thekwini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC) at 246 para [24].

is back in his country of origin and difficult to access. The probabilities are that he has no assets in this country, which the respondents could have attached to recoup its costs from. It would serve no purpose to burden the applicant with further costs of this application for leave to appeal, which might not be recovered by the respondents. In the exercise of my discretion, in the circumstances I deem it appropriate not to grant costs in favour of the respondents and against the applicant.

[11] In the premises the application for leave to appeal is dismissed.



N .M. MAVUNDLA

JUDGE OF THE COURT

DATE OF HEARING	**: 03 / 06 /2014**
DATE OF JUDGEMENT	**: 09 / 06 / 2014**
PLAINTIFF'S ATT	**: R T TSHIFURA ATT C/O BARES & BASSON ATT**
PLAINTIFF'S ADV	**: ADV T.P KRUGER**
DEFENDANT'S ATT	**: STATE ATTORNEY**
DEFENDANT'S ADV	**: ADV D MTSWENI**