

223/92

CASE NO 429/91

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF LAW AND ORDER

Appellant

and

DEOMANI SINGH

Respondent

CORAM: BOTHA, NESTADT, EKSTEEN, NIENABER JJA
et KRIEGLER AJA

DATE HEARD: NOVEMBER 17, 1992

DATE DELIVERED: NOVEMBER 27, 1992

J U D G M E N T

NIENABER JA:

Section 1 of the Indemnity Act No. 35 of 1990

("the Act") provides as follows:

"1. (1) The State President may, if he is of the opinion that it is necessary for the promotion of peaceful constitutional solutions in South Africa or the unimpeded and efficient administration of justice, by notice in the Gazette grant to any person the immunity referred to in subsection (2), either unconditionally or on the conditions he may deem fit.

(2) No proceedings, either civil or criminal, shall be instituted or continued in any court of law against any person to whom has been granted such immunity, during the period stipulated in such notice in respect of him, in respect of anything done or omitted by him on any date prior to the commencement of that period, and such person shall not be detained during such period in terms of any law in respect of an act or omission at any time prior to the commencement of that period."

On 15 January 1990 a notice by the State President, Government Notice no. 77, was published in Government Gazette no. 12964. It reads:

"Whereas I am of the opinion that it is necessary

for the promotion of peaceful constitutional solutions in South Africa, I hereby under the power vested in me by section 1(1) of the Indemnity Act, 1990 (Act No. 35 of 1990), unconditionally grant to the persons specified in the Schedule, immunity referred to in section 1(2) of the aforementioned Act for the period from the date of this notice up to and including 15 February 1991."

One of the names specified in the schedule was Kumar Sanjay. Kumar Sanjay was the nom de guerre of a man whose real name was Girja Singh. Girja Singh was born in Durban on 30 November 1939. I shall refer to him henceforth as "Singh".

Singh was arrested and detained by the security police on 16 January 1991, one day after the publication of the State President's aforesaid notice of temporary immunity. He was purportedly detained in terms of section 29 of the Internal Security Act no. 74 of 1982. His sister (the respondent in this appeal) brought an urgent application in the Durban and Coast Local Division against the appellant (the respondent in the application) for his immediate release. It succeeded. The court

(Bristowe J) in effect held that the State President's temporary immunity related, in each instance, to a particular person and not to his name. The court said:

"Mr Booyens who, with Mr Mann, has appeared for the Minister of Law and Order, has argued that the indemnity [read "immunity"] was granted to Sanjay Kumar but the person who is arrested is not him at all, it is Girja Singh. Regrettably these two names occupy the same corporeal body and by arresting one you arrest the other. In my view, while there is much substance in the argument that the State was misled as to the identity of the person, it does not touch the main issue, that is that the indemnity [read "immunity"] exists, and whilst it exists the person, by whatever name he goes, cannot be held in custody."

Leave was subsequently granted to the appellant by the court a quo to appeal to this court. The appeal, regrettably, was not regularly prosecuted: the requisite notice of appeal was not lodged within the then 21 day period prescribed by rule 5(1) of the rules relating to this court and the copies of the record of the proceedings were not lodged within the period of 3 months prescribed by rule 5(4). In fact the notice and the

copies were not lodged until some five months after leave had been granted by the court a **quo**. This non-compliance with the rules necessitated a petition to this court for condonation. It is that application for condonation which is now before us.

Of the various considerations relevant to an application of this sort (cf **Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie** 1969 (3) SA 360 (A) at 362F-H), two are particularly in point: one, the explanation tendered by the appellant for his non-compliance with the rules of court and two, its prospects of success on appeal. As to the first the appellant's attorney, in the founding affidavit for condonation, averred that he had made numerous enquiries from the registrar of the court a **quo** about the availability of the typed reasons and the order of the court a **quo** relating to the application for leave to appeal. These documents were required to enable him to

complete the record of the proceedings. The attorney's explanation was that, while waiting for them, he "overlooked the necessity to file a notice of appeal". Once the judgment was obtained, so he stated, the notice of appeal and the requisite copies of the completed record were promptly lodged, albeit out of time. The information in the founding affidavit as to his efforts to expedite the completion of the record was decidedly skimpy. Nor was any explanation or apology tendered by him as to why he laboured under the misapprehension that the filing of the notice of appeal was dependent upon the completion of the record. Be that as it may, I do not believe that his misconception and consequent failure timeously to comply with the rules were so gross and reprehensible as to render the application for condonation unworthy of consideration (cf *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131H-J). Indeed, counsel for the respondent did not contend that the

application for condonation should be refused on this ground. What was contended was that there were no prospects of success for the appellant on appeal. It was within the context of the application for condonation that the merits of the case were fully canvassed by both sides (cf *Rennie v Kamby Farms (Pty) Ltd supra* at 132A-B). These I now proceed to consider.

Kumar Sanjay was not Singh's only alias. According to his sister he was also known as Sonny Singh. And according to major Naude of the security branch of the South African police, the principal deponent on behalf of the appellant, he was known to the security branch by his real name and by the pseudonym "Bobby" or "Bob Pillay" but not by the name of Kumar Sanjay. Naude described him as " 'n opgeleide terroris" who was sentenced in 1964 to 10 years imprisonment for acts of sabotage and who left the country illegally in 1976. Thereafter he travelled extensively and received training at various training

camps of the African National Congress. At the time of his arrest Singh, to the knowledge of the South African police, was the Bureau chief of the African National Congress in Amsterdam where he normally resided.

During October 1990 one Maduna, a legal adviser to the African National Congress, made application locally on behalf of Singh, but under his assumed name of Kumar Sanjay, for a visa to enable him to enter the Republic of South Africa. This application was still pending when a similar application was made on 30 November 1990, again under the name of Kumar Sanjay, the declared purpose being to attend a "consultative conference of the African National Congress in South Africa". The latter application was likewise overtaken by events. Meanwhile, on 12 November 1990, a visa, valid until 11 February 1991, had been issued to "Kumar Sanjay" by the South African embassy at The Hague. It was under that name, his occupation being given as the African National

Congress' representative in the Netherlands, his country of birth as Guyana and the purpose of his entry to visit his family, that Singh entered South Africa on 3 December 1990. On his arrest Singh was found to be in possession of a passport issued by the Republic of India at Lusaka, which was supplemented by a further booklet issued at Maputo. In these documents he is described as an Indian national who was born in Georgetown, Guyana, which details were, of course, false.

While in South Africa he applied, on 14 January 1991 and at Durban, for a South African passport under his real name, Girja Singh. In the application he gave his place of birth as Durban and his occupation as ANC representative, Netherlands. It was that application, when referred to the security branch of the South African police for its recommendations, which precipitated his arrest on 16 January 1991. Notwithstanding representations by a firm of attorneys instructed by both

the present respondent and Mr Walter Sisulu of the African National Congress, and a reliance on the temporary immunity granted by the State President the day before, Singh was detained until he was eventually released by order of the court below. The attitude of the authorities, in disregarding the temporary immunity, is articulated as follows in the answering affidavit deposed to by major Naude:

"As gevolg van die feit dat die Applikant onder 'n vals naam die land binnegekom het, met 'n vals paspoort soos hieronder sal blyk, wat selfs 'n foutiewe geboorteplek vir hom aangedui het, voer ek met respek aan dat die Applikant se nalate om aan te dui dat hy ook onder andere name in Suid-Afrika bekend is, daartoe gelei het dat daar op geen stadium toestemming aan hom verleen is nie en dat sodanige toestemming as wat wel aan die persoon met die naam KUMAR SANJAY verleen is op 'n bedrieglike wyse bekom is."

And again:

"In die omstandighede voer ek met respek aan dat die Applikant inderwaarheid geen tydelike vrystelling ontvang het nie aangesien sodanige tydelike vrystelling bedrieglik bekom is en dat om daardie rede die Applikant hom nie kan beroep op die sogenaamde tydelike vrystelling wat onder hierdie vals naam aan hom gegee is nie aangesien dit

onmoontlik is om te bepaal of sodanige tydelike vrystelling wel aan hom gegee sou word deur die Staatspresident indien die volle besonderhede wel aan die Staatspresident verskaf is."

And that, broadly speaking, was also the argument advanced in this court: that the immunity was granted to a natural person whose name was specified as Kumar Sanjay; there was and is no natural person whose name was Kumar Sanjay; the immunity did not, in terms, apply to a natural person whose name was Girja Singh; and since the immunity purported to apply to a non-person it was accordingly a nullity.

The argument is fallacious: as a matter of fact there was and is a natural person with the name Kumar Sanjay. True, that may not have been his real name, but it is still a name by which, on the evidence, he was generally known and identifiable. Nothing in the Act provides, either expressly or by implication, that the schedule is to contain only the exact name of a person as a precondition to the grant of a valid immunity; ergo,

that an assumed name vitiates an immunity which would otherwise be valid. Section 1 of the Act refers to "any person" and "such person". No mention is made of his name. The emphasis is therefore on the identity of the person, not on the correctness of his name in the schedule. The immunity in the Government Notice under consideration was clearly intended to apply to each of the individuals listed in the schedule, regardless of their correct names. The immunity, in short, arose by any other name - true or false. This is not a case where a listed name cannot be linked to a particular person, either because no one is known by that name or because a variety of persons are. Here the incorrect name identifies the correct person. And that, for present purposes, is all that matters.

That is not to say that the misinformation furnished to the authorities and relayed to the South African police by Singh and the ANC on his behalf, may not have

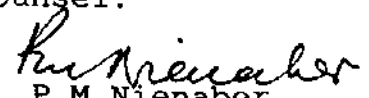
other implications. The appellant's complaint, in essence, is that the false information given to it meant that its recommendations to the State President on the granting of immunity to a person described as Kumar Sanjay was ill-informed, incomplete and misleading. Major Naude stops short of saying that a full disclosure of the true facts would have resulted in the refusal of immunity to Singh by the State President. But it is not necessary to pursue this line of enquiry or to discuss whether the State President or a court of law would have the right to revoke the immunity on the ground of the admitted misrepresentations. These questions do not arise in these proceedings and I purposely refrain from expressing any views on any of them. All that needs to be said, on the papers before the court *a quo*, is that Singh's pseudonym did not invalidate the immunity granted to him under it. That immunity, until it expired or was rescinded, protected him from arrest and detention. The

court a quo was right. The contemplated appeal against its judgment and order would inevitably fail. And in the absence of any realistic prospects of success the application for condonation must be refused.

The court a quo was minded, at first, to deprive the applicant of all or some of her costs because of the misinformation contained in the various applications completed by or on behalf of Singh. In the end costs were ordered to follow the result since the pro forma applicant was not shown to have been a party to any deception. Counsel for the appellant sought, at first, to have that order amended. But because the notice of appeal omitted to specify it as a ground of appeal, he did not pursue the point and accordingly no more need be said about it.

In the result the application for condonation is refused with costs. Since the merits of the appeal were fully argued such costs are to include the costs of the

appeal. In both instances the costs are to include those occasioned by the employment of two counsel.


P M Nienaber
Judge of Appeal

Botha JA]
Nestadt JA]
Eksteen JA] Concur
Nienaber JA]
Kriegler AJA]