



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal case no: **A8/2023**

In the appeal of:

TEBOHO ABRAM LETSOENYO

Appellant

and

HENRY ABRAM MOORCROFT

Respondent

CORAM: **MOLITSOANE, J et VAN RHYN, J**

HEARD ON: **24 JULY 2023**

JUDGMENT BY: **MOLITSOANE; J**

The judgment was handed down electronically by circulation to the parties' legal representatives by email and released SAFLII on 18 AUGUST 2023. The date and time for hand-down is deemed to be 18 AUGUST 2023 at 12h30.

- [1] The Appellant launched an appeal against the whole judgment and order granted by the Honourable Magistrate O.R. Majosi on 18 OCTOBER 2022. The appeal has lapsed and the Appellant seeks an order for condonation and reinstatement of the appeal. The application is opposed.

- [2] The Plaintiff and defendant are high-ranking police officers in the South African Police Service. The Respondent was at the time of the institution of the claim serving under the command of the plaintiff.
- [3] During 2019 the defendant laid criminal charges of *crimen injuria*, defamation, and intimidation against the plaintiff. Shortly thereafter the plaintiff was notified by the investigating officer of the charges against him through the unit's work email. Various other staff members have access to the email address used. The National Prosecuting Authority declined to prosecute. The defendant thereafter lodged a further complaint with the Human Rights Commission.
- [4] The essence of the gripe of the plaintiff is that the defendant published defamatory false statements against him alleging that the plaintiff racially discriminated against him and further that the SAPS protected him and failed to discipline him. He was of the view that his reputation was tarnished and that the allegations put him in bad light against his seniors and subordinates.
- [5] On the other hand, the defendant alleges that the plaintiff had said to him, "*it is true that what that news clip guy from the DA said in the news clip today about you people with leadership*¹." When the utterances were made he had no clue what the plaintiff meant. Later in the evening he conducted a research and found an article about the DA and coloureds not being competent to be in leadership positions. This finding triggered the chain of events that led to these proceedings. Because of the finding I later make, it is unnecessary to traverse the whole path leading to the alleged cause of action, in this case, save to deal with the events regarding the condonation application and its reinstatement.
- [6] The chronology of events as set out in the application for condonation and reinstatement indicates the following:

¹ Page 307 line 22-24 of paginated record.

- a) That the judgment was delivered by the Court a quo on 18 October 2022;
- b) That the Appellant noted his appeal within 20 days as prescribed by the Rules of the Magistrate Court;
- c) That the Appellant applied to the Registrar in writing for the allocation of a hearing date within 40 days as required by Rule 50(4) of the Uniform Rules;
- d) That the Appellant failed/omitted to file the record with the application for allocation of a hearing date as required by Uniform Rule 50(7);
- e) That on 17 January 2023, the Appellant filed part of the record of the proceedings of the Court a quo.

[7] The Appellant concedes that he failed to comply with Rule 50(4). His explanation for non-compliance is that his attorneys could not find the digital recording from the Court in order to hand over the same to the transcribers. That on 13 January 2023 contact was made with the transcribers who in turn, on the same day, provided the Appellant's attorneys with a form to complete. The said form was completed and dispatched back to the transcribers on 20 January 2023.

[8] The Appellant's attorneys followed up on the request for the transcript, on 27 January 2023. It is also the case for the Appellant that on 3 February 2023, his attorneys followed up with the court officials as to when the record would be made available to the transcribers. There was further correspondence and the record was finally served on 27 March 2023 on the Respondent's attorneys. The record filed did not include the proceedings of 11 August 2022 and was therefore incomplete. The submission of the Appellant is that there is nothing he can do to make the rest of the record available as he is not the custodian thereof and that the court was.

[9] In opposition to the application, the Respondent avers that it was unclear what steps at all were undertaken up until 13 January 2023 to obtain the transcribed record save to state that there was engagement with the court officials to obtain the record. In essence, the contention by the Appellant is that he failed

to provide a record because of the glitches caused in the procurement of the record from the Court a quo.

- [10] It is well settled in our law that the applicant who seeks condonation is required to give a full and candid explanation for non-compliance with the rules. The remarks of the Court in *Melane v Santam Insurance Co Ltd*², regarding the test for granting condonation are relevant:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked."

- [11] In *Grootboom v National Prosecuting Authority an Another*³ the court said the following:

"A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rule or court's directions. Of great importance, the explanation must be reasonable enough to excuse the default."

- [12] It is undisputed that the Appellant only applied for the assignment of the date of hearing on 9 January 2023. This was done contrary to Rule 50(4) read with Rule 50(7) which requires that the record of the proceedings be filed with the said request. On the said date, the Appellant was advised in writing by the attorneys for the Respondents that the transcribed record was still outstanding as the same had to be filed with the Rule 50 (4) Notice as per Rule 50(7)(a).

² 1962(4) SA 531 (A).

³ 2014(2) SA68 (CC) at 76D.

[13] The explanation for the non-compliance is in my view inadequate. There is no explanation as to what transpired from the date of delivery of the judgment until 13 January 2023, notably, after the attorneys for the Respondent made reference to the missing transcribed record. Except for vague allegations that there was engagement with the officials at the court there is nothing to substantiate the allegations. For the requirement that the applicant in the condonation application must explain the full reasons for the delay, the following remarks in *Uitenhage Transitional Local Council v SA Revenue Service*⁴ are apposite:

“A full detailed and accurate account of the causes of delay and their affects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time related, then the date, duration and extent of any obstacle on which reliance is placed, must be spelled out. (my emphasis)

[14] The Appellant made no attempt whatsoever to explain the period between November 2022 and January 2023. What appears to be an explanation is what he says there was engagement with the Court personnel. He gives no explanation with whom or when he interacted with the said personnel. The Appellant is being untruthful when he says he, inter alia, could not file the record on 9 January 2023 because of the *dies non*, as according to his version, he only managed to obtain the record on 24 March 2023, some two months later.

[15] The Appellant also filed an incomplete record. He puts the blame on the doorstep of the personnel of the Court a quo. It is in my view common knowledge, at least among legal representatives, that where the record is incomplete, the next course to follow is to approach the presiding officer for the reconstruction of the record. No allegations have been made as to the failure to embark on this procedure.

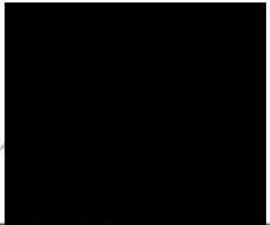
⁴ 2004(1) SA 292 SCA at 297 H-J.

[16] In my view, there are no prospects of success that can tilt the scale towards granting condonation and reinstatement of the appeal. The claim of the plaintiff is one of defamation, alternatively, violation of dignity. The evidence reveals that the Respondent laid complaints with the South African Police as well as with the Human Rights Commission. The Appellant conceded in cross-examination that the Appellant was entitled to lay those complaints in order to protect his rights and that there was nothing wrong in so doing. The Court a quo, in my view, correctly found that these concessions by the Plaintiff were fatal to his case.

[17] The Court a quo also correctly found that the publication of the summary of the alleged offence was not made by the Respondent. The evidence reveals that the possible inference is that, dissemination of the information regarding the charges laid was most likely done by the investigating officer in the normal course of his duties. On this point alone, there are no prospects of success on the merits. The application must fail. I accordingly order as follows:

ORDER

1. The application for condonation and re-instatement of the lapsed appeal is dismissed with costs



P. E. MOLITSOANE, J

I agree



I. VAN RHYN, J

On behalf of the Appellant:

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Instructed by:

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BLOEMFONTEIN

On behalf of the Respondent:

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