



**IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA,
PRETORIA**

In the matter between ~ **Not reportable**
CASE NO: 2015/54483

HENDRIK ADRIAAN ROETS Applicant

And

MINISTER OF SAFETY AND SECURITY First Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT** Second Respondent

And

In the matter between: **CASE NO: 2015/78694**

HENDRIK ADRIAAN ROETS Applicant

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

TSATSAWANE AJ

Introduction

- 1 This is an application for leave to appeal against my judgment in which I dismissed the applicant's applications for condonation.
- 2 By agreement between the parties the two applications for condonation were heard together. One application for leave to appeal was delivered in respect of

both applications and was heard as one application. This is convenient for the Court and the parties.

The judgment

- 3 I delivered one judgment which dealt with both applications for condonation.
- 4 In his action proceedings, the applicant claims damages against the respondents for damages allegedly suffered as a result of an alleged unlawful arrest and detention. The respondents objected to being sued without the applicant having complied with the provisions of section 3(1) of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002 ("the Act"). It is as a result of this objection that the applicant brought the applications for condonation.
- 5 In my judgment, I concluded that the applicant has failed to provide a full and reasonable explanation for his non-compliance with the provisions of section 3(1) of the Act. Of importance, I concluded that the applicant's debt arose from the date on which he was allegedly unlawfully arrested and detained and not from the date on which he was released from the alleged unlawful detention.
- 6 In paragraphs 30, 37 and 38 of the judgment, I said:

"30 *The question as to when the debt arose is also relevant for purposes of condonation. This is so due to the fact that the notice in terms of section 3(1) of the Act is required to be given within six months from*

the date on which the debt arose. For this reason, the explanation for the non-compliance must necessarily cover the entire period of the non-compliance; in this case, starting from the date of the alleged unlawful arrest and detention. The applicant's explanation does not satisfy this requirement, which means that it cannot be said to be a full explanation for the non-compliance.

.....

37 *In the premises, and in the light of the above quoted authorities, it follows that the applicant's debt arose on 13 September 2012 when he was arrested and detained. It is common cause that the applicant did not deliver to any of the respondents a notice in terms of section 3(1) of the Act within six months from that date, i.e. 13 September 2012. This being the case, it follows that in order to be granted condonation for this non-compliance, the applicant ought to have given a full and reasonable explanation for his failure to deliver the notice contemplated in section 3(1) of the Act which covers the entire period from 13 September 2012. The applicant did not do so due to the fact that he proceeded on the basis that the debt which is the subject of his claims against the respondents arose upon his release from incarceration. This is wrong.*

38 *In my view, and in the light of what the applicant does not say in paragraphs 20 and 22 of his founding affidavits, the applicant has failed to give a full and reasonable explanation for his non-compliance*

with section 3(1) of the Act to enable the Court to understand as to how the non-compliance came about and his motives and role in relation thereto.”

- 7 The above quoted paragraphs clearly indicate the basis on which I found against the applicant.

The application for leave to appeal

- 8 The application for leave to appeal is based on numerous grounds set out in the notice of application for leave to appeal and they were argued before me at the hearing of this application.

- 9 Mr. Du Plessis who appeared on behalf of the applicant and Mr. Tshivhase who appeared on behalf of the respondents filed comprehensive heads of argument in support of their respective cases. I am indebted to them for their assistance in this regard.

- 10 In terms of section 17(1) of the Superior Courts Act 10 of 2013, I must grant leave to appeal if I am of the opinion, amongst others, that the appeal would have a reasonable prospect of success.

- 11 The application for leave to appeal is based on the fact that I erred in various respects described in the notice of application for leave to appeal – it is not based on the other grounds set out in section 17(1), i.e. that there is some other

compelling reason why an appeal should be heard such as conflicting judgments on the matter under consideration.

12 The applicant does not seek leave to appeal against my finding that the debt which is the subject of his claims arose from the date on which he was allegedly unlawfully arrested and detained and not from the date on which he was released from detention. The relevance of this is that the explanation for the non-compliance must cover the entire period from the date of the alleged unlawful arrest and detention and not only from the date on which the applicant was released from detention.

13 In my view, the applicant's general grounds of appeal to the effect that the "*learned judge erred in finding that the applicant did not comply with the provisions of section 3(1) ...*" and that "*learned judge erred in finding that the applicant failed to furnish a full and reasonable explanation for the delay ...*" do not relate to the finding that the date on which the debt arose is the date on which the applicant was allegedly unlawfully arrested and detained. If this finding is not challenged, there is no prospect that the appeal would succeed.

14 In particular, the applicant does not seek leave to appeal against the finding that his explanation for the non-compliance had to cover the entire period of non-compliance from the date of the alleged unlawful arrest and detention and that his explanation does not cover that entire period.

15 The fact that the applicant does not seek leave to appeal against the aforesaid findings means that such findings will remain and if they do remain, as they

should remain because leave to appeal is not sought against them, the appeal would not have a reasonable prospect of success.

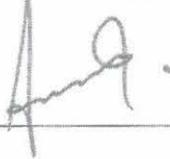
- 16 I was referred to Turnbull-Jackson v Hibiscus Coast Municipality And Others 2014 (6) SA 592 (CC) in support of the contention that I erred in holding the applicant responsible for the failure of his erstwhile attorneys to deliver the notice in terms of section 3(1) of the Act. Reliance on *Turnbull-Jackson* is misplaced due to the fact that therein, the Court actually found that the “*applicant was vigilant*” and it is as a result of this finding that the Court concluded that the applicant’s counsel’s “*unsatisfactory explanation cannot be imputed to him.*” In this case, the applicant was not vigilant and does not seek leave to appeal against my finding in paragraph 29.4 of the judgment to the effect that:

“29.4 ... *In this case, the applicant has placed very sketchy information before the Court to enable the Court to understand as to exactly what role his erstwhile attorneys played or did not play which resulted in the non-compliance.*”

- 17 The correct legal position is that an applicant for condonation must provide a full and reasonable explanation which covers the entire period of the delay. This was not done in this case and the applicant does not seek leave to appeal against my finding to the effect the explanation had to cover the entire period from the date of the alleged unlawful arrest and detention and that he provided sketchy information as to exactly what role his erstwhile attorneys played which resulted in his non-compliance.

18 In the premises, without the applicant having provided: (a) a full and reasonable explanation which covered the entire period of the non-compliance from the date of the alleged unlawful arrest and detention; and (b) full information as to exactly what role his erstwhile attorneys played which caused his non-compliance; and without the applicant seeking leave to appeal against the finding that the explanation had to cover the period from the date of the alleged unlawful arrest and detention, I am of the opinion that an appeal would not have a reasonable prospect of success.

19 In the result, the application for leave to appeal is dismissed with costs.



Kennedy Tsatsawane

Acting Judge of the Gauteng Division of the High Court of South Africa, Pretoria

15 March 2018