

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO. EL 1195/2019

Reportable: Yes / No

In the matter between:

THANDUXOLO MNGCEBELE

Applicant

and

MINISTER OF POLICE

1st Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Respondent

JUDGMENT

ZILWA J

[1] This is an application by the applicant (as plaintiff in the underlying action) seeking orders in terms of the Notice of Motion. With regard to the orders sought the Notice of Motion reads (warts and all) as follows:

“1. Declaring that the Applicants first became aware on 17 April 2019 of the damages claim against the Respondents, arising from the wrongful and unlawful arrest and detention of the applicant on 13 May 2017 by members of the South African Police Services (SAPS) in Mdantsane, on 16 April 2019 and his malicious prosecution by the employees of the first and second respondents during May 2017 to 12 April 2018;

1.1 Alternatively; In terms of section 3(4)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, the

Applicant's failure to serve its notice dated 24 April 2019, in terms of Section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 timeously, be condoned,

2. In terms of section 3(4)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, the Applicant's defective notice in terms of Section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 be condoned;

3. Cost of the application only in the event of the application being opposed."

[2] The application is opposed by the first respondent only, while the second respondent has remained supine.

[3] At the commencement of the argument the applicant's Counsel, Mr Jikwana, informed the Court that the applicant has abandoned the declaratory relief sought in paragraph 1 of the Notice of Motion set out above and only seeks the alternative relief set out in sub-paragraph 1.1 and paragraph 2, with costs.

[4] In his founding affidavit the applicant has stated the basis for the application to be that after summons had been issued on his behalf against the respondents (as defendants in the action) on 23 October 2019 claiming damages for "unlawful arrest and detention on 13 May 2017 by members of the SAPS and subsequent prosecution by members of the National Prosecuting Authority in collaboration with members of the SAPS during the period May 2017 to April 2018".

[5] In their Plea dated 07 January 2020 the defendants had raised a Special Plea of non-compliance by the applicant with section 3 and 4 of the Institutions of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (The Act) on the basis that the applicant (as plaintiff) failed to serve the requisite notices in terms of the Act within six (6) months and that the notice that was served did not comply with section 3(2) of the Act.

[6] Presently the applicant is a sentenced prisoner serving his sentence at the Wesbank Maximum Correctional Centre in East London. He contends that after undergoing what he regards as an unwarranted and unlawful arrest and detention by members of the SAPS on 17 May 2017 without a warrant of arrest at his home in Mdantsane he was detained at various detention centres for a period of eleven (11) months at the instance of various policemen and thereafter prosecuted by the members of the NPA without a reasonable or proper precause for so doing until he was acquitted and released on 12 April 2018.

[7] He further contends that as an illiterate layperson not schooled in legal matters he had thought that the respondents' employees cannot be held delictually liable for his arrest, detention and malicious prosecution. It was only during the month of April 2018 when a fellow inmate advised him that he was a client of his (applicant's) present attorneys of record and arranged consultation with them to visit and consult with him at the detention centre on 16 April 2018. During such consultation he had narrated his arrest, detention and prosecution that had culminated in his acquittal as set out above.

[8] He contends that after his narration to his attorney, Mr Ntshika, the latter had informed him that his arrest, detention and prosecution were wrongful and unlawful and that the respondents were liable to pay him for the damages suffered in respect thereof. It was only then that he became aware for the first time that he had a cause of action against the respondents and he immediately gave instructions to the attorney to institute civil proceedings against the respondents. On the basis that he had only become aware of his cause of action against the respondents on 16 April 2018 for purposes of section 3(3)(a) of the Act he seeks a declarator that his cause of action only arose on that date. Alternatively, he seeks condonation for his failure to institute the proceedings after issuing the requisite notices to the respondents within the prescribed time frames in terms of section 3(4)(a) of the Act.

[9] The present application was precipitated by the respondent's Special Plea to the applicant's combined summons, which Special Plea is annexed to the applicant's founding papers as annexure TN3. For reasons that will become apparent later it is essential to quote paragraphs 4 and 5 of the respondent's Special Plea referred to above. Such paragraphs read as follows:

“4. In terms of Section 4(1)(a) of Act 40 of 2002 where the organ of state is –

4.1 the Department of Police, the notice must be sent to the National Commissioner and the Provincial Commissioner of the province in which the cause of action arose, as defined in section 1 of the South African Police Services Act, 1995; and

4.2 a functionary or institution referred to in paragraph (c) of the definition of ‘organ of state’, as is the National Prosecuting Authority, to the chairperson, head or chief executive officer, or equivalent officer, of that functionary or institution, or where such functionary is a natural person, to that natural person.

5. The plaintiff has not compiled with sections 3 and 4 of Act 40 of 2002 in that he did not give any notice, whatsoever to –

5.1 the National Commissioner and the Provincial Commissioner: Eastern Cape; and

5.2 the second respondent,

within six (6) months of the amount becoming due or at all.”

[10] From the afore-going it becomes clear that one of the bases for the respondent’s Special Plea was the applicant’s failure to give notice to, amongst others, the Eastern Cape Provincial Commissioner of the SAPS. Such failure constitutes non-compliance with the peremptory requirement in Section 5(1)(b)(ii)(bb) of the Act.

[11] With regard to the applicant’s failure to also serve the Notice in terms of Section 3(1) of the Act on the Eastern Cape Provincial Commissioner of SAPS as required in the Act, the applicant’s explanation in the founding affidavit is that his attorney had advised him that he (the attorney) was under the mistaken impression that there was no need to also serve the Notice on the Provincial Commissioner and that only service on the National Commissioner was required.

[12] In its response to the applicant's explanation for the failure to effect the service on the Provincial Commissioner the first respondent only offers a bare denial and also points out the absence of a confirmatory affidavit from the applicant's attorney responsible for the omission. The confirmatory affidavit was only annexed to the applicant's replying affidavit. The respondents also deny that the omission has not caused them to suffer any prejudice. They contend that the first respondent's members that were involved in the applicant's arrest and detention and the investigation of the charges against him may (emphasis added) not have knowledge of the facts of the matter on account of the passage of time.

[13] Section 3(4)(b) of the Act sets out the Court's powers and the relevant aspects for consideration in dealing with condonation applications such as the one in issue herein. Before it can grant condonation the Court has to be satisfied that:

- (i) The debt has not been extinguished by prescription;
- (ii) Good cause exists for the failure by the creditor, i.e. to serve the statutory notice according to Section 3(2)(a) or to serve a notice that complies with the prescriptions of Section 3(2)(b); and
- (iii) The Organ of State was not unreasonably prejudiced by the failure.

[14] With regard to the first requirement of the debt not having been extinguished by prescription, it is common cause between the parties that the debt in issue in this case has indeed not been extinguished by prescription. Accordingly, the first requirement is satisfied.

[15] Regarding the second requirement of good cause that should exist for the failure by the creditor it is apposite to cite the trite position that "good cause" looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of the justice. As the Court aptly observed in

*Madinda v Minister of Safety and Security*¹ in any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the *bona fides* of the applicant, and any contribution by other persons of parties to the delay and the applicant's responsibility therefor.

[16] As it was held in *Chetty v Law Society, Transvaal*² good cause usually comprehends the prospects of success on the merits of a case, for obvious reasons. In its quest to establish whether good cause for the delay has been established the Court must decide whether the applicant has produced acceptable reasons for nullifying, in whole or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously. Strong merits may mitigate fault; no merits may render litigation pointless. There are two main elements at play in Section 4(b), viz the subject's right to have the merits of his case tried by a court of law and the right of an Organ of State not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice.³

[17] In the founding affidavit the applicant has contended that it was only during April 2018 upon discussing the circumstances of his arrest and detention with a fellow inmate in custody who had mentioned that his attorney, who later became the applicant's attorney in this case, was assisting him with a claim arising out of similar circumstances and after actually consulting with the attorney, that he became aware of his cause of action that resulted in the launching of the present action. To those contentions the first respondent has only pleaded lack of knowledge and the contention that the applicant should have known that he had a cause of action prior to such consultations. In argument Ms Da Silva, who appeared for the first respondent, drew a parallel between the requirements of the relevant section in this Act and those that govern the running of prescription in terms of section 11 of the Prescription Act 68 of 1969. She referred the Court to the full court appeal judgment of this division by Van Zyl DJP in the matter of *Minister of Police v Abongile Zamani* under case CA10/2021 that was handed down on 12 October 2021. However, I am of the view that that case is distinguishable from the

¹ 2008 (4) SA 312 (SCA) at 316E – F.

² 1985 (2) SA 756(A) at 765D – E.

³ *Madinda*, page 317C – D.

present case both on the facts, principle and the subject matter for determination. It dealt with the aspect of when prescription had started running on the facts of that case and not with condonation sought in terms of the Act in issue herein. I am of the view that the requirements and relevant considerations between the two statutes and causes of action in the two cases are distinguishable.

[18] In his founding papers and annexures thereto the applicant sets out a *prima facie* case of unlawful arrest and detention which, if not successfully refuted in defence, may possibly result in judgment in his favour. His ignorance, inexperience, naïveté or simple lack of intelligence in realising that the manner of his arrest and detention gives rise to a cause of action before consulting with his attorney of record in the present matter cannot, in my view, trump the conclusion that he has shown good cause for the failure to serve the requisite notice either timeously or at all. It is not insignificant that the failure to realise the requirement for service of the notice on the Provincial Commissioner as well is the applicant's attorney's fault, not his own.

[19] It should always be borne in mind that the purpose of condonation as envisaged in section 4 of the Act is to allow the action to proceed despite the fact that the peremptory provisions of Section 3(1) have not been complied with. Either a complete failure to send a notice, or the sending of a defective notice, entitles a creditor, such as the applicant herein, to make the application for condonation. Even this is qualified: it is only if an organ of State relies on a creditor's failure to serve a notice that the creditor, such as the applicant in the present application, may apply for condonation. If the organ of State makes no objection to the absence of a notice, or a valid notice, then no condonation is required.⁴ I am satisfied that the applicant has satisfied the requirement of good cause for his failure as envisaged in Section 3(4)(b)(ii) of the Act.

[20] With regard to the final requirement that the organ of State was not unreasonably prejudiced by the failure the applicant has, in his founding affidavit, averred that the respondent has suffered no such prejudice in consequence of his failure. In response the first respondent has denied that contention. The only basis for such denial is the contention that its members that were involved in the arrest and detention of the applicant and the investigation of the charges against him may not have independent

⁴ See *Minister of Safety and Security v De Witt* 2009 (1) SA 457 at 461 para [10].

knowledge of the facts of the matter on account of the passage of time (emphasis added).

[21] I am not persuaded that the respondent has successfully refuted the applicant's contention that it has not been unreasonably prejudiced by the failure.

[22] In *Madinda v Minister of Safety and Security (supra)* Heher JA held (at paragraph [21] page 320) that:

“The third leg of Section 3(4)(b) required the appellant to satisfy the court that the respondent had not been unreasonably prejudiced by the failure to serve the notice timeously. This must inevitably depend on the most probable inference to be drawn from the facts which are to be regarded as proved in the context of the motion proceedings launched by an applicant. The approach to the existence of *unreasonable* prejudice (not simply any level of prejudice, an aspect which the judgment of the court *a quo* blurs) requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exists often lies peculiarly within the knowledge of the respondent. Although the *onus* is on an applicant to bring the application within the terms of the statute, a court should be slow to assume prejudice for which the respondent itself does not lay a basis.”

[23] As already indicated above, the only ground upon which the respondent contends for prejudice is an assumption that the members of the service involved in the arrest, detention and the investigation of the charges against the applicant **may** not have independent knowledge of the facts of this matter on account of the passage of time. Needless to say, in the absence of any confirmatory affidavits by the members referred to about the effect which passage of time has had on their ability to deal with the relevant events renders the respondent's contention nothing more than baseless conjecture and surmise. It does not come within even shouting distance to the requirement that the respondent itself should lay a basis for any prejudice that it contends for.

[24] In those circumstances, I am satisfied that on the facts before me there is no basis for rejecting the applicant's contention that the respondent was not unreasonably prejudiced by the applicant's failure to comply with the notice requirement. It should be remembered that the point in issue is the statutory notice of the cause of action. The applicant has the same rights as any other litigant in relation to when he issued summons in the matter: he had to do so before his claim prescribed and the action, once instituted, would be subject to the usual hazards of litigation including systemic and other delays.⁵ Since, as already indicated above, it was common cause that the plaintiff's cause of action has not prescribed, the passage of time referred to by the respondent that may or may not have affected the independent knowledge by the relevant functionaries of the facts of this matter, has no bearing on the point in issue in the present application.

[25] In argument Ms Da Silva submitted that since in this case no notice, defective or otherwise, was served on the Eastern Cape Provincial Commissioner of police as required in section 5(1)(b)(ii)(bb) of the Act no case has been made for the grant of the relief sought. She argued that while the Court may condone late service of notice it cannot condone a complete failure to give notice. She further argued that since up until this stage no notice to the Provincial Commissioner has been served at all there is nothing to condone.

[26] In rejecting this argument I can do no better than simply restating Lewis JA's *dictum* in page 463 paragraph [18] in *Minister of Safety and Security v De Witt (supra)*, where he stated thus:

“[18] Similarly, although the court below correctly found that condonation should be granted to De Witt for his late service of notice, the court statement that condonation cannot be granted where no notice at all is served is incorrect. It is not consonant with wording of s3 or its purpose.”

This was further confirmation of what the learned judge had stated earlier on in the judgment that the section states what the creditor may do should he have failed to comply with the requirements of Sections (1) and (2) i.e. he may apply for condonation

⁵ See *Madinda v Minister of Safety and Security (supra)* at page 321D.

for the failure: whether there is complete failure to send notice, or the sending of a defective notice.

[27] In the premises I am satisfied that the applicant has made out a proper case for the condonation sought.

[28] Finally, having succeeded in the application the applicant would ordinarily be entitled to have the costs of the application awarded in his favour. However, in the exercise of my discretion regarding costs I am of the view that on the particular facts of this application I should make no order of costs in the applicant's favour. The applicant's papers are very slovenly drawn. It does not appear that any care was taken by whoever drew the papers to ensure that a proper job is done in drawing those papers that were to serve before this Court. The relief sought in paragraph 1 of the Notice of Motion is worded in a way that does not make sense at all. Small wonder that at the commencement of the argument Mr Jikwana for the applicant abandoned and disavowed any reliance on the "relief" sought therein. He only sought the reliefs in paragraphs 1.1, 2 and 3.

[29] Even the relief sought in paragraph 1.1 of the Notice of Motion, which merely refers to condonation of the applicant's failure to serve its notice dated 24 April 2019 in terms of section 3(1) of the Act timeously, is not a model of clarity. The relief that was ultimately argued pertained to failure to serve such notice on the Provincial Commissioner of Police. It is only by putting substance over form that the court shall grant the proper relief, having heard full argument with regard thereto from both sides.

[30] The slovenliness even permeated the founding affidavit. The numbering of the paragraphs thereof is confused and confusing, resulting in considerable problems for the respondent in properly responding thereto in its answering papers. As a measure of censure I consider it proper not to award any costs in favour of the applicant despite his success in the application.

[32] In the result the following order shall issue:

1. The applicant's failure to serve its notices in terms of Section 3(1) read with Section 5(1)(b)(ii)(bb) of Act 40 of 2002 is hereby condoned.
2. The applicant is granted leave to proceed with its action in case EL1195/2019 despite the failure referred to in paragraph 1 above.
3. Each party shall pay its own costs of the application.

P ZILWA
JUDGE OF THE HIGH COURT
BHISHO

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Date Heard:

19 MAY 2022

Judgment Delivered:

31 MAY 2022