IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no. CA342/2017
Date heard: 27/8/18
Date delivered: 4/9/18
Not reportable

In the matter between:

WANGA MAGUGA
Appellant

and

MINISTER OF POLICE **Respondent**

JUDGMENT

Plasket J

[1] The appellant, Mr Wanga Maguga, (Maguga) instituted a damages claim against the respondent, the Minister of Police, (the Minister) in which he alleged that he had been unlawfully assaulted by members of the South African Police Service (the SAPS) acting in the course and scope of their employment. He failed to give the Minister notice of the claim within the prescribed period, as he was required to do in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Legal Proceedings Act). The Minister filed a special plea in which this point was taken and, in response, Maguga brought an application for condonation of the late giving of the notice. That application was dismissed with costs by Bloem J. This appeal is before us with the leave of Bloem J.

The legislation

[2] Because of the size, bureaucratic complexity, number of personnel and relatively high staff turn-over of many organs of state, such as, typically, the SAPS, special procedural dispensations have long been put in place to cater for claims against them.[1]

[3] More senior legal practitioners will recall some of the more draconian of such measures, in the pre-democratic era, with few fond memories. Section 32 of the Police Act 7 of 1958 was a typical example. It required notice of intention to institute proceedings to be given to the Commissioner of the South African Police within five months of a cause of action arising, and summons to be issued within six months, with a clear month, at least, separating the two.[2] No provision was made for condonation and if either the notice or the summons was late, the claim could not be enforced.[3]

[4] Because, in the democratic era, 'sledgehammer' provisions such as these were open to constitutional challenge against the fundamental rights to equality and of access to court,[4] Parliament first enacted piecemeal reforming legislation, such as the South African Police Service Act 68 of 1995, in an attempt to alleviate the harshness of the previous legislative regime. It later opted to enact uniform legislation dealing with legal proceedings against organs of state generally that sought to balance the fundamental rights of the people and the legitimate interests of organs of state. The result was the Legal Proceedings Act.[5]

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1 *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) paras 13-14.
2 See generally on these limitation of action provisions, Lawrence Baxter *Administrative Law* at 733-738.
3 See for example *Hartman v Minister van Polisie* 1983 (2) SA 489 (A). In *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A), however, the court held that if it was impossible for a plaintiff to comply (because he had been held in indefinite detention without trial, without access to a lawyer), the five and six month periods only began to run when he was able to comply. That appears to have been the only relaxation of the requirements of s 32 and similar provisions.
4 See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC). See too *Zantsi v Chairman, Council of State, Ciskei & others* 1995 (2) SA 534 (Ck). Note that, prior to 1994, the homelands, both 'independent' and 'self-governing', all had limitation of actions legislation that was based on the South African model. *Zantsi's* case concerned the Defence Act 17 of 1986 (Ck), passed by the Ciskei legislature after so-called independence.
5 See generally on the purpose of the Legal Proceedings Act, *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA) paras 1-4.

[5] The long title of the Legal Proceedings Act provides that its purpose is '[t]o regulate the prescription and to harmonise the periods of prescription of debts for which certain organs of state are liable; to make provision for notice requirements in connection with the institution of legal proceedings against certain organs of state in respect of the recovery of debt; to repeal or amend certain laws; and to provide for matters connected therewith'.

[6] Section 3 is the heart of the Legal Proceedings Act. It provides, in s 3(1), for the giving of notice in respect of the institution of legal proceedings against organs of state, unless an organ of state waives its rights. It states:

'No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

(*a*) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(*b*) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).'

[7] Sections 3(2) and (3) deal with the giving of notice. They state:

'(2) A notice must -

(*a*) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and

(*b*) briefly set out-

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

(3) For purposes of subsection (2)(*a*) -

(*a*) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(*b*) a debt referred to in section 2(2)(*a*), must be regarded as having become due on the fixed date.'

[8] Section 3(4) provides for condonation in the event of notice not being given at all or defective notice being given. It states;

'(*a*) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(*a*), the creditor may apply to a court having jurisdiction for condonation of such failure.

(*b*) The court may grant an application referred to in paragraph (*a*) if it is satisfied that-

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

(*c*) If an application is granted in terms of paragraph (*b*), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.'

[9] This case is concerned with the interpretation and application of s 3(4). I turn now to the facts, most of which are common cause or not in dispute.

The facts

[10] Maguga alleged that he was visited by members of the SAPS one evening at his home in Duncan Village, East London. He was questioned about a firearm. He denied any knowledge of the firearm, whereupon he was assaulted by the policemen. He went to hospital, where he was medically examined and treated for his injuries. He claimed that despite the treatment he received he continues to suffer from some of the effects of the assault.

[11] He later went to the Duncan Village police station. When he told his story to the member of the SAPS who attended to him, the latter informed him that from the description of the policemen involved, they appeared to be members of a unit called the TRT section. Despite reporting the assault, a docket was not opened.

[12] When Maguga told the policeman that he also wanted to pursue a civil claim against his assailants, he was advised to instruct an attorney. He then approached the local legal aid office where he consulted with an attorney. She advised him that a civil claim could only be instituted if a criminal case had been opened.

[13] Early in April 2012, Maguga identified one of the policemen involved in the assault. He returned to the Duncan Village police station. On 4 April 2012, a detailed statement was taken from Maguga and a docket was opened.

[14] In the statement, it was recorded that the assault occurred on 24 November 2011. Maguga said in his affidavit that this was incorrect. He gave the date as 26 November 2011. This is the date mentioned in the notice given in terms of the Legal Proceedings Act. When Maguga's attorneys obtained copies of his hospital records, it became clear that Maguga was mistaken about this date too. From the hospital records, it appeared that the assault had, in fact, occurred on 2 December 2011.

[15] After the docket had been opened, Maguga reported this fact to his attorney. She told him that a civil claim could only be pursued after those who had assaulted him had been convicted.

[16] With this in mind, Maguga returned to the Duncan Village police station on a number of occasions to enquire about progress in his matter. Unknown to him, however, the investigating officer, having tried to make telephonic contact with Maguga and having 'looked for' his address unsuccessfully had, by 16 April 2012, decided to abandon his investigation. The docket was closed on 23 April 2012.

[17] In March 2013, Maguga was doing tiling work at the home of a magistrate, Ms Jwacu. She noticed that he experienced hearing and other health problems. When she enquired about these problems, Maguga told her about the assault and his efforts to obtain redress. She told him that the legal advice he had been given was incorrect and undertook to place him in contact with an attorney who could help him.

[18] Ms Jwacu was as good as her word and Maguga consulted, for the first time, with his current attorneys on 6 April 2013. On that day, a notice in terms of the Legal Proceedings Act was sent.

[19] Summons was issued on 24 June 2014. On 24 February 2016, the Minister filed a plea and a special plea, which was to the effect that that the notice did not

comply with the requirements of the Legal Proceedings Act because it had not been given within six months of the cause of action arising.

[20] By notice of motion dated 25 July 2016, Maguga applied for condonation for the late service of the notice.

The issues

[21] It is not in dispute that the notice was received. It is also common cause that the claim had not prescribed. It was argued on behalf of the Minister, and accepted by Bloem J in the court below, that no good cause for the failure to give notice timeously had been established, and that the late notice had occasioned unreasonable prejudice to the Minister.

[22] The correct approach to condonation in terms of the Legal Proceedings Act was set out by Heher JA in *Madinda v Minister of Safety and Security*.[6] In the first place, the test for the court being satisfied that the requirements mentioned in s 3(4) are present involves not proof on a balance of probabilities but 'the overall impression made on a court which brings a fair mind to the facts set up by the parties'.[7]

[23] Secondly, the requirement of 'good cause' involves an examination of 'all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice', and may include, depending on the circumstances, '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 or parties to the delay and the applicant's responsibility therefor'.[8]

[24] Thirdly, good cause for a delay, Heher JA held, is not 'simply a mechanical matter of cause and effect' but involves the court in deciding 'whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially,

6 *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA).
7 Para 8.
8 Para 10.

any culpability on his or her part which attaches to the delay in serving the notice timeously'; and in this process, '[s]trong merits may mitigate fault; no merits may render mitigation pointless'.[9]

[25] Fourthly, Heher JA highlighted the interests involved when he said:[10]

'There are two main elements at play in s 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. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could hardly favour the interests of justice. Moreover, what can be achieved by putting the court to the task of exercising a discretion to condone if there is no prospect of success? In addition, that the merits are shown to be strong or weak may colour an applicant's explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interest, while one with little hope of success can easily be understood to drag his or her heels. As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration.'

[26] Fifthly, it is particularly important that the circumstances relevant to just cause 'be assessed in a balanced fashion', so that the fact that 'the applicant is strong in certain respects and weak in others will be borne in mind in the evaluation of whether the standard of good cause has been achieved'.[11]

[27] Sixth, it must be borne in mind that the concept of good cause is not self-standing but is linked to the delay. As a result, 'subsequent delay by the applicant, for example in bringing his application for condonation, will ordinarily not fall within its terms'. This does not mean that such delays are irrelevant: while they are not part of

9 Para 12.
10 Para 12.
11 Para 13.

the ‘good cause’ enquiry, they nonetheless are ‘part of the exercise of the discretion to condone in terms of s 3(4)’.[12]

[28] Finally, unlike the position in other legislation, and I would add, in the approach to condonation in the context of non-compliance with the rules of court and the like, a clear distinction is drawn in s 3(4) of the Legal Proceedings Act between good cause, on the one hand, and absence of prejudice, on the other. The purpose of the distinction, Heher JA held, is to ‘emphasise the need to give due weight to both the individual's right of access to justice and the protection of state interest in receiving timeous and adequate notice’.[13]

[29] When a judge decides to grant or refuse condonation, he or she exercises a discretion based on a balancing of relevant factors. In the case of what has been described as a narrow discretion, an appeal court may only interfere in the event of a misdirection on the part of the court of first instance. In the case of the discretion to grant or refuse condonation in terms of s 3(4) of the Legal Proceedings Act, the position is different. In *Premier, Western Cape v Lakay*[14] Cloete JA held that ‘if condonation is refused by a court, an appellate court is in my view at liberty to decide the same question according to its own view as to whether the statutory requirements have been fulfilled, and to substitute its decision for the decision of the court of first instance simply because it considers its decision preferable’.

Good cause

[30] It seems to me that Maguga’s prospects of success are good. From his statement to the police, it appears that at least two people witnessed the assault on him. In addition, he has detailed medical records that are consistent with his version. He has been informed that his assailants are part of a particular SAPS unit and he has been able to identify one of his assailants. If given the opportunity, he is certain he can identify others. As against that, he gave an incorrect date for the incident. Nothing much turns on this when it is considered that he made his statement some

12 Para 14.
13 Para 15.
14 *Premier, Western Cape v Lakay* 2012 (2) SA 1 (SCA) para 14.

months after the incident and the medical evidence, as I have said, corroborates his version that he was indeed assaulted.

[31] It is evident from Maguga's affidavit that he took action with some expedition: soon after he had been treated in hospital, he reported what had happened to him at the Duncan Village police station. It is clear too that from an early stage he was intent on pursuing a civil remedy against his assailants. As a lay person, he was reliant on the advice of the attorney who he consulted. Through no fault on his part he was misinformed and given erroneous legal advice that prevented a notice from being given timeously.

[32] As a result of the erroneous advice that a criminal conviction had to precede a civil claim, he returned to the Duncan Village police station, having managed to identify one of his assailants. It was then that a docket was opened. He also stated that he returned to the police station from time to time to enquire about progress. This conduct is also consistent with an intention to pursue his legal remedies. It is not clear from his affidavit precisely how often he returned to the police station. Clearly, nothing of note happened, and there was little he could have done about matters. On the one hand, and unknown to him, the investigation was not progressing at all because the investigating officer had given up very quickly; and the legal aid attorney was doing nothing in the belief that a criminal prosecution was necessary before summons could be issued. The delay between April 2012 and March 2013 must be seen in this context.

[33] The catalyst for action was the chance encounter with Ms Jwacu in March 2013 which led to Maguga consulting with an attorney and the notice being despatched in early April 2013.

[34] Bloem J was sceptical about Maguga's explanation and thought that supporting affidavits from a legal aid official and Ms Jwacu ought to have been filed to corroborate his version. In my view, the learned judge placed too onerous a burden on Maguga, given that his version was not disputed. I am inclined to the view that the learned judge may have expected too much of a lay person faced with the difficulties that confronted Maguga. What is clear is that he wanted redress for the

wrong done to him and that he was consistent in this regard. He did the best he could to pursue his remedies but he was the victim of poor legal advice that impacted directly on the failure to give notice timeously, and what appears to have been a lack of interest on the part of the SAPS.[15] It is significant that as soon as Ms Jwacu alerted Maguga to the true position, and put him in touch with his present attorneys, he immediately pursued his claim.

[35] I turn now to the delay between the giving of notice and the launching of the application for condonation. I do not believe that the delay between the giving of notice and the filing of the special plea can be held against Maguga. Having issued summons, he was entitled to await the Minister's plea in order to ascertain whether it would be necessary to apply for condonation. In *Minister of Safety and Security v De Witt*[16] Lewis JA held on the basis of the wording of s 3(4)(*a*) – 'if an organ of state relies on a creditor's failure to serve a notice' – that 'the objection of the organ of State is a jurisdictional fact for an application for condonation, absent which the application would not be competent'.[17] In other words, it is the objection that is the trigger for an application for condonation. The period between the despatch of the notice and the filing of the special plea can thus be left out of account.

[36] What then of the period of five months from the service of the special plea to the launching of the condonation application? In my view, it has no bearing on whether Maguga has established just cause for condonation. To the extent that it may be a factor, it is off-set by the good prospects of success.[18]

[37] In conclusion, I find that when Maguga's explanation is considered in its full context, he has established good cause for the failure to give notice within the six month period envisaged by s 3(2)(*a*) of the Legal Proceedings Act.

Unreasonable prejudice

15 See in this regard, the broadly comparable case of *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA) paras 16-18.
16 Note 5.
17 Para 10.
18 *Madinda v Minister of Safety and Security* (note 6) para 14.

[38] The enquiry into unreasonable prejudice shifts the focus from the conduct of the person applying for condonation to the effect of the non-compliance on the interests of the respondent.[19]

[39] The unreasonable prejudice complained of must, of necessity, be related to the delay in giving notice.[20] In other words, it is only prejudice that arose between the beginning of June 2012, six months after the cause of action arose, and 6 April 2013, when the notice was given, that is relevant.

[40] The prejudice contended for by the Minister is the incorrect date mentioned in the notice as the date upon which Maguga was assaulted. The Minister contends that because the incorrect date was given, it could not investigate the claim. In my view, that is either a far-fetched assertion or a worrying indictment of the investigative capacity of the SAPS. It does not matter, however, for purposes of this enquiry because the prejudice complained of relates to the content of the notice, and not to anything that arose as a result of the delay. It is thus irrelevant for purposes of condonation in terms of s 3(4) of the Legal Proceedings Act. The result is that the Minister has failed to establish unreasonable prejudice as a bar to the grant of condonation.

Conclusion

[41] I have found that Maguga has established just cause for the delay in giving notice and that no unreasonable prejudice on the part of the Minister has been proved. As it is common cause that the claim has not prescribed, all three of the requirements for the grant of condonation, in terms of s 3(4) of the Legal Proceedings Act, are present. It follows that the appeal must succeed.

[42] I make the following order.

(a) The appeal succeeds with costs.

(b) The order of the court below is set aside and replaced with the following order.

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19 *Madinda v Minister of Safety and Security* (note 6) para 15.
20 *Premier, Western Cape v Lakay* (note 14) paras 22-23.

‘(i) The application succeeds with costs.

(ii) The late service by the applicant of the notice in terms of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 is condoned.’

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C Plasket

Judge of the High Court

I agree.

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B Hartle

Judge of the High Court

I agree.

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N P Jaji

Judge of the High Court

APPEARANCES

For the appellant:	Z Z Matebese SC Instructed by Caps Pangwa & Associates, Grahamstown
For the respondent:	T M Ntsaluba SC Instructed by Enzo Meyer Attorneys, Grahamstown State Attorney, East London