REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO 2011/32180

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

12/6/12
DATE

SIGNATURE

In the matter between -

OMOKOKO, ALUMBA JEAN PIERRE APPLICANT

and

THE MINISTER OF POLICE RESPONDENT

JUDGMENT

SUTHERLAND J:

INTRODUCTION

[1] The applicant wants to sue the respondent for damages arising out of certain circumstances relating to his detention from 28 June 2009 until 3 February 2010. Before he can do so, he is obliged to have served a notice within six months of the debt becoming due, as contemplated by Section 3(2)(a) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (The Act). He served a notice on 8 April 2011, which was out of time. This application seeks condonation of that failure, as contemplated by s 3(4)(a) the Act.

[2] Section 3 of the Act provides that:'

> "(1) 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).
>
> (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.

(4) (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." (Emphasis supplied)

[3] The defendant declined to accept the late notice.

[4] The debt has not prescribed. Thus, (i) of s 3(2)(b) is satisfied. The respondent has not put up a case to suggest unreasonable prejudice. Thus, (iii) of s 3(2)(b) is satisfied. The sole controversy is whether is not good cause for the failure has been shown as required by (ii) of s 3(2)(b).

[5] There are several controversies in respect of that issue. They include:

5.1 What is the cause of action relied upon by the applicant?

5.2 When did it arise?

5.3 When and how did the applicant identify the relevant organ of state to be sued?

5.4 When and how did the applicant acquire knowledge of the "facts giving rise to the debt"?

5.5 Is the explanation for the delay good enough?

RELEVANT BACKGROUND

[6] The applicant was accused of the rape of his niece. He was arrested. He applied for bail several times. Bail was refused. One of the factors weighed in the bail applications was his status as a foreigner, and another was whether he had a fixed abode. The Court was informed that he was an illegal immigrant, whilst he indeed at all material times had a valid asylum seeker's residence permit. Ultimately, the matter was struck off the roll by a magistrate.

[7] After his release he sought legal advice on 11 February 2010. The docket was called for on 6 April 2010. The police refused to produce it. Eventually, an application under the Promotion of Access to Information Act 2 of 2000 (PAIA) was made on 12 August 2010. Only then was the docket given to the attorneys of the applicant, eventually, during mid February 2011. On 1 April he again consulted his attorney, who had now the contents of the docket with which to advise him. On 8 April the notice was served.

THE CAUSE OF ACTION

[8] The determination of the true character of the cause of action is relevant as to when that cause arose. The respondent has proceeded on the footing that the cause

arose upon arrest on 28 June 2009, and therefore the notice is some 22 months after the event. The applicant contends that this view is misconceived.

[9] The applicant does not wish to allege the arrest was unlawful. Indeed, that stance is manifestly correct, as the arrest was the result of an allegation of a serious crime. Once that point is grasped the date of arrest can be seen as an irrelevance.

[10] The cause of action upon which the applicant indeed relies has two aspects:

10.1 First, the applicant contends that by failing to bring him before a court within 48 hours of arrest, his constitutional rights in terms of s 35(1) (d) of the Constitution were violated. He was brought up before the Magistrate on 2 July 2009, four days later. The 48 hours expired on Tuesday, 30 June at 20h47. He should have appeared at the latest the next day, 1 July. The appearance was a day late.

10.2 Secondly, the applicant contends that he was denied bail as a result of the improper conduct of certain police officers, who culpably suppressed or concealed the evidence that he was legally a resident in South Africa and culpably failed to verify the fact that he had a fixed abode, which resulted in material misrepresentations to the magistrates who heard the bail applications, influencing the decision to refuse bail.

[11] Accordingly, it is in relation to these claims that the matter falls to be decided.

THE APPLICANT'S EFFORTS RELEVANT TO GIVING THE NOTICE

[12] The notice to be given had to set out the cause of action that had been acquired. In that regard, -

> "... the creditor acquires a complete cause of action for the recovery of the debt ... when the entire set of facts which the creditor must prove in order to succeed with ... [the] ... claim against the debtor is in place." (*Truter v Deysel* 2006 (4) SA 168 (SCA) at [16])

[13] When did he learn of the identity of the organ of state responsible for these alleged delicts? Self evidently, human beings are *de facto* responsible for institutional deeds, and it is only by identifying the people responsible can their employer be identified. On the basis of what the applicant could reasonably have known during the period of his detention, both the personnel of the Police and the personnel of the National Prosecuting Authority could have been implicated. Moreover, although less likely, the Department of Justice might also have been liable if some misconduct had been committed by one of its officials.

[14] Ultimately, certain police officers were identified. They are Tegogo Sebothama, the investigating officer, and Johanna Solani Maivanga, the arresting officer.

[15] How did the applicant know that, or at least come to believe that they were responsible for the deeds in question? The applicant alleges that this knowledge was only available when the contents of the docket became available to both explain what had transpired and to identify who performed what acts.

[16] Is this plausible? According to the applicant's notice, after his arrest he showed the arresting officer his s 22 permit to remain in the country. She made notes of it. He retained the permit. He met the investigating officer once only and give him his permanent address as '684 Pretorius, 62 Lilaron Building, Arcadia, Pretoria' (*sic*). He never saw the investigating office again until after his release. However, perversely, the investigating officer refused to note this address, but instead recorded in the docket the address at which he had been arrested, 22 Unwin Street, Moffat View, the home of the complainant. Later, the investigation officer, in an affidavit deposed to on 23 October 2009, which affidavit was in the docket, recorded that he could not verify the applicant living at the address stated in the docket. Moreover, he described the applicant as an illegal immigrant. Both statements are alleged to be untrue and were causes of the refusal of bail. There is mention of other misconduct by a legal representative who took his permit and later denied doing so, but that is not germane to this enquiry. His permit was found in the docket by a prosecutor, and when verified for authenticity, he was released.

[17] Why could the applicant not know enough to serve the notice earlier? Section 3(2)(b)(i) of the Act requires the facts to be set out, however briefly, in the prescribed

notice. It is plain that the affidavit of the investigation officer could not have come to the attention of the applicant before the docket was read. He could not have known of the conduct revealed from the contents of the docket, or be advised earlier that it was actionable. In terms of s 3(3)(a) of the Act, the cause of action about the suppression of evidence about his true status and address could only become due when he was informed of these facts after February 2011 when his attorney pried the docket out of the police hands.

[17] The cause of action about the late appearance stands on a different footing. Nothing in the docket could supplement what he knew on 2 July 2009. The only organ of state capable of being responsible was the Police. That debt indeed became due on that date.

THE DELAY

[18] Self–evidently, until his release on 3 February 2010, he cannot be criticised for inaction. Only once he regained his liberty could he take steps to assert his rights. Within a week he consulted attorneys.

[19] The attorneys took appropriate steps to get the docket. That was relevant to a full examination of the applicant's predicament. They could, however, have served a notice about the complaint of late appearance after the 48 hour period. They did not.

[20] The time that elapsed from mid-February 2011 until 8 April, a period of about 7 weeks or 43 days, has been criticised. During this time, the attorney assigned to the matter had to read and analyse the contents, form an opinion, consult with the client and then prepare the notice and serve it. The consultation with the applicant took place on 1 April, a week before the notice was served. In my view, given the exercise performed, no criticism is warranted. It is, of course, true that the pace of response could have been faster, but that is not the test. Making due allowance for a legal practitioner juggling several demands, there is no reasonable inference, from these facts, of sloth or hesitation.

[21] The failure to give a separate notice in respect of the '48 hours' complaint is further, in my view, not to be condemned. It is the less grave of the two causes of action and can fairly be said to be wound up with the other cause of action, as a pattern of either neglect or spitefulness. The trial can explore the possible reasons why, on the tale that emerges even from the record of the docket, he was abused and treated like a piece of paper.

[22] Nothing in the respondent's answering papers rebuts the essential facts set out by the applicant. The respondent was content to criticise the explanation and then try to diminish the weight to be attached to the factors raised in the applicant's account.

[23] The prospects of securing a condemnation of the conduct described, if proven, is excellent.

[24] The requirement to show good cause, as envisaged by Hefer JA in *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA), means examining everything that bears on fairness and facilitating the proper administration of justice. In my view the case for condonation is well made.

[25] I make an order as follows:

1. The applicant's failure to comply with Section 3(2) (a) of Act 40 of 2002 is condoned.

2. The applicant's notice served on 8 April 2011 shall stand as fulfilment of s (2) (a) of Act 40 of 2002.

3. The applicant is given leave to institute proceedings against the defendant pursuant to that notice, and shall serve the necessary process within three months of the date of this judgment.

4. The costs of this application shall be costs in the cause.

Roland Sutherland

ROLAND SUTHERLAND
Judge of the South Gauteng High Court, Johannesburg
11 June 2012

/ Hearing: ...

Hearing	:	23 May 2012
Delivered	:	14 June 2012
For Applicant:		Attorney Asmita Thakor of Webber Wentzel Bowens Attorneys
For Respondent:		Advocate N Sikhakane
Instructed by	:	The State Attorney,
Reference	:	C Sethlatlole