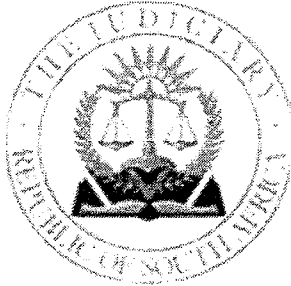
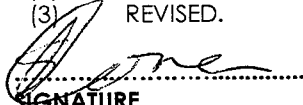


REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG****CASE NO: 2013/20896**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
 SIGNATURE	18/4/19... DATE

In the matter between:**MELATO GIFT NGOBENI**

Applicant

and

MINISTER OF POLICE

Respondent

JUDGMENT

COWEN AJ:-

[1] The applicant, Mr Melato Ngobeni, applies for condonation in terms of section 3(4)(a) and (b) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, as amended ('the Act'). Condonation is sought for the late service of notice of intended legal proceedings required by the Act.

[2] Section 3 of the Act, titled 'Notice of intended legal proceedings to be given to organ of state' provides, in relevant part:

- (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 intention to institute the legal proceedings in question; or
 - (b) The organ of state in question has consented in writing to the institution of the 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 willfully prevented him or her or it from acquiring such knowledge; and
 - (b) ...
- (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.

- [3] The applicant (as plaintiff) has instituted an action for damages against the respondent (as defendant), the Minister of Police, under case number 20896/13.¹ In the action, the applicant alleges that he was unlawfully arrested on 2 May 2011 at the Golden Highway Plaza and thereafter unlawfully detained at Sebokeng Police Station and Leeuhof Prison. Summons was issued in June 2013.
- [4] In the summons, it is alleged, amongst other things, that the applicant was unlawfully arrested and detained without a warrant of arrest on false allegations of armed robbery. He was detained until 25 May 2011. The debt relating to unlawful arrest and detention arose as a result of these events.
- [5] It is common cause that on 10 October 2011, the applicant, through his attorney, had sent a letter notifying the respondent of intended proceedings ('the first letter'). The letter was stated to be a notice in terms of section 3 of the Act. It was in respect of an intended claim for damages in the amount of R300 000.00 arising *inter alia* from harm to the applicant's dignity, reputation, *iniuria*, *contumelia* and deprivation of freedom and based on the alleged unlawful arrest and detention. The letter was sent by registered post at least three weeks prior to the expiration of a six-month period from the date on which any debt for

¹ I refer in this judgment only to the applicant and the respondent. At times the reference in context refers to these parties in their capacities in the action as plaintiff and defendant respectively.

unlawful arrest could have arisen. This afforded adequate time for the letter to have been delivered in the ordinary course of post.²

[6] It is not in dispute that to the extent that the first letter constitutes effective notice to the respondent of the action instituted, it complies with section 3(1)(a) and section 3(2)(a) of the Act. No condonation would accordingly be required for the late service of that notice as it was not late.

[7] The dispute before me arose, however, not due to the lateness of the first letter. It arose because of a second letter, also sent by the applicant's attorney in terms of the Act. The second letter was sent by registered post on 27 January 2012. It was sent in circumstances where the applicant's attorney had 'recently received copies of the docket' from which it allegedly appears that a member of SAPS 'unlawfully or maliciously opposed' the applicant's bail application. At that stage, the applicant contemplated a larger claim for R500 000.00, including the claim for which notice had already been given. The second letter is also stated, in its heading, to be notice in terms of section 3 of the Act.

[8] In its particulars of claim and when pleading compliance with the Act, the applicant relied on both the first and second letters. When the respondent pleaded, it filed a special plea of non-compliance with section 3 of the Act claiming that no notices were served as required by section 3 of the Act.

² Section 7 of the Interpretation Act 33 of 1957 and *Madinda v Minister of Safety and Security* (153/07) [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) (28 March 2008) at paragraph 5.

[9] On 16 November 2018, the applicant instituted this application for condonation.

The State Attorney filed a notice of intention to oppose the application on behalf of the respondent on 5 December 2018 and on 13 December 2018, the answering affidavit was filed. The answering affidavit is deposed to by SAPS' Legal Administrative Officer. A replying affidavit was then filed. The matter came before me on the opposed roll on 15 April 2019 and was heard on that day. The applicant was represented by Mr Swanepoel, the applicant's attorney, and the respondent was represented by Ms Mahlangu.

[10] Ms Mahlangu confirmed that she is instructed in the trial and that the respondent's complaints about the notice had been ventilated fully in the papers before me. Ms Mahlangu further confirmed that the respondent's only substantive complaint about the notice was whether the applicant's notice was late in view of the fact that the second letter was sent only in January 2012. In other words, the respondent was relying on the second letter for effective notice.

[11] During the course of the hearing, the parties agreed that it would be appropriate for the applicant to amend the notice of motion to include declaratory relief to cater for the contingency that the Court finds that the applicant does not require condonation in terms of the Act. The notice of motion was accordingly amended.

[12] In view of the conclusion to which I have come regarding the import of the second letter, it is not necessary for me to decide whether the second letter was served timeously or not. I merely note that, in light of section 3(3)(a) of the Act referred to above, it is not clear that it was in fact late. This is because it was sent in the

wake of the applicant's attorney having obtained new information on receipt of the docket.

[13] In my view, the second letter is not of material importance when regard is had to the content of the two letters and the content of the particulars of claim. In short, the claim that was pursued is the claim that was notified in the first letter. Although the second letter may, on one reading, suggest that the action will include both the originally notified claim and a new claim relating to frustration of bail, it is clear from the particulars of claim that the claim pursued is a claim for damages arising from unlawful arrest and detention as originally notified. The facts germane to the frustration of bail are pleaded as relevant to the originally notified claim for unlawful arrest and detention. Viewed in this light, the notice of January 2012 had the effect of providing the respondent with additional information germane to the claim that had come to light subsequent to the initial notice and since the applicant had obtained access to the docket. It also advised that the claim would be for a greater amount. At the hearing, Ms Mahlangu – in my view responsibly – did not seek to contend that the respondent only obtained effective notice of the intended proceedings when it received the second letter. Rather, counsel accepted that the first notice was effective.

[14] In light of this conclusion, the applicant does not require condonation under the Act.

[15] In order to ensure that this aspect of the dispute is resolved between the parties, it is appropriate that I grant declaratory relief. I do so substantially as sought in the amended notice of motion.

[16] The remaining issue is costs. Although the applicant was successful in obtaining declaratory relief in his favour, the relief granted was not initially sought. On the other hand, the defendant's opposition is difficult to understand. In my view and on the information before me, these were unnecessary proceedings and both parties should have conducted the litigation in a manner that avoided the need for them to proceed, not least on an opposed basis. In these circumstances, it is appropriate that each party pay their own costs.

[17] I make the following order:

1. It is declared that the notice dated 7 October 2011 dispatched by the applicant on 10 October 2011 complies with section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 for purposes of the claim instituted against the defendant under case number 20896/13.
2. Each party is to pay its own costs.



**S J COWEN AJ
ACTING JUDGE OF THE HIGH COURT,
JOHANNESBURG**