REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2016/19414

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

13 MARCH 2020 **N ADAM**

In the matter between:

MOTLADILE JOHN MOKGOTO **Applicant**

and

THE MINISTER OF POLICE **1st Respondent**

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **2nd Respondent**

JUDGMENT

Adam AJ:

[1]. In this application the applicant, Mr Motladile, is seeking condonation for the late filing of the notice of intended legal proceedings to be given to an organ

of state in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act[1] (*the Act*). The applicant further seeks costs on the party and party scale against the first and second respondents in the event that the application is unopposed. Alternatively, costs against the first and second respondents on an attorney and client scale in the event that they oppose this application as well as interest on the taxed or agreed costs.

[2]. The issue to be considered is whether condonation should be granted or whether the matter has prescribed as contended by the respondents in their answering affidavit.

Background

[3]. The applicant was arrested on 15 May 2013 at or near Randfontein Police Station by members of the South African Police Service (SAPS), allegedly for corruption. The applicant, a Sergeant employed by SAPS, was detained and appeared for the first time in the Randfontein Magistrates' Court on 17 May 2013. He was remanded for a formal bail application until 24 May 2013 on which date he was released on bail of R1500.

[4]. The applicant alleges that he consulted with his legal representatives sometime on 1 October 2015 after he received correspondence dated 26 August 2015 from the Deputy Director of Public Prosecutions, which stated that "prosecution is declined".

[5]. The applicant issued summons on 7 June 2016 and it was served on the respondents' legal representatives on 14 June 2016. The amount claimed in the summons is R1.5 million in respect of wrongful and unlawful arrest, wrongful and unlawful detention and *contumelia* as well as deprivation of freedom and discomfort.

[6]. The respondents raised a special plea of prescription which relates to the date on which the arrest and detention took place i.e. 15 May 2013. According to the respondents the claim should have been brought on or before 15 May 2016.

[7]. The notice in terms of section 3 (2) of the Act was served on the first and second respondents on 12 October 2015 and 25 February 2016 respectively. On 10 February 2016, the first respondent acknowledged receipt of the notice and advised the applicant that the notice does not comply with the Act. The applicant launched this application for condonation on 5 August 2019 (more than three years after receiving notification that the notice did not comply).

Condonation

[8]. Section 3(1) and (2) of the act stipulates:

> *(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.*
>
> *(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 knowledge of the creditor.

[9]. Section 3 (4) states:

(a) if an organ of state relies on the creditor's failure to serve a notice in terms of subsection (2) (a), the creditor must 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.

[10]. The requirements set out in section 3(4) are conjunctive and all three must be established by the applicant in the condonation application.

Debt extinguished by prescription

[11]. For the court to be satisfied that condonation may be granted, it must be convinced that the claim has not prescribed. It will serve no purpose if the claim is extinguished by prescription and condonation is nevertheless granted.

[12]. As indicated above, the applicant served his notice on 12 October 2015 and 25 February 2016 on the first and second respondents respectively. The statutory requirement is that the notice must be served on the organ of state

within six months from the date on which the debt became due. Mr Sineke, on behalf of the applicant, argued that the debt had not been extinguished by prescription because the Director of Public Prosecution, Gauteng Local Division only declined to prosecute on 26 August 2015. He submitted that the applicant was unaware which organ of state to bring the claim against and further that he could not bring the malicious prosecution claim against the second respondent without receiving the notice on 26 August 2015. He submitted that the debt only became due after the applicant's acquittal on 26 August 2015.

[13]. Mr Zondi argued that the debt had been extinguished by prescription as the arrest and detention occurred on 15 May 2013.

[14]. It is crucial for this court to determine whether prescription started to run on 15 May 2013 which is the date of the arrest alternatively, on 26 August 2015 which is the date of the acquittal.

[15]. Section 12 of the Prescription Act [2] is relevant and reads:

> *' 12 When prescription begins to run-*
>
> *(1) subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.*
>
> *(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.*
>
> *(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'*

[16]. Nothing in the papers demonstrates that the applicant was wilfully prevented from coming to know about the existence of the debt. The applicant certainly knew the debtor and the facts from which the debt arose. All that was argued was that he had to wait for his acquittal in order to incorporate the claim for malicious prosecution. I find this submission untenable as the combined summons does not incorporate a claim for malicious prosecution. The applicant instituted a claim against the respondents for wrongful and unlawful arrest, wrongful and unlawful detention and *contumelia* as well as deprivation of freedom and discomfort.

[17]. Moseneke J, as he then was, in an unreported judgement *Eskom v Bojanala Platinum District Municipality*[3] are relevant:

> *'[16] In my view, there is no merit in the contention advanced on behalf of the plaintiff that prescription began to run only on the date the judgement of the SCA was delivered. The essence of this submission is that a claim or debt does not become due when the facts from which it arose are known to the claimant, but only when such claimant has acquired certainty in regard to the law and attendant rights and obligations that might be applicable to such a debt. If such a construction were to be placed on the provisions of section 12 (3) grave absurdity would arise. These provisions regulating prescription of claims would be rendered nugatory and ineffectual. Prescription periods would be rendered elastic, open ended and contingent upon the claimant's subjective sense of legal certainty. On this contention, every claimant would be entitled to have legal certainty before the debt it seeks to enforce becomes or is deemed to be due. In my view, legal certainty does not constitute a fact from which a debt arises under section 12 (3). The claimant cannot blissfully await authoritative, final and binding judicial pronouncements before its debt becomes due, or before it is deemed to have knowledge of the facts from which the debt arises.'*

[18]. The position is summed up succinctly by the Supreme Court of Appeal in *Minister of Finance v Gore N.O*[4] where the following was said:

> *'[17] This court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until the creditor becomes aware of the full extent of its legal rights.'*

[19]. It is therefore my view that the facts from which the debt arose for the prescriptive period to start running was the date of the arrest and detention of the applicant i.e. 15 May 2013. In his particulars of claim the applicant claims for wrongful and unlawful arrest and detention and this is the date of the arrest when the first known harm became due and payable. It was not necessary to wait for the relevant legal conclusions or the termination of legal proceedings.

Does good cause exist?

[20]. The only reasons that appear in the applicant's founding affidavit, at paragraph 37, 38 and 39 are that he consulted with his legal representatives in October 2015 and that was the first time that he became aware that he needed to bring an application for condonation. He fails to deal with the period from May 2013 until October 2015. However, on 15 May 2013 the applicant was aware that he was arrested by members of the South African Police Services. Furthermore, the applicant is a Sergeant who was employed by SAPS.

[21]. He goes on to mention in paragraph 39 that he has reasonable prospects of success in this matter but does not expand on the assertion.

[22]. The Act does not define 'good cause'. In *Silber v Ozen Wholesalers (Pty) Ltd*[5], the Court remarked:

> *'The meaning of 'good cause' in the present sub rule, like that of the practically synonymous expression "sufficient cause" which was considered by this court in Cairn's Executors v Gaarn 1912 A.D 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently fully to enable the court to understand how it really came about, and to assess his conduct and motives.'*

[23]. Good cause as pointed out in *Madinda v Minister of Safety & Security* [6] is also linked to the failure to act timeously. The failure has a bearing on the discretion which is exercised by the court in determining whether or not to grant condonation. The explanation proffered by the applicant in paragraphs 37, 38 and 39 of his founding affidavit is inadequate and does not enable the court to appreciate the inordinate delay of six years. The onus lay on the applicant to show good cause for the wanton delay which he has failed to do.

Prejudice to the respondents

[24]. The onus to show the absence of prejudice lies with the applicant. As pointed out in *Madinda v Minister of Safety & Security* dealing with good cause

and the absence of unreasonable prejudice separately may be intended to strike a balance between the individual's right of access to justice and the protection of state interest in receiving timeless and adequate notice.

[25]. The applicant deals with prejudice in paragraphs 40, 41, 42 and 43 of his founding affidavit. He says that the arresting officers are all still employed by the South African Police Service and that the officials of the National Prosecuting Authority are also still employed by National Prosecuting Authority. He alleges that the case docket and all other relevant information is still intact and can easily be obtained by the respondents. The basis of the assertions is not revealed. The respondents in the answering affidavit deny these submissions and state that these submissions do not address the prejudice to be suffered by the respondents. A finding on the dispute of fact is not necessary in light of the requirements of section 3(4).

[26]. As prescribed in section 3(4)(b) the court can only grant condonation once it is satisfied that the three requirements have been met as the requirements set out in section 3(4) are conjunctive.

[27]. The contention that the six-month period started running from August 2015 lacks merit and is rejected. I therefore find that the applicant's debt arose in May 2013 and granting him condonation for the late filing of a notice which was filed six years later will not serve the interests of justice. By the time summons was issued in June 2016 the claim had long prescribed. The applicant also failed to show good cause for the inordinate delay of six years. I

agree with the submissions made by Mr Zondi on behalf of the respondents that the applicant has failed to make out a case for condonation.

[28]. In the circumstances, the application must fail.

Costs

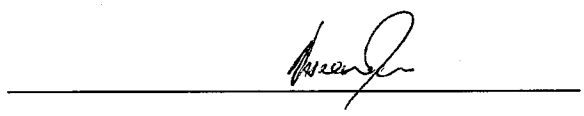
[29]. The respondents have been successful in opposing the application. This means that, applying the general rule, the respondents are entitled to a cost order.

[30]. I can see no reason to deviate from the general rule and cost should therefore be awarded in favour of the respondents.

Order

In the circumstances, the following order is made:

(1) The application for condonation for the applicant's failure to serve the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002, within the period laid down in section 3(2)(a) of the Act is dismissed with costs.



N ADAM

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Date of hearing: 9 March 2020

Date of judgment: 13 March 2020

For the Applicant: Mr W Sineke

Instructed by: Sineke Attorneys

For the First and Second Respondents: Adv MM Zondi

Instructed by: The State Attorneys

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[1] Act 40 of 2002

[2] Act 68 of 1969

[3] 2003 JDR 0498 (T) at para 16. Also quoted by Saner in his book: "Prescription in SA Law" (issue 23 3-98)

[4] 2007 (1) SA 111 (SCA) at par 17

[5] 1954 (2) SA 345 (A) at 352 H-353A

[6] 2008 (4) SA 312 SCA at 317 para 14