IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 65755/2011

Date: 17 March 2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

17/3/2014 .....
DATE SIGNATURE

In the matter between:

ZANE OSWALD CLEOPHAS Plaintiff

And

NTATI MTETHWA NO
MINISTER OF SAFETY AND SECURITY
OF THE GOVERNMENT OF SOUTH AFRICA First Defendant

NHLANHLA SIBUSISI MKHWANAZI NO Second Defendant
ACTING COMMISIONER OF THE
SOUTH AFRICAN POLICE SERVICE

MAKOBELA Third Defendant

SUPERINTENTDENT FANIE MALAPO Fourth Defendant

JUDGMENT

PRETORIUS J,

[1] This matter was enrolled for trial on 11 March 2014. At the pre-trial meeting by the two parties on 27 February 2014 it was agreed that the formal application for condonation would first be heard and the trial will be postponed *sine die*.

[2] The plaintiff issued summons on 16 November 2011 against the defendants for the unlawful arrest and detention of the plaintiff by the third and fourth defendants, who acted in the scope of their employment of the first and second defendants. The arrest, which forms the basis of the action, took place on 19 November 2008 at Rustenburg. The action had thus not prescribed when summons was issued. The notice of intention to issue summons against the defendants was served on 30 September 2011 and acknowledgement of receipt of the notice was given.

[3] It must be noted that a copy of this notice was only annexed to the plaintiff's replying affidavit. It is trite law that an applicant has to make out his case in the founding affidavit.

[4] Although summons was issued on 16 November 2011, the defendants only pleaded to the particulars of claim on 10 May 2012 and the plea was served on the plaintiff's attorney on 14 May 2012. The plea was served after a notice of bar was served on the defendants on 8 May 2012. In the plea the defendants pleaded that the plaintiff had not complied with the provisions of section 3 of Act 40 of 2002 as a letter of intention to sue the defendants was not delivered timeously, that is within 6 months.

[5] The plaintiff/applicant launched the formal application for condonation on 6 November 2013 and served it on the defendants/respondents on 12 November 2013 – 18 months after the plaintiff was alerted to the fact that he had not complied with the provisions of section 3 of Act 40 of 2002.

[6] Section 3(4) of the **Institution in Legal Proceedings against Certain Organs of State Act 40 of 2002** provides:

> *"(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."

[7] It is clear that at the time summons was issued that a cause of action had not been extinguished by prescription. The plaintiff now has to show good cause for his failure to comply with the provisions of the Act and that the defendants were not unreasonably prejudiced by this failure.

[8] In **MEC for Education, KZN v Shange 2012 (5) SA 313 (SCA)** at paragraph 15 Snyders JA held:

"The provisions of s 3(4)(b)(ii) of the Act have been considered in several judgments.[6] For present purposes it is not necessary to repeat all of the relevant considerations, but only to state that the court is to exercise a wide discretion;[7] that 'good cause' may include a number of factors that are entirely dependent on the facts of each case;[8] and that the prospects of success of the intended claim play a significant role."

[9] It is so that the defendants specifically pleaded on 14 May 2012 that:

> *"The defendants specifically plead that plaintiff did not comply with Section 3 of Act 40 of 2002 in that he did not timeously delivered a letter within 6 months, alternatively did not deliver a letter at all as prescribed by the Act"*

[10] The application for condonation was only served on 12 November 2013 – 18 months after the plaintiff had been alerted to the fact that he had not complied with the provisions of the Act. There is no explanation for this delay by the plaintiff.

[11] The plaintiff cannot rely on the fact that the two witnesses had passed away prior to 2012 and therefor they would not have been able to testify in any event and therein lies the prejudice to the defendants.

[12] The plaintiff did not set out any facts on the merits of the action to enable this court to decide whether he has any prospect of success in the action. The plaintiff neglects to set out the facts of the matter that he will rely on in the action to prove his claim.

[13] The court cannot make any decision whether he has any prospect of success in the action. Even in his replying affidavit he refrained from setting out the facts, but referred the court to the letter dated 30 September 2011 which served as a notice of the plaintiff's

intention to institute action. The bare facts are set out and once more these facts did not form part of the founding affidavit, but was only attached to the replying affidavit. The plaintiff did not set out the merits of the action to be instituted in his founding affidavit as he was wont to do.

[14] In **Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA)** Heher JA held that 317 C:

> *"Strong merits may mitigate fault; no merits may render mitigation pointless."*

[15] If this is taken into consideration this court is left totally in the dark as to what the prospect of success of the plaintiff is in the action.

[16] Madjiedt AJA found in **Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd 2010 (4) SA 109 (SCA)** at that the court must be in a position to assess the merits to balance that factor with the cause of the delay. Even more so where a further delay of 18 months has not been explained at all.

[17] The court takes note that the plaintiff first relied on a lack of knowledge when explaining why he had not given notice timeously, but then later in his affidavit states that a lack of money caused the notice not to be sent. There is no affidavit from his erstwhile attorney, Mr van

der Merwe, to confirm his version. In the letter dated 25 June 2013 addressed to Mr van der Merwe by Rautenbach Attorneys, the plaintiff's present attorneys refer to the action as follows:

> *"The refer to the above matter and confirm that we act on behalf of our client, Mr CLeophas and received instructions that you acted on his behalf in the criminal matter as well as the Labour Court matter. We have issued Summons against the Minister of Safety and Security for the unlawful arrest and detention of our client, which matter has been set down for trial on the 11th March 2014."*

[18] There is no indication that Mr van der Merwe had to deal with the civil case at any stage, therefor the court cannot find that Mr van der Merwe is to blame for not sending the letter timeously, as the plaintiff's own attorney indicated that they had issued summons. There was no reference to Mr van der Merwe having not done his duty by not dealing with the civil matter. There was no indication that it had been expected of Mr van der Merwe to institute a civil claim.

[19] In **Mohlomi V Minister of Defence 1997 (1) SA 124 (CC)** at paragraph 11 Didcott J held:

> *"Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and*

obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. ***Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.*** " (Court's emphasis)

[20] In **Rance case (*Supra*)** Madjiedt AJA found in paragraph 33:

"In terms of s 3(4)(b) a court may grant condonation if it 'is satisfied' that the three requirements set out therein have been met. In practical terms this means the 'overall impression' made on a court by the facts set out by the parties."

And at paragraph 35:

"In general terms the interests of justice play an important role in condonation applications.[9] *An applicant for condonation is required to set out fully the explanation for the delay;* ***the explanation must cover the entire period of the delay and must be reasonable.*** " (Court's emphasis)

[21] The plaintiff's argument that there will be no prejudice to the defendants cannot be considered as true. The docket had been destroyed, albeit already in 2009 and the third and fourth defendants had passed away in 2011. If a notice had been sent timeously, that is within six months as required, the docket and court records would not have been destroyed; statements would or could have been obtained from the third and fourth defendants.

[22] In the **Rance case (*supra*)** it was decided that condonation had to be sought as soon as the concerned party realises that it is required – the plaintiff waited 18 months before launching an application for condonation.

[23] This time period, which has not been explained, can be in no instance be regarded as reasonable. The interest of justice cannot be served if a plaintiff, who is out if time in any event, waits a further 18 months to launch the condonation application. This lack of urgency is exacerbated by the plaintiff giving no explanation for waiting 18 months to launch this application.

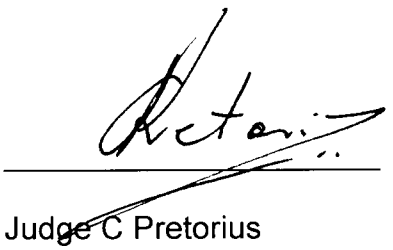
[24] The interest of justice cuts both ways and the court cannot decide in the plaintiff's favour, without considering the prejudice the defendants will suffer. It is clear that the defendants will suffer huge

prejudice as they will not be able to defend a claim under this circumstance

[25] I have considered all the facts and come to the conclusion, that due to the reasons set out above, the plaintiff should not be granted condonation in terms of section 3(4) of Act 40 of 2002.

[26] I make the following order:

1. The application for condonation in terms of paragraph 1 and 2 of the notice of motion is dismissed with costs.



Judge C Pretorius

Case number	: 65755/2011
Heard on	: 10 March 2014
For the Applicant / Plaintiff	: Adv J Holland-Müter
Instructed by	: Rautenbach
For the Respondent	: Adv M Barnard
Instructed by	: State Attorney
Date of Judgment	: 17 March 2014