

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 32962/2011

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

23 / MAY / 2014

DATE

SIGNATURE

23/5/2014

In the matter between:

C.P. CAU

PLAINTIFF

And

THE MINISTER OF POLICE

FIRST DEFENDANT

COMMISSIONER OF POLICE

SECOND DEFENDANT

MINISTER OF JUSTICE AND CONSTITUTIONAL

THIRD DEFENDANT

DEVELOPMENT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FOURTH DEFENDANT

JUDGMENT

MAVUNDLA J;

- [1] This is an opposed application for condonation of the late delivery of the applicant's notice of intended proceedings against the respondents as required in terms of s3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002.
- [2] It is common cause that the applicant was arrested on the 14th April 2005. It is also common cause that he was in custody until the charges were withdrawn against him on the 9th March 2009.
- [3] The applicant caused summons to be issued and served upon the fourth respondent on the 21st June 2011 and the third respondent on 22 June 2011, without serving its notice of intention to claim within six months from the date upon which the cause of action arose.¹ The relevant notice was only served upon the first respondent on the 18th August 2010 and on the fourth respondent on the 24 August 2010.
- [4] The applicant claimed for general damages an amount of R2 500 000. 00, and in respect of loss of income during detention

¹ S3 (2) of Act 40 of 2002.

calculated at R129 684.28, both totalling an amount of R2 633 776.00 (two million, six hundred and thirty three thousand and seven hundred and seventy-six rand), consequent to the alleged unlawful arrest and detention.

[5] Where a party failed to serve a notice of intention to institute an action against an organ of state within 6 months from the date on which the cause of action arose², may approach the court for condonation of the late service of its notice in terms of s3(4).³

[6] Section 3(4)(b) accords the court a discretion to grant condonation provided that 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.” In the matter of *Minister of Agriculture and Land Affairs v CJ*

² S3(2) of Act 40 of 2002.

³ Act 40 of 2002.

Rance (Pty) Ltd⁴ Majiedt (AJA) held that these three requirements are conjunctive and must be established by the applicant for condonation.

[7] The applicant's application in terms of s3(4)a) is premised on an affidavit deposed to by his attorney of record. The reasons advanced on the applicant's behalf for his failure to comply with s3 (1) of Act 40 of 2002 was that: he is an illiterate and indigent Mozambican citizen who was employed as a miner and speaks mainly Fanakalo. It was difficult for him to communicate in the South African languages, without an interpreter. Although he always intended to sue the authorities for the inordinate period that he had been incarcerated, he had lost his job after his arrest and did not have funds to take appropriate steps to sue. He only saw his lawyer for the first time on 21 June 2010.

[8] The applicant was arrested on the 14th April 2005, assuming that his arrest was unlawful; this would be the date on which his cause of action arose, or shortly thereafter upon the expiration of 48 hours. His right to claim was therefore extinguished by

⁴ 2010 (4) SA 109 (SCA) at para [11].

prescription on the 13th April 2008. That being the position, the court's discretionary powers to grant condonation are, in my view, ousted.

[9] The applicant, on his own version, had always intended to sue the authorities. This presupposes that he knew that he had a right to sue and who. Assuming that the incarceration contributed in his inability to sue that would not have stopped the running of prescription.

[10] The applicant was released on the 9th March 2009 and only saw his lawyer on the 21st June 2010. It is trite that in criminal cases the courts would always inform an arrested person of his rights to legal representative through Legal Aid, if he or she cannot afford his own. It can hardly be expected that the applicant would for the 47 months he was in custody, not have been aware of the existence of the Legal Aid. He is in any event silent in regard to this aspect. The reason advanced on his behalf for only seeing any attorney 15 months after his release are not, in my view, good cause to warrant that the court should exercise its discretion

in his favour. In the circumstances I conclude that the applicant has not furnished this court with satisfactory and good reasons for his inordinate delay in seeking legal advice and initiating the process to sue.

[11] Besides, the applicant does not provide any explanation, why the relevant notice was only served upon the first respondent on the 18th August 2010 and on the fourth respondent on the 24 August 2010. A party who intends to bring an action against the organ of state, when he is out of time in complying with the provisions of s3(1), must upon becoming aware of his failure, promptly and expeditiously bring an application for condonation. In my view there has also been an inordinate delay in bringing this application for condonation and there is no good cause advanced for this.

[12] In the premises the application for condonation is dismissed with costs.



N .M. MAVUNDLA

JUDGE OF THE COURT

DATE OF JUDGEMENT	: 23/05 /2014
PLAINTIFF'S ATT	: R T TSHIFURA ATT C/O BARES& BASSON ATT
PLAINTIFF'S ADV	: ADV T.P KRUGER
DEFENDANT'S ATT	: STATE ATTORNEY
DEFENDANT'S ADV	: ADV D MTSWENI