

REPUBLIC OF SOUTH AFRICA

WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES/NO.

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

(3) REVISED.

25/8/2014

DATE

SIGNATURE



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

25/8/2014

CASE NUMBER: 37401/2011

In the matter between:

MARUMO TSHEPANG QUEEN

APPLICANT/ PLAINTIFF

and

MINISTER OF POLICE

RESPONDENT/ DEFENDANT

JUDGMENT

MODIBA AJ:

1.

This is an application for Condonation for the late filing of a notice to institute legal proceedings in terms of section 3 of the Institution of Legal Proceedings Against Certain organs of state act 40 of 2002 ('the Act').

2.

BACKGROUND

On 3 March 2010, the applicant who is the plaintiff in the main action was allegedly unlawfully arrested, detained and assaulted by members of the South African Police Services. She was released on 4 March 2010. She consulted with her attorney on 25 January 2011, approximately 10 months after the alleged unlawful arrest, detention and assault. Approximately seven days after consulting with her attorneys, on 1 February 2011, her attorneys served a notice in terms of section 3 of the act on the defendant. On 1 July 2011, her attorneys issued summons claiming damages against the defendant. The summons was served on 7 July 2011. On 4 October 2011, the defendant filed a plea and a special plea alleging that the plaintiff failed to file a notice in terms of section 3 of the Act within 6 months as prescribed by the Act. On 3 May 2013, the plaintiff filed an application in terms of section 3 (4) (b) of the act for late filing of the notice to institute legal proceedings against the defendant. The defendant opposed the application.

3.

THE APPLICABLE LEGAL PRINCIPLES

In terms of section 3 (4) (b) of the act, the court may condone failure to issue a section 3 notice if it is satisfied that:

- (i) the debt has not been extinguished by prescription;
- (ii) good cause exists for failure by the creditor;
- (iii) the organ of state was not unreasonably prejudiced by the failure.

4.

It is an established principle in South African law that the phrase 'if the court is satisfied that' does not require proof on a balance of probabilities but rather requires an overall impression made on a court which brings a fair mind to the facts set up by the parties. See *Die*

Afrikaanse Pers Beperk v Naser 1948 (2) SA 295 (C) at 297, cited with approval by the Supreme Court of Appeal in *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at 8.

5.

The defendant had raised a defence of prescription in his answering affidavit. Counsel for the defendant abandoned this defence during argument. It is common cause that when the plaintiff issued summons on 1 July 2011, her claim against the defendant had not prescribed. It was prudent for counsel for the defendant to abandon this defence.

6.

The second requirement for condoning the applicant's failure to serve the section 3 notice within the prescribed is that she must show good cause for this omission. In the *Madinda* case, the SCA held that 'good cause' requires consideration of those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. These factors may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant and any contribution by other persons or parties to the delay and the applicant's responsibility therefore.

7.

The reason advanced by the plaintiff for failure to serve the section 3 notice within the prescribed 6 months period is that she was ignorant of this requirement. She only became aware of the requirement when she consulted with her attorneys on 25 January 2011. Her attorneys served the said notice seven days later. Counsel for the plaintiff submitted that the plaintiff's ignorance constitutes good cause for failure to comply with section 3 of the Act. Counsel for the defendant contended that the plaintiff's ignorance does not constitute good notice. Counsel for the defendant further contended that the plaintiff further delayed in

bringing the condonation application. This coupled with the fact that she failed to provide a reasonable explanation for this delay, warrants dismissal of her application. In her founding affidavit the plaintiff avers that at all material times after the alleged unlawful arrest, detention and assault she was unaware of the laws relating to prescription as well as the requirement regarding instituting legal proceedings against the defendant. In my view the plaintiff's ignorance accounted for her failure to file the section 3 notice timeously. As soon as she was aware of the requirement to file this notice, the notice was filed on her behalf by her attorneys. Counsel for the defendant contended that to show good cause the plaintiff should have gone further to explain why she waited 10 months before she consulted her attorneys regarding the alleged unlawful arrest, detention and assault. Counsel for the plaintiff submitted that she has made out a prima facie case of unlawful arrest, detention and assault and that she need not provide any explanation regarding her delay in bringing the Condonation application. In the *Madinda* case, the court held that subsequent delays in bringing the application for Condonation does not contribute to good cause as they did not contribute to failure to file the notice (at para 14). I agree with this approach by Heher JA. I am of the view that the plaintiff has shown good cause for failing to file the section 3 notice within the prescribed time.

8.

The last requirement is whether the defendant stands to suffer prejudice if the application is granted. The plaintiff contends that the defendant has failed to show that he will suffer prejudice if the application for condonation is granted. Counsel for the defendant argued that the defendant stands to suffer prejudice if the application is granted because (a) failure to give proper notice unreasonably prejudices the defendant as it makes it difficult for him to present a proper defence to the plaintiff's claim, (b) the defendant could not consult with witnesses while their memories are still fresh, (c) some of the documentary evidence may have disappeared. It is therefore not in the interest of justice for the application to succeed.

The defendant made various averments illustrating the undue prejudice that it stands to suffer if the section 3 notice is not filed timeously. He has not advanced facts that show that he has suffered actual prejudice as a result on the plaintiff's omission. It was submitted on behalf of the defendant that it cannot trace some of its witnesses. However, he failed to indicate which witness cannot be traced. In her particulars of claim, the plaintiff alleges that she was arrested by one police officer at her home. Counsel for the plaintiff argued that the fact that the defendant has pleaded evidences the absence of prejudice because he could not have pleaded unless the defendant had consulted with the officer who was involved. He also could not plead unless he had referred to documentation regarding the incident that gave rise to the plaintiff's claim. In my view, the defendant has failed to show that he stands to suffer prejudice if the application is granted.

9.

In the premises, I am satisfied that the plaintiff has made a proper case for condonation for the late filling of the notice in term of section 3.

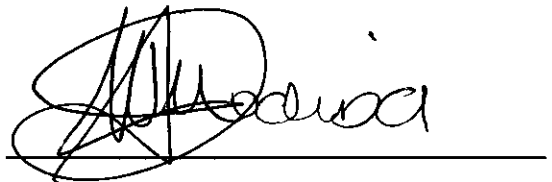
10.

No argument in respect of costs was advanced on behalf of the parties. The plaintiff has prayed that costs be awarded against the defendant in the event that he opposes the application. It is trite that a party who seeks the indulgence of the court is liable for costs. In this case the applicant is seeking the indulgence of the court and should pay the costs of the application despite opposition by the defendant as it is within the defendant's right to oppose the application.

ORDER

I therefore make the following order:

1. Condonation is granted to the applicant for failure to serve a notice in terms of section 3 (1) (a) of the institution of Legal Proceedings Against Certain organs of State Act 40 of 2002.
2. The applicant is ordered to pay the costs of this application.

A handwritten signature in black ink, appearing to read 'Modiba AJ', is written over a horizontal line.

MODIBA AJ

Counsel for the Applicant

Mr JHVDB Lubbe

Instructed by:

De Klerk & Marais Inc

Counsel for the Respondent

Mr MS Mphahlele

Instructed by

The State Attorney Pretoria

Date of hearing: 29 July 2014

Date of judgment: 25 August 2014