IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION

CASE NO: 89077/16

(1) REPORTABLE: YES ✓

(2) OF INTEREST TO OTHER JUDGES: YES ✓

(3) REVISED. ✓

13 April 2022

SIGNATURE DATE

In the matter between:

SELLO THABANG Applicant

and

THE MINISTER OF POLICE N.O First Respondent

THE MINISTER OF JUSTICE N.O Second Respondent

JUDGMENT

Sardiwalla J:

[1] The applicant seeks condonation for the late filing in terms of section 3 (4) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002, (hereinafter referred to as the "Act") for its failure to comply with sections 3(1) and 3 (2) (a) of the Act.

Background

[2] The applicant was arrested on 16 October 2006 for the alleged armed robbery with aggravating circumstances.

[3] On 16 October 2009 the applicant and his co-accused were convicted and sentenced to 12 years' imprisonment. After serving about 12 months of his sentence the applicant applied for leave to appeal against his conviction and sentence which was however, refused. During 2011 the applicant applied for a reduction of his sentence as well as parole, both of which were unsuccessful.

[4] Subsequently in 2011 the applicant applied special leave to appeal under case number SCA 14/2011 against his conviction and sentence which was successful. On 29 August 2013 under case number A109/2013 the South Gauteng Division of the High Court acquitted the applicant and he was released on 2 September 2013.

[5] The applicant brought an action for damages against the first and second respondents on the 10 February 2016.

[6] The respondents in their plea in the main action has resisted the applicant's claims for remuneration on the ground, *inter alia*, that it had not received the notice within six months as stipulated in section 3 of the Act and that on that basis there is no good cause. It further claimed that the applicant's claim had prescribed.

[7] The parties agreed to a separation of issues in terms of Rule 33(4) of the Uniform Rules of Court and the matter was enrolled. The Honourable Acting Judge seized with the adjudication was unwilling to adjudicate the special plea of prescription until the condonation application for the late service in terms of section 3(4) of institution of legal proceedings was determined.

[8] It is important at this stage to re-iterate that this is a condonation application, however by request of the parties and which was agreed to between the parties the special pleas were to be argued and decided upon as these would still remain preliminary points in the main trial. Whilst there is no rule that the special pleas must be decided in the main trial, I must point out that the respondents have the opportunity to set the matter down for hearing 10 (ten) days prior to the main trial for same to be argued. Albeit this Court is of the view that it would be more convenient to decide the special pleas where sufficient evidence has been led.

First special plea: Non-compliance with the Act

[9] Section 3 of the Act deals with the giving of Notice of Intended Legal Proceedings against an Organ of State and as follows:

> "Notice of intended legal proceedings to be given to organ of state:
>
> (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; or ..
>
> (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 5

I. the facts giving rise to the debt; and

II. such particulars of such debt as are within the knowledge of the creditor."

Section 3(4) 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) he organ of state was not unreasonably prejudiced by the failure."

[10] It is clear from the wording of the section that these requirements must be shown to exist cumulatively and in conjunction with each other. It is also trite law that the applicant bears the overall onus of proving their existence on a preponderance of probability. See **Pillay v Krishna**1946 AD 946 at 952 – 953;

[11] Where notice has been given then, the question arises whether the applicant satisfied this court of the existence of all three requirements contained in section 3(4)(b) of Act 40 of 2002.

Second special plea: Prescription

[12] Section 12 of the Prescription Act 68 of 1969 states that;

"**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) ..

(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."

[13] The term "due" is not defined in the Prescription Act. Its meaning was recently considered by the SCA in ***Miracle Mile***[1] where it was held that;

"In terms of the [Prescription] Act, a debt must be immediately enforceable before a claim in respect of it can arise. In the normal course of events, a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor. Thus, in [Deloitte Haskins] at 532G-H, the court held that for prescription to commence running,

'there has to be a debt immediately claimable by the creditor or, stated in another way, there has to be a debt in respect of which the debtor is under an obligation to perform immediately'.

[1] *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd 2017 (1) SA 187 SCA*

(See also The Master v I L Back & Co Ltd 1983 (1) SA 986 (A) at 1004F-H). In Truter v Deysel 2006 (4) SA 168 (SCA) ([2006] ZASCA 16) para 16, Van Heerden JA said that a debt is due when the creditor acquires a complete cause of action for the recovery of the debt, i.e. when the entire set of facts which a creditor must prove in order to succeed with his or her claim against the debtor is in place".[2]

[14] A fundamental principle of prescription, which is much clearer under the current Prescription Act, is that it will begin to run only when the creditor is in a position to enforce his right in law, not necessarily when that right arises.[3]

[15] In applying the principle held in ***Miracle Mile*** that a debt is due when it is immediately claimable by the creditor and immediately payable by the debtor, the debt became claimable by the plaintiff on the date of his release from incarceration on 15 October 2015. However, the complete cause of action was only established after consultation with his attorneys on 6 June 2017. This principle was also confirmed in ***Truter***[4] where the SCA held that, for the purpose of prescription, a debt is due when the creditor acquires a complete cause of action to approach a court to recover the debt. Although the right to reclaim the amounts arose the day after his release from incarceration, in absence of any knowledge of the identity of the respondents, the applicant's rights in law only became enforceable on 6 June 2017.

[16] Considering the above, prescription would not have commenced as alleged by the

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[2] Standard Bank of South Africa Ltd v Miracle Mile Investments supra at para 24.
[3] See Lubbe "Die Aanvang van Verjaring waar die Skuldeiser oor die Opeisbaarheid van die Skuld kan Beskik" (1988) 51 THRHR 135.
[4] Truter v Deysel [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 16.

respondents, the day after he was convicted and sentenced in October 2009 or during 2011 when he applied for leave to appeal, but would commence from the instance the applicant became aware that the debt was due and enforceable. This occurred when he consulted with his attorneys on 10 April 2015 therefore prescription began to run from 10 April 2015 and will only be extinguished on 11 April 2018. As a result of the above applicable principles the letter of demand that was served on the respondents in July 2015 was served within the six-month period as stipulated in section 3 (2)(a) of the Act.

Good cause

[17] In considering the second requirement the *locus* ***classicus*** **is** ***Madinda v Minister of Safety and Security***[5]. In this regard Heher JA remarked as follows at para [10]:

"[10] The second requirement is a variant of one well known in cases of procedural non-compliance. … 'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These 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 of other persons or parties to the delay and the applicant's responsibility therefore."

In para [12] at 317 C the learned judge continued as follows:

"[12] … 'Good cause for the delay' is not simply a mechanical matter of cause and effect. The court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which

[5] *[2008] ZASCA 34; 2008 (4) SA 312 (SCA)*

attaches to the delay in serving the notice timeously. Strong merits may mitigate fault; no merits may render mitigation pointless. There are two main elements at play in s 4(b) (sic – it should read s 3(4)(b)), viz the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice." (emphasis added)

[18] I must also consider the delay in bringing the application for condonation as it might be relevant in adjudicating whether the applicant is entitled to the relief. Heher JA dealt with this issue in ***Madinda supra*** in a matter where the plaintiff brought the application for condonation nine months after the letter of demand was rejected by the Minister of Safety and Security. The following passages are quoted to emphasise the viewpoint of the Supreme Court of Appeal:

"[14] One other factor in connection with 'good cause' in s 3(4)(b)(ii) is this: it is linked to the failure to act timeously. Therefore, subsequent delay by the applicant, for example in bringing his application for condonation, will ordinarily not fall within its terms. Whether a proper explanation is furnished for delays that did not contribute to the failure is part of the exercise of the discretion to condone in terms of s 3(4), but it is not, in this statutory context, an element of 'good cause'. …

[20] It is also true that, although her attorney received the rejection of the notice in the middle of October 2005, the appellant did not commence proceedings for condonation until July 2006. As I have earlier pointed out, unexplained delay which relates to the period after the notice was de facto given will ordinarily relate not to the establishment of good cause but to condonation. ...

…

[28] … But when he received that reply it must have been clear that all hope of concession was past. It was the delay thereafter until July 2006 which he should have explained but did not. Applications for condonation should in general be brought as soon after the default as possible. Thereby possible further prejudice to the other party and misconception as to the intentions and bona fides of the applicant can be lessened. A delay in making the application should be fully explained. The failure to do so may adversely affect condonation or it may merely be a reason to censure the applicant or his or her legal advisers without lessening the force of the application. I think that the latter is the correct attitude to take in the present matter in relation to the evaluation of whether condonation should be granted. Under the present statutory dispensation there is no time limitation on the institution of action and the appellant had until September 2007 (when her claim would have prescribed) to issue summons. The matter was clearly very much alive during the first half of 2006 and the State had no reason to think otherwise. Nor has the respondent suggested that it was prejudiced or misled by the additional delay." (emphasis added)

[19] In ***Minister of Agricultural and Land Affairs v C J Rance (Pty) Ltd***[6] the general principles pertaining to the issues *in casu* were merely restated. In that matter almost two and a half years lapsed before the plaintiff served a notice of its intention to institute proceedings on the Minister. The delay was not explained. The court referred at para [13] to the so-called conventional explanation for demanding prior notification of intention to sue organs of state to the effect that,

"with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide before

[6] *2010 (4) SA 109 (SCA)*

getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them."

[20] In ***C J Rance supra*** the organ of state clearly demonstrated that it would be prejudiced if the late notice of demand was condoned insofar as it did not have any opportunity to do an investigation of its own pertaining to the fire that had allegedly broken out on State property and damaged the plaintiff's assets. Also, it was the court's view that no factual foundation was laid for the court to establish whether there was some prospect of success in the action to be instituted.

[21] In ***MEC for Education, KZN v Shange***[7] the court found that good cause had been shown. The learner could not be blamed for any delay or failure. He was still a minor when his cause of action arose and the court found that he was reliant on others to prosecute his claim and that they had failed him. The attorney's mistake to direct the notice of demand to the Minister of Education instead of the MEC for Education, KZN was excused by the court *a quo* and although the Supreme Court of Appeal referred to case law dealing with attorneys' mistakes that could be attributed to their clients, it found that no blame for any delay or failure could be attributed to the respondent. See also ***Dauth and others v Minister of Safety and Security and others***[8]

[22] *Bona fides* play an important role in considering good cause. It is evident in this matter that the applicant after his release in September 2013 sought legal advice albeit not

[7] *2012 (5) SA 313 (SCA)*

[8] *[2008] ZANCHC 26; 2009 (1) SA 189 (NC) at para [8].*

immediately. However, it cannot be reasonably expected that a man that had spent nearly seven years in imprisonment to have the financial means to seek legal advice or institute action immediately. It is significant to note that the letter of demand was served immediately after he consulted with his attorneys in April 2015. Therefore, due to the stipulated period in section 3 (2) (a) of the Act having not prescribed at that stage, the matter was clearly very much alive at all relevant times and the respondents had no reason to think otherwise.

[23] In the answering affidavit the application for condonation is apparently opposed on the basis of absence of "good cause" and non-compliance. However, no factual basis was alleged that the respondents suffered any unreasonable prejudice as a result of any delay. Such averment could surely not be made with any conviction. In find no reason why the respondents will be disadvantaged at the trial of the main action, whether or not it received late notice and/or even if the condonation application was brought at the eleventh hour.

[24] In condonation applications a court considers the merits together with the grounds advanced for the failure. As stated in ***Madinda supra***, and quoted above, strong merits may mitigate fault whilst no merits may render mitigation pointless. It is also accepted that the interests of justice play an important role in condonation applications and that it is expected of an applicant to set out fully the explanation of his delay during the entire period of the delay and such explanation must be reasonable. Also, a condonation application must be brought as soon as the party concerned realises that it is required. Bearing all this in mind, Heher JA in ***Madinda*** highlighted the two important elements to be considered in adjudicating applications in terms of s 3(4)(b), namely the subject's right to have his case tried by a court of law and the right of the organ of state

not to be unduly prejudiced. *In casu* no facts are alleged as mentioned *supra* and it is not even vaguely suggested that prejudice has been or will be suffered by the respondents due to applicants' alleged non-compliance. In this regard I wish to refer to the following *dictum* by Heher JA in ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another***[9], quoting from para [13]:

"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser

[9] *[2008] ZASCA 6; 2008 (3) SA 371 (SCA)*

who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter." (emphasis added.)

[25] There is no *onus* on an applicant for condonation to prove his/her case on a balance of probabilities. The court must merely be satisfied that the three requirements contained in section 3(4)(b) have been met. Although applicant and/or his attorneys might be blamed for the delay in bringing the application for condonation, there is no obvious prejudice to the respondents and as I have found above that the notice was served within the prescribed time period as prescription only began to run from 10 April 2015 when the applicant became aware that his claim was enforceable. As a result, the application for condonation was not even required. The overall impression created by the undisputed facts is such that I am satisfied that applicant is entitled to have his case tried by a court of law.

[26] In the result the special pleas of both non- compliance and prescription must be dismissed. The applicant, as I have found, submitted the letter within the prescribed six-month period as set out in section 3(2)(a) of the Act and therefore an application for condonation in terms of section 3(4)(b) was in fact unnecessary.

[27] As a result, I make the following order: -

(1) The applicants' alleged 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 s 3(2)(a) of the Act is hereby condoned.

(2) The first special plea of non-compliance is dismissed;

(3) The second special plea of prescription is dismissed;

(4) The respondents are ordered to pay applicants' costs of the application on an opposed basis.

SARDIWALLA CM

JUDGE OF THE HIG COURT

Appearances:

Date of hearing	1 February 2021
Date of Judgment	13 April 2022
For the Applicant:	Advocate RJ De Beer
Instructed by:	Authur Moore Inc.
For the Respondents:	Advocate S M Malatji
Instructed by:	The State Attorney Pretoria