IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: A91/2018

In the matter between:

MINISTER OF POLICE N.O.	First Appellant
NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA	Second Appellant
and	
SABELO YEKISO	Respondent

JUDGMENT: 03 September 2018

DAVIS J

Introduction

[1] This case concerns compliance with the requirements set out in the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ('the Act') and, in particular, the power of a court to grant condonation for a failure by a party such as respondent to serve a proper notice as required in terms of s 3 (2) (a) of the Act.

[2] To the extent relevant, s 3 of the Act provides as follows:

'(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 intentions to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceeding(s) –

(i) Without notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in ss (2).

(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 s 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 the knowledge of the creditor.'

The factual background

[3] Respondent alleged that on 21 February 2006 he was arrested, detained and then prosecuted by first and second appellants. In total, he was held as an awaiting trial prisoner until his release on 07 October 2011. He further alleged that the charges against him were malicious and without foundation.

[4] In summary, he was detained for over five years during which time he finally stood trial which was supposed to begin in 2007, but after many delays finally got underway in 2009. He was ultimately acquitted.

[5] He pleads that his acquittal was as a consequence of there being an absence of any evidence linking him to the crimes with which he had been charged. He further avers that the investigating officer and other members of the South African Police Service knew or ought to have known that no reasonable objective

grounds or justification existed for his arrest and continued detention. He further pleads that the prosecutors who were seized with the matter had failed to acquaint themselves with the contents of the relevant police dockets and, if they had, it would have been obvious that there was no reasonable ground or justification to detain or charge him. I should add that the respondent passed away on 06 November 2015 and that the executor of the estate obtained an order of substitution which enabled him to proceed with the claim against the appellants. However, for the purposes of this judgment, I shall simply refer to the respondent.

The legal processes which were followed by the respondent

[6] The respondent issued summons out of this Court against the appellants in October 2012 under case number: 18862/12. Summons was served on the first appellant on 01 October 2012 and on second appellant approximately five months later on 12 March 2013. On 06 January 2014, following the filing of a plea and three special pleas by the appellants on 30 April 2013, the respondent withdrew his claims in the action under case number: 18862/12 and tendered costs relating thereto.

[7] Some seven months later, on 18 July 2014, the respondent again issued summons. Summons was served on first appellant on 21 July 2014 and on second appellant on 01 September 2014. The claim for damages was in the amount of more than R 26 m, based on his alleged unlawful arrest on 21 February 2006, his alleged unlawful detention for the period 22 February 2006 until 07 October 2011 and further upon an alleged malicious prosecution.

[8] A plea and three special pleas were filed on behalf of the appellants on 11 December 2014. The special pleas were directed to the failure of the respondent to comply with s 3 of the Act and, further, that the claims of unlawful arrest and detention had prescribed in terms of s 11 (d) of the Prescription Act 68 of 1969 ('the Prescription Act').

[9] It is necessary to separate the various claims against first appellant in that the claims based on unlawful arrest and unlawful detention constitute separate causes of action based on the arrest on 21 February 2006 and then the period of detention from 22 February 2006 until the respondent was released on 07 October 2011. In both instances there appears to have been no notice served on appellants as required in terms of the Act. A further claim based on unlawful detention is made against second appellant in respect of the same period of detention and a further claim based on malicious prosecution against second appellant.

[10] In upholding respondent's application for condonation, Weinkove AJ found that the respondent had provided adequate reasons as to why notification had not been made to appellants at the times prescribed by the Act. The learned judge found that it would be in the interests of justice if the court condoned the late notice. The court also found that the respondents had not suffered any prejudice because the notice was only some two months out of time. For these reasons, the learned judge found that the respondent had adequately explained the basis for the delay, the explanation was sufficiently fulsome and was done in good faith. In addition, there were reasonable prospects of success in respect of respondent's proposed action.

[11] It is against this order of condonation granted in terms of s 3 (4) of the Act that the appellants have approached this court on appeal, with the leave of the court *a quo*.

The applicable law

[12] Section 3 (4) (b) of the Act requires that, if a court grants condonation, it is required that it be satisfied that:

(i) The debt has not been extinguished by prescription;

(ii) Good cause exists for the failure by the creditor; that is to serve the statutory notice in terms of s 3(2)(a) or to serve a notice that complies with the prescriptions of s 3(2)(b); and

(iii) the organ of State is not unreasonably prejudiced by this failure.

These requirements are cumulative. *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at para 6.

[13] Care must be exercised so as to give meaning to the concept of 'good cause'. Prospects of success on the merits of the claim may play an important role depending on the reasons for the delay which are provided by the applicant. If there are no prospects of success, it would raise the question as to why a court should exercise a discretion to condone. See *Madinda* at para 12.

[14] It is critical that an applicant for condonation furnish a proper explanation for his or her default which would be sufficiently comprehensive to enable a court to understand why it occurred and therefore enable the court to make a proper assessment as to whether to exercise a discretion in applicant's favour. See *Premier, Western Cape v Lakay* 2012 (2) SA 1 (SCA) at para 17.

[15] On appeal, an appellate court is entitled to decide the same question as that which was asked of the court *a quo*, namely whether condonation should be granted according to its own view as to whether the three cumulative requirements have been fulfilled. *Premier, Western Cape v Lakay at para* 14.

[16] With this summation of the law, it is possible to turn to the facts upon which the application for condonation was based.

Prescription

[17] The first issue which confronts this court is the question of prescription, which is one of the three requirements which must be met for an applicant seeking condonation in terms of s 3 (4) (a) of the Act. To recapitulate, the key facts are as follows: the respondent was arrested on 21 February 2006. He was released from prison on 07 October 2011. Summons was initially served on the first appellant on 04 October 2012 and on the second appellant on 12 March 2013. This action was withdrawn on 06 January 2014. Subsequently, respondent instituted action in terms of which summons was served on first appellant on 21 July 2014 and on second appellant on 01 September 2014.

The case in respect of the alleged unlawful arrest

[18] In the ordinary course, the respondent's claims based on unlawful arrest of February 2006 prescribed on 21 February 2009 in terms of s 11 (d) of the Prescription Act. Before the court *a quo*, respondent contended that the claim for unlawful arrest, subsequent detention and malicious prosecution was a continuous

transaction which could not be regarded as complete until the outcome of the criminal prosecution.

[19] The court *a quo* unfortunately erred in finding that the claim for unlawful arrest and subsequent detention and prosecution was to be treated as one continuous transaction which could not be regarded as complete until the outcome of the criminal prosecution. This finding is clearly in conflict with the approach adopted in *Lombo v African National Congress* 2002 (5) SA 668 (SCA) at para 26 and to the concept of a continuous wrong as set out in *Barnard and others v Minister of Land Affairs and others* 2007 (6) SA 31 (SCA) at para 20:

> 'In accordance with the concept, a distinction is drawn between a single, completed wrongful act - with or without continuous injurious effects, such as a blow against the head – on the one hand and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment as long as the wrongful conduct endures. (See e.g. *Slomowitz v Vereeniging Town Council* 1996 (3) SA 317 (A); *Mbuyisa v Minister of Police, Transkei* 1995 (2) SA 362 (TK); *Unilever Best Foods Robertsons (Pty) Ltd and others v Soomar and another* 2007 (2) SA 347 (SCA) at para [15].'

[20] It appears that Mr Godla, who appeared on behalf of the respondent, was alive to this difficulty and, accordingly, in his heads of argument prepared for this appeal changed respondent's case and raised the issue of s 13 of the Prescription Act to counter the problem of there being a discrete set of events rather than one continuous process from arrest to release. This latter argument had not been pleaded by the respondent, it had not been raised in the founding affidavit in the

application for condonation nor canvassed in argument by respondent in the court *a quo* when the condonation application was heard.

[21] Section 13 (1) (a), to the extent relevant, provides as follows:

'13 Completion of prescription delayed in certain circumstances

(1) If –

(a) the creditors is ... prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15 (1); or

(b) ...

(h) ...; and

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist.

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).'

[22] Apart from the difficulty that this section was not pleaded by the respondent, the further question concerns whether the respondent was prevented by superior force from pursuing his claim which, in turn, would allow him to invoke the provisions of s 13 of the Prescription Act.

[23] The manner in which s 13 (1)(a) of the Prescription Act can be invoked is well illustrated in *Montsisi v Minister of Police* 1984 (1) SA 619 (A) where a plaintiff was held in indefinite in detention in terms of the Terrorism Act 83 of 1967, s 6 of which Act which prevented detainees from obtaining any legal advice or instituting any action while in detention. The court held that, in terms of s 13 (1) (a) of the

Prescription Act, the plaintiff had been prevented by superior force from instituting proceedings and accordingly the period of prescription was extended for a year after the impediment had come to end; that it is after his release from detention.

[24] By contrast, in *Skom v Minister of Police and others: In Re: Singatha v Minister of Police and another* [2014] ZAECBHC 6 the court held that the fact of incarceration did not on its own prevent a plaintiff from giving instructions to an attorney to institute proceedings on his behalf. It also emphasised that, on the facts, the plaintiff was legally represented during his criminal trial and had not pleaded that the detention had made it 'difficult to awkward' to instruct an attorney to institute proceedings. To suggest otherwise would merely to have engaged in speculation.

[25] In the present case, the facts are very similar to those which pertained in *Skom, supra*. It was clear from the record that the respondent was legally represented during his criminal trial. Whether he had access at all relevant times to a legal representative or whether he suffered the relevant impediment is a key question. The latter submission which has now been raised by respondent's counsel is not supported by the facts of the case. There is no suggestion that respondent was denied access to legal advice in respect of a proposed civil action against appellants.

[26] On these papers together with the manner in which the case was pleaded by respondent, there is no basis by which to contend that somehow s 13 of the Prescription Act should apply and that accordingly the claim based on an unlawful arrest on 21 February 2006 had not prescribed.

The unlawful detention

[27] On the basis that the continued detention from 22 February 2006 until 07 October 2011 gave rise to a separate cause of action for each day that he was so detained, the detention period between 22 February 2006 until 21 July 2011 had also prescribed for the same reasoning as employed in respect of the unlawful arrest. The proceedings against first appellant commenced when summons was issued on 21 July 2014 and therefore it would mean that a period of more than three years had elapsed for the detention period ending on 21 July 2011. On the same basis, a period of more than three years had elapsed since 01 September 2011 when the respondent served summons on the second appellant on 01 September 2014.

[28] Accordingly, the respondent has not satisfied the first requirement for condonation in terms of s 3 (4) of the Act, namely that the debt had not been extinguished by prescription, in respect of his detention until 02 September 2011. The claims based on malicious prosecution and for the detention between 02 September 2011 to 7 October 2011 have not prescribed. This latter situation requires an examination as to whether respondent has met the requirement of 'good cause'.

Good cause

[29] In respect of the detention between 02 September 2011 to 07 October 2011, and the claim for malicious prosecution respondent has an obligation to satisfy the court that the requirement of good cause exists for his failure to comply with the provisions of the Act.

[30] To some extent the respondent has sought to satisfy this requirement by way of an account set out by Mr Godla in an affidavit in support of condonation, to the effect that after respondent's release his biological father met an attorney who identified himself as a Mr Phillips. Mr Phillips advised the respondent's father to take legal action against the State. Given that respondent's biological father was unemployed, it was financially impossible for him to employ the services of an attorney. An attempt was made to obtain legal aid. When this proved unsuccessful, Phillips was finally contacted and persuaded to take the matter on a 'contingency basis'. Upon consultation with a Mr Gantolo of Phillips attorneys, respondent was made aware of the requirement for notice to appellants in terms of s 3 (a) of the Act.

[31] It appears that this explanation is the reason as to why, on 26 June 2012, a letter was sent by Phillips attorneys to first appellant in which it was stated that this letter 'serves as a notice in terms of s 3 of the Act'. However the respondent withdrew his action on 06 January 2014 and, as indicated, he served summons on 21 July 2014 on first appellant and on the second appellant on 01 September 2014.

[32] On 11 December 2014, appellants filed a special plea of non compliance with the provisions of s 3 of the Act. The application for condonation was only launched on 14 March 2017, approximately two years and three months later. Respondent was ready to proceed to trial on 06 February 2017 without any condonation application. Finally on 13 March 2017 an application was made for condonation in terms of s 3 (4) of the Act. No explanation was provided for this delay. In in light thereof, the further question of prospects of success must be addressed.

[33] In *Minister of Agriculture and Land Affairs v CJ Rance* 2010 (4) SA 109 (SCA) Majiedt AJA (as he then was) examined the concept of 'good cause'. He referred to the question of prospects of success as relevant to the test for 'good cause' as follows:

> 'The prospects of success of the intended claim play a significant role- 'strong merits may mitigate fault, no merits may render mitigation pointless'. The court must be placed in a position to make an assessment on the merits in order to balance that factor with the cause of the delay as explained by the applicant. A paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause of the delay. An appellant thus acts at his own peril when a court is left in the dark on the merits of an intended action, eg where an expert report central to the applicant's envisaged claim is omitted from the condonation papers.' (para 37)

[34] In the present case, nothing is said by the respondent concerning prospects of success in respect of his claims. Particularly important to this enquiry is that on 15 September 2010 the respondent escaped from the holding cells of the Khayalitsha court and was rearrested on 20 September 2010. This fact was clearly an important issue with regard to the question of his continued detention. Nothing is said by respondent in respect of his escape from detention nor in respect of the decisions of the magistrate's court to refuse bail. In short, the court *a quo's* findings of prospect of success are wholly speculative and not based on any evidence provided by respondent.

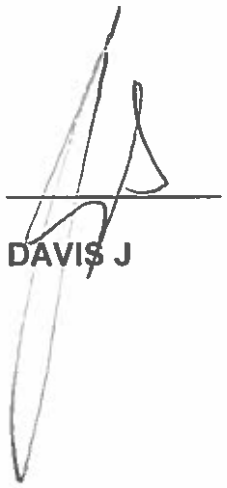
[35] To summarise: it is not necessary, given the approach that I have adopted to this dispute, to deal with whether the appellants' case was reasonably prejudiced by the failure of the respondent to comply with the terms of the Act. Suffice to say that

condonation could not be granted in this case because the relevant debts had been extinguished by prescription and, further, to the extent necessary, the respondent has not shown the necessary good cause to justify an application or condonation.

[36] In the result the following order must be granted:

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the court *a quo* on 16 May 2017 is set aside and substituted with the following order:

   'The application for condonation is dismissed with costs, including the costs of two counsel.'



DAVIS J

BOQWANA and NUKU JJ concurred