



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2020/18097

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

26/5/2023
DATE

J Moorcroft
SIGNATURE

In the matter between –

DOMINGOS, JOAO NAVES

FIRST APPLICANT

NKOMOKAZIHLATSHWA, JOHN MATHE

SECOND APPLICANT

AND

MINISTER OF POLICE, NO

FIRST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS

SECOND RESPONDENT

Neutral Citation: *Domingos and Another v the Minister of Police and Another* (Case No. 2020/18097) [2023] ZAGPJHC 583 (26 May 2023)

JUDGMENT

MOORCROFT AJ:

Summary

Non-compliance with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 – Notice given two years after arrest but within three months of release at end of trial – Good cause shown for condonation

Order

[1] I make the following order:

1. *The late filing of the answering affidavit is condoned, with no order as to costs of the application for late filing;*
2. *The applicants' failure to serve a notice of demand timeously in accordance with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, is condoned.*
3. *The costs of the application is reserved for determination by the trial court.*

[2] The reasons for the order follow below.

Introduction

[3] The applicants seek an order condoning their failure to serve a notice in terms of section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, alternatively an order that they be granted leave to serve a notice on such conditions as the Court deems appropriate.

[4] Section 3 reads as follows:

3 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

(b) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

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

(3) For purposes of subsection (2) (a)-

(a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) a debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.

(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.

[5] The applicants allege that they were arrested on 8 November 2017. They were detained until 14 June 2019 when they were acquitted. They consulted with their attorney on 25 June 2019 and soon thereafter letters of demand were despatched. The letters of demand were served shortly after. Summons was served on 4 May 2020.

[6] The respondents pleaded to the summons on 8 April 2021. They pleaded over and the first respondent also raised a special plea alleging non-compliance with section 3 quoted above. In the plea on the merits the respondents plead a series of bare denials.

[7] The founding affidavit is sparse. What is common cause however is that the applicants were detained for a considerable period of time before they were acquitted, and that they consulted an attorney very shortly after their release. Letters of demand went off within a short period of time and the first respondent's counsel accepts in his heads of argument that while the demand was made late the first respondent does not make out a case that the demand was in other respects non – compliant.

[8] While it might be technically correct that demand could perhaps have been made during the years 2017 to 2019, the applicants were only free to go about their business in June 2019

and they cannot be blamed for seeking legal advice at this stage. Having regard to the time that they spent in detention.

[9] It is also so that the alleged delict complained of may have been a continuous delict and only terminated in June 2019 upon their release. I need make no finding in this regard though.

[10] Demand was made within three months of their release. I am satisfied that the debt has not been extinguished by prescription, that good cause exists for the failure by the applicants to serve the notice in 2017 and 2018, and that the first respondent was not unreasonably prejudiced by the failure.

[11] I note that the respondents' attorney also had to seek condonation for the late filing of the answering affidavit. A proper case is made out for condonation and it is granted.

[12] I therefore make the order in paragraph 1 above.



J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **26 MAY 2023**.

APPEARANCE FOR THE APPLICANT:

B M KHUMALO

INSTRUCTED BY:

H C MAKHUBELE INC

APPEARANCE FOR THE FIRST RESPONDENT:

D LEBENYA

INSTRUCTED BY:

STATE ATTORNEY

DATE OF THE HEARING:

28 FEBRUARY 2023

DATE OF JUDGMENT:

26 MAY 2023