

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)**

CASE NO: 22551/2007

DATE: 24 MARCH 2010

NOT REPORTABLE

In the matter between:

M[...] E[...] M[...]

Plaintiff

And

P[...] J[...] M[...]

First Defendant

MINISTER OF SAFETY AND SECURITY

Second Defendant

JUDGMENT

LEDWABA, J

[1] The applicant filed an application for the late filing of the notice in terms of **section 3(4)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002** (the Act). The second respondent, an organ of the state, is opposing the application.

[2] The summary of the factual background common cause to the parties is that:

2.1 The applicant was arrested on 29 October 2004 on a charge of conspiracy to murder his divorced wife (the first respondent).

2.2 On 22 May 2006, nearly 18 months after the arrest, the applicant served a notice of institution of legal proceedings against the second respondent in respect of “*unlawful arrest, detention and malicious prosecution*”. In the notice the applicant *inter alia* made the following allegations:

“Our instruction is to demand payment from the Ministry, of an amount of R2 300 000.00 (two Million Three Hundred Thousand Rand) in damages emanating from our client’s unlawful arrest detention and malicious prosecution.

Mr. M[...] was then released on bail of R1 000.00 by the Magistrate in Pretoria under case number 14/22/2005 and had to be in and out of court until the 19th January 2006, when the charges were withdrawn by the Magistrate in Temba Court after the alleged witnesses of the said offence were nowhere to be found and Mr. M[...]’s Attorneys applied for withdrawal of charges.

Due to the unlawful arrest, detention for a period of a month and the malicious prosecution, our client suffered damages in the amount of R2 3000 000.00 (sic) which amount we demand it to be paid within a period of one (1) month from you (sic) receipt of this letter, failing which we have instruction to seek necessary relief through the courts”.

2.3 On 4 June 2007, the applicant issued summons against the first and second respondents claiming an amount of R2.3 million in respect of his alleged unlawful arrest and detention, defamation and malicious prosecution.

2.4 On 17 September 2007 the second respondent served and filed his plea in the matter and raised a special plea regarding the applicant’s failure to comply with section 3 of the Act, more specifically subsections (2)(a) and (b) thereof.

2.5 On 19 October 2007 the applicant served a replication on the second respondent’s special plea as raised, merely denying same.

2.6 Notwithstanding the above, the applicant failed and/or neglected to launch an application for condonation but instead proceeded to set the matter down for trial on 31 August 2009.

2.7 On 25 August 2009, a mere four days before the trial, the applicant served the second respondent with an application for condonation. The second respondent objected to the said application by serving a rule 30 notice, which then prompted the applicant to postpone the trial and not to proceed with the application for condonation. On 22nd September applicant served second defendant with another application for condonation.

[3] In terms **section 3(4) of the Act** the court has a discretion to condone non-compliance, subject to three requirements being met. The provisions of **section 3(4)** read as follows:

“(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. ”

[4] *In casu*, it is common cause that the debt has not been extinguished by prescription because the notice was served within the prescription period of three years.

[5] The applicant explained his reason(s) for not serving the notice timeously in paragraphs 9 and 10 on paginated page 6 of his founding affidavits as follows:

“9. Other than my lack of funds to consult on the civil aspect of second respondent’s conduct within six months of such detention I was of the understanding that debt from second respondent was not due, if not non-existent, up until the 19th January 2006. I could not have instituted proceedings to run concurrently with criminal proceedings; hence the outcome of the proceedings does have effect on the other type of proceedings. I was not in a better position to serve notice for civil adjudication of my matter at the time when another court i.e. criminal court, is put to the matter.

10. I interpreted the continuation of my criminal proceedings to fall within circumstances under which completion of the prescription is delayed. Similar to provisions of section 13 of Prescription Act no. 68 of 1969, in which the debt as an object of dispute is subjected to arbitration, prescription of my case was misunderstood to be delayed pending the final adjudication of criminal case.”

[6] In the particulars of claim the applicant has three claims, claim A, B and C.

(i) Claim A is a claim for wrongful and unlawful arrest and detention. Applicant is claiming R900 000

and an additional amount of R5 00 000 for *Contumelia* suffering personal discomfort.

(ii) Claim B is a claim for defamation wherein applicant is claiming an amount of R400 000.

(iii) Claim C is a claim for malicious proceedings wherein applicant is claiming an amount of R700 000 and a further amount of R200 000 for the legal costs of defending the prosecution.

[7] Advocate I. Ellis for the second respondent, when she argued for the dismissal of the application, *inter alia*, raised the following issues:

(i) that there was unreasonable delay in bringing an application for defamation,

(ii) that second respondent would be prejudiced and that there is no good cause (i.e. applicant did not satisfy the requirements of **section 3(4) (b) (ii) and (iii) of the Act**.

[8] The Act does not specify as within which period must an application for condonation be brought if the notice was served before the debt is extinguished by prescription. I do agree that such application is to be brought within a reasonable period depending on the circumstances of each case. Advocate Malowa submitted that applicant intended bringing the application before the trial commenced on the date of hearing. I cannot find, on the circumstances of this case, that the delay in filing a proper application for condonation after the plea was filed, justifies just the dismissal of the application.

[9] The purpose of **the Act** was clearly explained in the **Minister of Safety and Security v De Witt 2009 91 SA 457 (SCA)** that its aim is to bring consistency to procedural requirements for litigating against organs of State and to respect compliance with the constitution.

[10] The applicant in his reasons for not serving the notice timeously, he mentioned the lack of funds and his misunderstanding that if the criminal proceedings were still in progress, prescription was delayed or suspended. He further alleged that the debt only became due from 19 January 2006 when the case was withdrawn, referring to clause A, B and C.

[11] It is important to distinguish that on a claim for wrongful arrest the debt becomes due on the date of arrest and or a claim for malicious proceedings the debt becomes due on the finalisation of the criminal proceedings. See also **Thompson and Another v Minister of Police and Another 1971 (1) SA 371 (ECD)**.

[12] I requested both counsel to file additional heads of argument on whether withdrawal of criminal charges due to lack of evidence can be regarded as the termination of the proceedings in favour of the applicant herein.

[13] Advocate Ellis for the second respondent in her additional heads of argument submitted that the withdrawal of a case in terms of **section 6(a) of the Criminal Procedure Act 51 of 1977** prior to a plea implies that the state retain the right to charge the accused afresh and cannot be regarded as an acquittal.

[14] It is important to note that in **Minister for Justice and Development v Maleko [2008] 3 All SA 47 (SCA)** the court

in paragraph 8 said: “*in order to succeed (on the merits) with a claim for malicious prosecution a claimant must allege and prove:*

(a) that the defendant set the law in motion instigated or instituted proceedings.

(b) that the defendant acted without reasonable and probable cause.

(c) that the defendant acted with “malice” and

(d) that the prosecution has failed

[15] Second respondent’s counsel on the issue of prejudice further said the state may be prejudiced by the late filing of the notice in that witnesses may no longer be available. However, it is common cause that the case was withdrawn due to non availability of the witnesses. The late filing of the notice did not cause the witnesses not to be available.

[16] Advocate Ellis further argued that there are no prospects of success in the applicant’s claim in that he will not be able to prove that criminal proceedings were terminated in his favour because the state may recharge the applicant.

[17] In the **Maleko case** it was stated that if it can be proved that prosecution has failed that would be sufficient.

[18] In my view, if the state does not have witnesses to prosecute its case successfully prosecution is not possible unless the accused pleads guilty.

[19] Of importance, is also that the fact that the state may recharge the applicant, after the case has been withdrawn does not bar the applicant to institute the malicious prosecution case otherwise the constitutional right to claim may be frustrated by the state in not proceeding with prosecution after the matter has been withdrawn.

[20] If the second respondent submits that the criminal proceedings are still continuing then the action for

malicious prosecution has not yet arose. This submission cannot, in my view, be correct.

[21] Regarding the defamation claim (claim B), it is trite that the notice is silent on the said claim and the alleged claim for defamation has now prescribed. I can therefore, not entertain condonation for the said claim because it was not mentioned in the notice. Since there was no notice for such a claim the debt in respect of the said claim has now prescribed.

[22] On careful analysis of the facts which are common cause the notice in respect of a claim for malicious prosecution was served timeously because the case was only withdrawn on 19 January 2006 and the claim was served within six months after the withdrawal. The application for the condonation of the late filing of the notice is therefore in respect of claim C, the claim of wrongful arrest and detention.

[23] In my view, the state will not be unreasonably prejudiced by the late filing of the notice because even before the notice was served the witness(es) was not available and if the witness(es) were available I think, the applicant could have been recharged.

[24] The applicant has, in my view, shown good cause why the late service of the notice in respect of the wrongful arrest and detention claim should be condoned.

[25] **I therefore, make the following order:**

(i) The late service of the notice in terms of service 3(2)(a) read with section 3(4) of the Act is condoned.

(ii) Applicant is granted leave to pursue claims A and C in the particulars of claim

(iii) Costs to be costs in the main application.

A. P. LEDWABA

JUDGE OF THE HIGH COURT

Date of hearing: 15 March 2010

Counsel for Applicant: Advocate M. Malowa

Instructed by: Matloga Attorneys

Counsel for Respondent: Advocate I. Ellis

Instructed by: State Attorney