

PARTIES: THANDO WELLINGTON SIXAKWE V MINISTER OF SAFETY & SECURITY + 1 NOT REPORTABLE

[3] *Summary:*

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 1763/08

Date delivered: 1 September 2009

In the matter between:

THANDO WELLINGTON SIXAKWE

Applicant

and

MINISTER OF SAFETY AND SECURITY

First Respondent

MINISTER OF CORRECTIONAL SERVICES

Second Respondent

JUDGMENT

EKSTEEN AJ:

[1] The plaintiff is an adult male resident in KwaZakhele, Port Elizabeth. On 29 November 2006 he was arrested by members of the South African Police Services in Port Elizabeth and charged of housebreaking and theft. Charges were subsequently withdrawn and the applicant is now desirous of instituting legal proceedings for the recovery of damages for an alleged wrongful and unlawful arrest and detention and malicious prosecution. In these proceedings the applicant seeks condonation in terms of section 3(4) of the Institution of Legal Proceedings against certain Organs of State Act, 40 of 2002 (hereinafter “the Act”) for his failure to comply with the Act in respect of notice of his intention to institute an action against the respondents.

[2] Sections 3(1) and (2) of the Act sets out the obligation imposed upon a party wishing to institute proceedings against an organ of state to give notice. These sections read as follows:

- “(1) No legal proceedings for the recovery of the 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;
 - (b) ...
- (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] Section 3(4) provides for condonation to be granted in circumstances where the notice referred to section 3(1) and (2) was not given. It reads as follows:

- “(4)(a) If an organ of state relies on a creditors 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 (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] The papers establish that the applicant was arrested without a warrant, along with a second accused, on 29 June 2006 and charged with housebreaking and theft. The applicant and his co-accused were detained in custody until their first appearance in court on 1 December 2006. On this occasion the matter was postponed to 7 December 2006 and it was ordered that both the accused be detained in custody. A warrant of detention was duly made out in respect of the applicant and he was held in custody pending the second appearance on 7 December. On 7 December the matter was once again remanded to 20 December and again it was ordered that the applicant and his co-accused be held in custody and the necessary warrants were completed.

[5] Prior to the third appearance, however, attorneys representing the applicant's co-accused caused the co-accused to be requisitioned for purposes of the bringing of an application for bail. The application was to be heard on 13 December 2006, however, prior to the hearing of the application the prosecutor withdrew the charges against both the applicant and his co-accused. It appears, *ex facie* the inscription by the magistrate on the court papers filed of record that he ordered that a release warrant in respect of the applicant should be made out. Whether this occurred and whether it was transmitted to the Department of Correctional Services is not apparent from the papers. It is, however, common cause that the

plaintiff was not released. Plaintiff remained in custody until 20 December 2006.

[6] The applicant did not serve notice as envisaged in section 3(1) and (2). A notice was however prepared and delivered on 11 December 2007, some six months after the notice was due. The letter containing the said notice addressed to the respondents by attorney D Gouws Incorporated requests the respondents to consent to the Institution of Proceedings without compliance of section 3(1)(a) and 3(2)(a). The letter contains an inscription at the foot thereof that the offices of Attorney Gouws would be closed from 14 December 2007 and re-opened on 7 January 2008. The papers do not reveal whether any response was received from the respondents to the notice, however, on 28 July 2008 summons was issued on behalf of the applicant. Respondents now rely on plaintiffs failure to serve notice of the intended action. Hence this application.

[7] In order to succeed in an application of this nature the three considerations set out in sub-section (4)(b) must be established to the satisfaction of this court. It is common cause that the debt relied upon has not been extinguished by prescription and this consideration does not give rise to difficulty.

[8] In argument it was somewhat tentatively suggested that the respondents would be prejudiced if condonation were granted in that the respondents would have difficulty in obtaining the records of the alleged events and

statements from relevant personnel who may have been involved in the matter. I do not consider that any basis has been laid in the papers in support of this submission. The applicant in his founding papers alleges that the respondents could suffer no prejudice. The respondents did not respond to that allegation at all and it stands undisputed. The submission made on behalf of the respondents does not appear to be borne out by the amount of relevant documentation which has indeed been annexed to the answering papers. The delay which has occurred was merely six months and I am satisfied that the respondents would not be prejudiced were condonation to be granted.

[9] The real issue to be decided and which has been the subject of enthusiastic debate at the Bar is whether I can be satisfied that good cause exists for the failure by the applicant.

[10] In ***Madinda v Minister of Safety and Security*** 2008 (4) SA 312 (SCA) Hehrer JA considered this requirement as follows at 316E-G:

“The second requirement is a variant of one well known in cases of procedural non-compliance. See ***Tallwood Properties v South African Reserve Bank*** 1996 (1) SA 215 (W) at 227I-228F and the cases there cited. “Good cause” looks at all those factors which bear on the fairness of granting the relief as between the parties and as effecting 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 by other persons or parties to the delay and the applicants responsibility therefore”

[11]In ***Silber v Ozen Wholesalers (Pty) Ltd*** 1954 (2) SA 345 (A) at 352H-353A Schreiner JA said:

“It is enough for present purposes to say that the defendant must at least give an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.”

[12]The applicant states in his founding affidavit that it was only whilst preparing the particulars of claim that he was advised by his legal advisors that he had not complied with section 3 of the Institution of Legal Proceedings against certain Organs of State Act, 40 of 2002. The failure is explained as follows:

“I did not do so timeously, because I was not aware of the time limitations in terms of the Act, the only limitation I knew was that the action must be brought within three years, failing which it will prescribe. A further reason for the delay was the fact that I was

(s)trapped for cash, and couldn't instruct my legal advisors to proceed with the required speed."

[13] Scant as the explanation may be the thrust thereof is clearly that the applicant was unaware of the requirement in law until he was advised by his attorney, at the time of the preparation of the particulars of claim, that he had failed to comply with the requirements. The applicant does not say precisely when this occurred, but we do know that notice was given in December 2007. The summons was served some six months later, however, the particulars of claim are not dated. What is, however, clear is that when he was first informed of the requirement compliance was no longer possible

[14] It is true that he advances a secondary reason relating to his financial disability. In this regard much was made in argument of the absence of any explanation relating to his financial resources, his employment and earnings, his endeavours to raise the money or the difficulties experienced in this regard. In support of this argument strenuous reliance was placed on the judgment in ***Minister of Safety and Security v Desmond Spalding*** an unreported Full Bench Judgment of this Court, delivered on 5 December 2008 under case number CA136/08. In that matter the applicant approached his attorney immediately after the cause of action had arisen and was advised of the requirement relating to the notice and to time limits. His attorney, however, required a deposit to be paid up front and by virtue of his financial position he was unable to instruct his

attorney. With full knowledge of his obligation the applicant failed to comply with the Act. Against this background he sought condonation and gave no explanation as to what finances he had at his disposal whether he was employed, what endeavours he made to raise money for the deposit or what the reasons were for his inability to raise the funds to meet the prescriptive deadline of which he had been informed.

[15]In my view the facts of the present matter are distinguishable from those considered in the said judgment in that the applicant in the present matter was unaware of the requirement to give notice and of the time limit. In those circumstances I do not consider that his financial position requires as extensive an explanation. It is the ignorance of the applicant of the legal requirement which gave rise to the lack of urgency. I am satisfied that this account, notwithstanding that it is scant in detail, is sufficient in explanation for the court to understand how it came about.

[16]In addition to the alleged lack of explanation it was argued on behalf of the respondents that there are no reasonable prospects of success in the action and that the application should accordingly be refused on that basis. I have set out the facts pertinent to the applicant's claim in the proposed action above. They do not appear to be seriously in dispute. The applicant contends that he was wrongfully and unlawfully arrested and detained from 29 November to 20 December 2006 and that servants of the first respondent maliciously and without reasonable and probable cause set the law in motion against him. It is common cause that he was

charged of housebreaking and theft and that the charges were withdrawn on 13 December 2006 without any evidence being tendered. Notwithstanding the withdrawal of the charges and the order by the magistrate that a release warrant be issued in respect of the applicant the applicant remained in detention until 20 December 2006.

[17]The withdrawal of charges without tendering any evidence in support thereof is, *prima facie*, evidence that reasonable prospects of success exist in a claim for wrongful and unlawful arrest and for a malicious prosecution. The proceedings terminated in the plaintiff's favour in a manner indicative thereof that the prosecutor was of the view that there was no *prima facie* case for the plaintiff to answer.

[18]The respondents argue that by virtue of the fact that warrants of detention were issued after the first appearance the detention of the plaintiff was accordingly lawful. This argument does not account for the original arrest and detention prior to the first appearance. Whether it would protect the first respondent in the event of the plaintiff establishing that member of the South African Police Services acted with malice in setting the law in motion appears to me to be doubtful, however, it is not necessary for me at this stage to determine that issue.

[19]As against the second respondent it is alleged that the second respondent cannot be liable where warrants of detention were issued on 1 December and again on 7 December for the detention of the applicant until

20 December. The second respondent, so it is argued, is obliged to comply with the warrant.

[20]I have already stated that when the charges were withdrawn on 13 December it appears from the magistrate's inscription that an order was made that a release warrant in respect of the applicant should be issued. The applicant was not released on 13 December 2006 and remained in custody until 20 December 2006. The papers do not reveal whether the release warrant was in fact issued and whether it was conveyed to the second respondent. This is a matter which would ultimately be determined on evidence in possession of one or other of the respondents. Whatever the result of that enquiry may be it appears to me, *prima facie*, that the applicant does have a reasonable prospect of success of recovering from the State damages in respect of the detention for the period from 13 December to 20 December 2006, whether from first respondent or second.

[21]The applicant cannot at this stage be blamed for not knowing which of the respondents would be liable for such period. His claim, in any event, lies against the State. See section 1 of the State Liability Act, 20 of 1957. The Minister is merely cited in his nominal capacity as a representative of the Executive Government. Compare ***Minister of Railways and Harbours v Johannesburg Municipality*** 1912 AD 595. As against the State the applicant appears to have strong prospects of success on at least part of his claim.

[22]In all the circumstances, weighing up the considerations which have bearing on the concept of “good cause” I am satisfied that good cause does exist for the delay.

In the circumstances it is ordered that:

1. The failure by the applicant to give notice to the respondents within the required time period as set out in section 3(1)(a) read with 3(2)(a) of the Institution of Legal Proceedings against certain Organs of State Act, 40 of 2002, is condoned in terms of the provisions of section 3(4) of the said Act.
2. The applicant is authorised to effect service of the particulars of claim annexed to the notice of motion herein upon the respondent.
3. The respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of this application.

J W EKSTEEN

ACTING JUDGE OF THE HIGH COURT