

**Not Reportable**

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No: 1367/09  
Date Heard: 1/12/16  
Date Delivered: 13/12/16

In the matter between:

**LUNGA MOHALE**

Applicant

and

**THE MINISTER OF SAFETY AND SECURITY**

Respondent

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**JUDGMENT**

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**GQAMANA AJ:**

[1] This is an application in which the applicant<sup>1</sup> seeks an order for condonation for his failure to serve to the respondent<sup>2</sup> a notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 ("the Act"). The application is vehemently opposed by the respondent.

[2] It is trite that in terms of the provisions of section 3(1)(a) of the Act, any party that intends to institute legal proceedings against an organ of

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<sup>1</sup> Plaintiff in the main action.

<sup>2</sup> Defendant in the main action.

state must serve a notice in writing of his intention to institute such proceedings. Further the notice must be served within six (6) months from the date on which the debt became due.

[3] However if the creditor's failure to serve the notice in terms of section 2(a) is raised as an issue by an organ of state, the creditor may apply to court for condonation of such failure.

[4] This application concerns exactly that. In brief, the applicant instituted an action for damages arising from an alleged assault, unlawful arrest and "unlawful custody" against the respondent. It is apparent from the particulars of claim that the alleged cause of action arose on 21 May 2006. Summons and particulars of claim were issued on 20 May 2009, missing prescription by one day. The action was instituted without the required notice in terms of section 3(1)(a).

[5] In response to the applicant's claim, the respondent in his plea raised a special plea pointing out the applicant's non-compliance with the provisions of section 3(1). The respondent's plea was served on the applicant's then attorneys of record, Mr Kuban Chetty (the first attorneys) on 28 October 2009. Despite this point having been pertinently raised, the

applicant took no action to remedy and bring the application for condonation for such failure to this court.

[6] In the course of the proceedings, the applicant swapped attorneys, and engaged O'Brien Incorporated attorneys (the second attorneys). Even with the second attorneys no application for condonation was brought to this court. I will revert later to this in my judgment because there is an affidavit filed by Mr O'Brien stating that, he advised the applicant of the necessity to file the condonation application to such that same was prepared and drafted by Mr O'Brien but the applicant refused to sign it. Mr O'Brien withdrew as the applicant's attorney on 14 August 2014 and the present attorney's services were engaged. The present attorneys, Peter McKenzie attorneys were on record as from 9 September 2014. Still no application for condonation was filed and the matter having been set down for trial on 13 October 2014 was removed from the roll. The status *quo* remained even with the present attorneys of record, and the condonation application surfaced for the first time on 7 October 2016. This was almost seven years after reliance on this point i.e. non-compliance with section 3(1), was drawn to the attention of the applicant.

[7] The powers of this court to grant condonation is circumscribed by section 3(4)(b). In short I can grant the application if I am satisfied that:

- (a) the debt has not prescribed;
- (b) good cause exists for the failure by the creditor; and
- (c) there will be no unreasonable prejudice to the respondent.

[8] There is *plethora* of *jurisprudence* that gives guidance to the courts in exercising their discretion in applications such as this one. The Supreme Court of Appeal, faced with an appeal on the same issue in *Madinda v Minister of Safety and Security*<sup>3</sup> eloquently set out the principles to be followed in exercising the discretion as prescribed in section 3(4).

[9] In the instant application, it is common cause that the prescription factor is not applicable. Mr Gajjar, counsel for the respondent did not submit that the respondent will be unreasonable prejudice, therefore the third leg is also not applicable. That then brings me to the second consideration, namely the good cause. In consideration of “good cause” I need to bear in mind and not conflate the failure to give notice within the prescribed time period and the delay in bringing the application. Unlike in *Madinda’s* case, in this matter the notice has not been given at all. The explanation given by the applicant for his failure, is lacking and insufficient. With all my attempts to assist the applicant, but I just cannot find an explanation for his failure to give the notice. Even after his non-compliance

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<sup>3</sup> 2008(4) SA 312 (SCA), paras [9] – [16].

was drawn to his attention by the respondent in his plea no action was taken to remedy same. In fact, except for Mr O'Brien's affidavit that the applicant refused to sign the condonation application, there is just no explanation.

[10] In his founding affidavit in the condonation application, the applicant mentioned that after the alleged assault, he lost consciousness and regained same only after three<sup>4</sup> days when he was in an intensive care unit at Livingstone Hospital. After his discharged from Livingstone Hospital, in October 2006<sup>5</sup>, he was again arrested and was only released on bail during November 2006.<sup>6</sup> Thereafter on 13 November 2006, he attended to Mount Road Police Station to lay charges against the police member that assaulted him. Further when he also wanted to "open" a civil case against the police, he was advised (by whom is not mentioned), that civil action can only be instituted once the criminal case is finalised. Since then no further actions was taken by him until he spoke to a certain Advocate Crompton during April 2009, who then referred him to his first attorney, Mr Chetty and summons were then issued on 20 May 2009. As I have mentioned no notice was ever served on the respondent and the condonation application was only served and filed in October 2016. Not that the applicant was oblivious to the need to serve the envisaged notice and/or to bring the condonation application

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<sup>4</sup> This must have been on or about 23 May 2006 because the alleged assault happened on 21 May 2006.

<sup>5</sup> I am not told of the exact date and also same is not clear from the hospital records.

<sup>6</sup> Again the exact date is not mentioned.

but, despite such knowledge no notice or condonation application was forthcoming.

[11] As guided by the principles set out in *Madinda (supra)*, “good cause” requires one to look at all factors which have the bearing on the fairness and proper administration of justice. Therefore in considering “good cause”, I need to take into account various factors, *inter alia*, the prospects of success, the reasons for the delay, the sufficiency of the explanation offered, the *bona fides* of the applicant, any contribution by other persons or parties to the delay and the applicant’s responsibility therefor.

[12] On facts and evidence before me the explanation given for failing to give such notice is lacking and insufficient. In addition to this even the explanation for the delay in bringing the condonation application suffers the same fate. No other person except the applicant can be blamed for the delay. The *bona fides* of the applicant is questionable. When Mr O’Brien, his second attorneys draw to the applicant’s attention the need for the condonation application, the applicant refused to sign the condonation application. Regarding the prospects of success, this is not one of the cases that the strength of the merits in favour of the applicant can be easily dissected from the pleadings. The applicant contends that he was assault and unlawfully arrested by members of the SAPS. In his plea, the

respondent denied the assault and the unlawful arrest and pleaded that the shooting occurred during the scaffolding between the applicant and his friend when they were attempting to rob Constable Xatasi his firearm. The plea goes on and state that, the arrest was legally justified in terms of section 40(1)(a), alternatively, section 40(1)(b) of the Criminal Procedure Act 51 of 1977 in that, the applicant was arrested and detained on the charges of housebreaking, attempted robbery of a firearm, resisting a lawful arrest and assault. Without expressing a firm view but, on the facts pleaded, the applicant's prospects of success are very slender.

[13] Therefore on the facts and all the evidence before me, I am not satisfied that good cause favours the applicant and consequently condonation application must be refused.

[14] I need to deal also with the issue of the reserved costs on 25 October 2016. In doing so, I must sketch out the following relevant facts. The condonation application was served on the respondent's attorneys on 7 October 2016, with no opportunity afforded to the respondent to exercise his rights in accordance with the time frames set out in Rule 6 of the Uniform Rules. On 21 October 2016, the notice of opposition was served on the applicant's attorneys. Consequently the application set down on 25 October 2016 had to be postponed and costs were reserved. I have no reservations

in my mind that had the application been brought in the long form, the matter would not have been set down on 25 October 2016 and the costs occasioned by the postponement on the said date would have been avoided. The applicant was the creator of this misfortune and consequently he must suffer the consequence that flows from that.

[15] In the circumstances the following order is made:

- (a) The application for condonation for the non-compliance with section 3(1) of the Act is refused.
- (b) The applicant is ordered to pay the respondent's costs including the reserved costs occasioned by the postponement on 25 October 2016.

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**NW GQAMANA**  
**Acting Judge of the High Court**

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| Counsel for the Applicant:  | Adv AC Barnett<br>Port Elizabeth                  |
| Instructed by:              | Messrs Peter Mckenzie Attorneys<br>Port Elizabeth |
| Counsel for the Respondent: | Adv GJ Gajjar<br>Port Elizabeth                   |
| Instructed by:              | State Attorneys<br>Port Elizabeth                 |
| Date Heard:                 | 1 December 2016                                   |
| Date Delivered:             | 13 December 2016                                  |