

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, GQEBERHA)**

Case No.: 97/2021

Date heard: 10 March 2022

Date delivered: 26 April 2022

In the matter between:

DARRYL NATHAN UITHALER

Applicant

and

THE MINISTER OF POLICE

First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Respondent

JUDGMENT

ZIETSMAN AJ:

[1] This is an application for condonation in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (“the Act”), prompted by a special plea having been raised by the Respondents.

[2] The background and purpose of the Act were recently reaffirmed in *Mabaso v National Commissioner of Police and Another*.¹

¹ 2020 (S) SA 375 (SCA).

- [3] In *Mabaso* the court emphasised that provisions such as section 3 are primarily for the benefit of organs of State, rather than prospective litigants.² The underlying purpose being one of convenience, in order to assist the particular organ of State to conduct proper investigations into the claim and then to decide whether to make payment or defend the intended action.³
- [4] Before I proceed to deal with the merits of the matter, I will first deal with Applicant's point *in limine* which was not raised as an issue in the practice note, but persisted with at the hearing of the matter.

Point *in limine*

- [5] Applicant took issue with the late filing of the Respondents' answering affidavit. The argument on behalf of Applicant was that as First Respondent's answering affidavit and the Second Respondent's confirmatory affidavit were filed late, without an accompanying application for condonation, it should be treated as "*pro non scripto* and should be disregarded", effectively proceeding on an unopposed basis.
- [6] Applicant filed a replying affidavit. The relevance thereof will become apparent below.
- [7] Ms du Toit, who appeared on behalf of Applicant, relied on *Phasha v Morudi N.O. and Others*,⁴ in particular paragraph 10 thereof. The applicant who was the respondent in the main application (for eviction), brought an application for condonation for the late filing of his answering affidavit (in the eviction application). The respondents, who were the applicants in the main application, opposed the applicant's condonation application. The respondents served and filed their answering affidavits one day out of time and the court held that "without an application for condonation, ... the court

² *Mabaso* supra at para [13].

³ *Mabaso* at para [15].

⁴ (3046/2018) [2019] ZALMPPHC (7 May 2019).

will not *mero motu* or from an application from the bar grant the respondents condonation". The court proceeded to determine the condonation application on the applicant's founding affidavit. The facts of the matter are, in my view, distinguishable in that the applicant did not file a replying affidavit. Applicant in this matter took a further step by filing a replying affidavit.

- [8] Mr Barnett, who appeared on behalf of the Respondents, referred to a recently reported judgment by Kroon AJ in *Ardnamurchan Estates (Pty) Ltd v Renewables Cookhouse Wind Farms 1 (RF) (Pty) Ltd and Others*⁵. The court held that:

"... where ... an answering affidavit is delivered out of time and an applicant takes a further step by delivering a replying affidavit, that applicant is in the same position as an applicant who has agreed in terms of rule 27(1) to afford a respondent an extension for the delivery of the answering affidavit."⁶

- [9] Applicant filed a replying affidavit. Accordingly, the answering affidavit cannot be treated as a nullity and is in my view, properly before court.
- [10] In any event, I raised the issue of prejudice with Ms Du Toit, of which there could be none, and I therefore proceeded, in the interest of justice, to hear the matter.

Legal framework

- [11] Sections 3(1) and (2) deal with the obligation on a party wishing to institute proceedings against an organ of State to give notice of the intended legal proceedings. The notice must be given within six months from the date on which the debt became due.
- [12] Section 3(4) provides for condonation if an organ of State relies on a creditor's failure to serve a notice contemplated by sections 3(1) and (2). It reads:

⁵ [2021] 1 All SA 829 (ECG).

⁶ At para [26].

- '(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.'

[13] Once the court is so satisfied, the discretion to condone operates according to the established principles in such matters.⁷ It is trite that the court's discretion may only be exercised if the three criteria are met. Effectively, it is a balance between good cause on the one side and prejudice on the other.

The facts and analysis

[14] Applicant's alleged claims for unlawful arrest and initial detention, against the First Respondent, is for the period 27 to 29 January 2018, and for further detention, against both Respondents, is for the period 29 January to 30 October 2018. Notices in terms of section 3(1) of the Act were given on 30 September 2019 and 18 December 2020 respectively, nearly 20 and 26 months respectively after the causes of action are alleged to have arisen and nearly 14 and 20 months respectively after the expiry of the six month period within which notice is required to be given. Summons was issued on 21 November 2019, out of the Regional Court, in respect of the First Respondent only. Subsequently, summons was issued on 18 January 2021, out of this

⁷ *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at paras [6] and [16].

court, against both Respondents. The action against the First Respondent in the Regional Court was withdrawn.

[15] The founding affidavit was deposed to by Applicant. He attempts to explain the entire period of delay in paragraphs 32 to 34 and 36, 38, 40 and 54:

‘32. When I was released from custody, my mother sent me to live in Cape Town for a while because she did not want me to become involved in gangsterism, which is rife in the H[...] (aka “Katanga”) area.

33. I stayed in Mitchell’s Plain in Cape Town at my uncle’s house until July 2019 and then returned to Port Elizabeth.

34. Upon my return to Port Elizabeth, I then decided that I would pursue a claim against the police and my mother then asked Jafta Wright (“Oom Japie”) if he knows someone, who could assist me with a civil claim without charging any upfront fees. He then told me that he would take me to his attorney. On the 5th of July 2019, he then took me to his attorney, Mr. Mckenzie, who then accepted my instructions on a contingency basis.

...

36. He advised me he would first have to investigate and consider the merits and then draft the required statutory notices and have it served on the Respondent via registered mail.

...

38. After receiving no objection to the validity of my claims from the First Respondent, my attorney then proceeded with summons in the Port Elizabeth Civil Regional Court, on the 21st of November 2019 against the First Respondent only because he was not in possession of a copy of the relevant police case docket.

...

40. After receiving a copy of the relevant police case docket ... from the Respondents' Attorney ... my attorney then advised me that a claim against the Second Respondent should also be instituted. I then instructed him to proceed accordingly.

...

54. I respectfully submit that I have demonstrated herein that good cause exists for my failure to give timeous notice to the Respondents. Furthermore, I only completed Grade 9 at school and do not have any legal background. Therefore, I was not at all aware of the fact that I had to institute proceedings against the Respondents within six (6) months after the date that the cause of action arose.'

[16] With regard to prospect of success, Applicant alleges that there are strong prospects of success in respect of his claims against both Respondents. He explains as follows:

'On or about the 9th of January 2018, I was walking alone in B[....] Street, H[....], Port Elizabeth. I cannot recall what time it was, but it was during the early afternoon. I came from my ex-girlfriend's (Lucretia) house in B[....] Street, H[....]. I was on my way home at [....] L[....] Street ... I then saw a person, whom I know as Jamesie, standing on the corner of O[....] S[....] Road ... There was a woman nearby, who was standing next to a wall of one of the houses in O[....] S[....] Road... Suddenly Jamesie pulled out a firearm and starting firing shots in my direction. I then turned around and ran away. I also saw a guy wearing a grey top and pink hair, firing shots with a firearm in Jamesie's direction. I then ran to my house. At no stage did I shoot anyone on the day in question because I was not in possession of a firearm, and I had absolutely no reason or motive to shoot anyone. I was, in fact, carrying a tablet device in my hand at the relevant time. Although I reside in a crime-ridden and gang-infested area, I must emphasize that I am not part of any

gang and until my arrest and detention on the 27th of January 2018, I was never arrested and did not have any brushes with the law.’

- [17] He further explains that the basis for the wrongfulness and unlawfulness of his arrest and subsequent detention has been fully set out in his particulars of claim.
- [18] Applicant, in his founding affidavit, refers to his warning statement which he deposed to on 28 January 2018, when he was formally charged, but fails to annex it to his founding affidavit. It is however annexed to his request for trial particulars, as annexure “C”. Having regard to the warning statement, Applicant places himself on the scene, however in his founding affidavit he refers to it as his “exculpatory version”. Applicant then goes on to allege that the only witness, one Ms Herwels, falsely implicated him, that her statement is contradicted by warrant officer Schoeman’s statement as well as the statement deposed to by the victim who was shot, Ms Damons. According to Applicant, these statements allegedly support his “exculpatory version”. However, none of the statements are attached to Applicant’s founding affidavit and a copy of the docket was not placed before court. This was pertinently raised with Applicant’s counsel, who conceded as much.
- [19] Although the strength of the case is not decisive,⁸ the failure to attach the statements on which Applicant relies makes it impossible to evaluate whether he has a *prima facie* case, as alleged, and it is relevant to the evaluation of the *bona fides* of Applicant.
- [20] Applicant submitted that the Respondent’s “failure to specifically challenge his factual allegations regarding the issue of strong prospects of success, has the effect that it stands unchallenged”. This is not correct. It is for Applicant to place facts before court which will place the court in a position to make an assessment on the merits. If he fails to do so, he does so at his own peril.

⁸ *Madinda* at para 18.1.

[21] In *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* the court held that:⁹

“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 applicant 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.”

[22] Applicant also contends that his constitutional rights were not read to him, but admits that he signed the notice of rights. In addition thereto, his warning statement also refers to the fact that he was duly informed by detective warrant officer Gouws of his rights. In my view, this does not assist Applicant on the merits.

[23] The Respondents allege that Applicant was lawfully arrested, without a warrant, since the arresting officer entertained a reasonable suspicion that Applicant committed a schedule 1 offence, being attempted murder. Further, that Applicant was at all times lawfully detained. Since Applicant was charged with an offence which is also listed in schedule 5 of the Criminal Procedure Act 51 of 1977 (“CPA”), the onus rested on him to satisfy the court hearing his bail application that it was in the interest of justice to release him from custody. Applicant, who was legally represented at the bail hearing, failed to discharge the onus on him and, as a result, he was detained until 30 October 2018. The charges against Applicant were withdrawn only after the complainant and witness refused to testify in the matter since they feared for their lives. The complainant indicated, in particular, that she resided in the same area where the New Kids Gang operates. This is the only reason that

⁹ 2010 (4) SA 109 (SCA) at para [37].

the matter could not proceed to trial. Significantly, this is not denied by Applicant. He merely notes that neither the complainant nor the witness claimed that he made any threats towards them.

[24] It is trite that all three requirements listed in section 3(4) of the Act must be established before a court may exercise its discretion in favour of condonation.

[25] It is common cause that the first requirement has been established. The cause of action has not been extinguished by prescription.

[26] The second requirement is whether 'good cause exists for the failure by the creditor'. Depending on the facts of each matter, these factors may include 'the 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 applicant's responsibility therefore'.¹⁰

[27] With regard to prospects of success in the proposed action, the First Respondent must prove that the arresting officer entertained a reasonable suspicion, suspicion but not certainty, when arresting Applicant. Applicant must prove that his post-appearance detention resulted in the wrongful and malicious deprivation of his liberty.¹¹ As stated above, there is a paucity of detail on the merits. Applicant refers to the only witness having falsely implicated him, that her statement is contradicted by warrant officer Schoeman's statement as well as the statement deposed to by the victim, and that these statements allegedly support his "exculpatory version" as contained in his warning statement. He also refers to the investigation diary and that nowhere in the diary is it recorded that a photo identification parade was held. None of the statements are attached to Applicant's founding affidavit and a copy of the docket is not before court.

¹⁰ *Madinda's* at para [10].

¹¹ *Minister of Police and Another v Erasmus* (366/2021) [2012] ZASCA 57 at paras 11 and 12.

- [28] Strong merits may mitigate fault, no merits may render mitigation pointless.
- [29] What is before court is Applicant's warning statement wherein he in fact confirms that he was on the scene. As stated above, it is common cause that the charges against Applicant were withdrawn only after the complainant and witness refused to testify in the matter since they feared for their lives. This is the only reason that the matter could not proceed to trial. In my view, this does not assist Applicant at all.
- [30] To the contrary, Applicant has neither set out sufficient facts to establish prospects of success nor that he has a *prima facie* cause of action.
- [31] As to Applicant's failure to act timeously, he had to 'at least furnish 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
- [32] In my view, the reasons for the delay are not fully explained. I agree with the Respondents that Applicant's explanation lacks detail in that he does not state when exactly he went to live in Cape Town, why he did not pursue his claim before leaving and why his claim could not be pursued, and notice given, whilst he was in Cape Town. He states that he decided to pursue a claim upon his return, but not that he was unaware of his rights before then or that he was not aware that a claim could be instituted against the Respondents. Despite the fact that he consulted with his attorney of record on 5 July 2019, the required notices were only given on 30 September 2019 and 18 December 2020 respectively.
- [33] Finally, the Respondents attempt to make something of prejudice, but in my view this is somewhat exaggerated. The Respondents contend that there is always the inherent danger that the memories of witnesses have faded and that the full extent of the prejudice is normally only revealed at trial when a plaintiff has *carte blanche* to make any allegation which suits his narrative,

¹² See *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A, cited with approval in *Madinda's* case at para 11.

with the defendant being unable to counter it with a clear and independent recollection of the matter. Whilst this might be so, unreasonable prejudice complained of must of necessity be related to the delay in giving notice.¹³ It is thus only prejudice that arose between July 2018 and April 2019, six months after the causes of action arose, and 30 September 2019 and 18 December 2020, when notices were given, that is relevant. The Respondents ought to have records, and it appears that they do have, of the arrest and post-appearance detention of Applicant. The Respondents have therefore failed to establish unreasonable prejudice as a bar to the grant of condonation.

[34] However, Applicant has failed to establish all three requirements of section 3(4)(b) of the Act. It therefore follows that the only appropriate order in the circumstances is to dismiss the application for condonation.

Costs

[35] I can see no reason why there should be any deviation from the rule that costs follow the result.

[36] The following order is issued:

1. The application is dismissed with costs.

T. Zietsman
ACTING JUDGE OF THE HIGH COURT

Appearances:

Obo Applicant: Adv. M. du Toit, instructed by Peter McKenzie Attorneys, Gqeberha

¹³ *Premier, Western Cape v Lakay* 2012 (2) SA 1 (SCA) at paras 22 – 23.

Obo Respondents: Adv. A. Barnett, instructed by the State Attorney, Gqeberha