



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 1823/2021

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

JOAO DA MARIA GUMBI

Applicant

And

MINISTER OF POLICE

First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Respondent

HEARD ON: 23 FEBRUARY 2023

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 07 June 2023 at 11H30.

[1] On 23 April 2021 the applicant as plaintiff instituted a claim against the respondents as defendants for R1 450 000.00 as damages arising from his arrest and subsequent prosecution.

[2] The summary of the plaintiff's pleaded claim is the following: On 25 February 2019 he was arrested without a warrant whilst walking down the street at Paballong village on Welkom on a suspicion of contravening the provisions of section 49(1) of the Immigration Act¹ by entering and remaining in the Republic without a valid passport. Pursuant to the arrest, he was detained at Hofmeyer police station in Welkom. On the next day he was taken to court where he appeared before the magistrate and was thereafter remanded in custody without bail as the public prosecutor insisted that he should not be released until he produced his passport. He was ultimately released on 6 March 2019 after his brother handed in his passport. The charge was also withdrawn.

[3] The respondents defended the action and apart from the plea to the merits the respondents also raised a special plea objecting to the applicant's non-compliance with the provisions of section 3 (2) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act (the Act) ² on the basis that the applicant's notice of his intention to institute legal proceedings against the respondents was served outside the prescribed period of six (6) months from the date the debt became due.

[4] In terms of section 3 (1) (a) of the Act, no legal proceedings for the recovery of a debt may be instituted against second respondents as organs of State unless the applicant has given written notice to the respondents to institute such legal proceedings within six (6) months after the claim became due.³

[5] The fact that the applicant's notice as contemplated in section 3 (1) (a) of the Act was only served on the respondents on 25 February 2021 some eleven months after the debt became due is not in dispute. The applicant's concession triggered this application. He seeks an order condoning the late service of the notice on the grounds that the delay is not due to a wilful default on his part but occasioned by the inaction on the part of his erstwhile attorneys, Messrs Mphela Attorneys.

¹ Act No, 13 of 2002.

² Act No, 40 of 2002.

³ Section 3(1) (a) and 3 (2) (a) of the Act.

[6] Section 3(4)(b) of the Act confers a discretion on the court to grant condonation if it is satisfied that: the debt which forms the basis of the applicant's claim has not prescribed; good cause exists for the failure to serve the notice timeously; and the respondents were not unreasonably prejudiced by the failure to serve the notice timeously.

[7] The discretion is exercised judicially by having regard to interrelated factors which include amongst others, the degree of lateness, the explanation of the delay, the applicant's prospects of success in the proposed action, the applicant's interest in progressing the matter and the avoidance of unnecessary delay in the administration of justice.⁴

[8] The parties are *ad idem* that the applicant's claim has not prescribed therefore for the applicant to succeed with this application, he must basically show that good cause exists for the failure to serve the notice timeously and that the respondents are not unreasonably prejudiced by the late notice.

[9] Good cause involves '*all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. 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 applicant's responsibility therefor*'.⁵

[10] The applicant attributes the delay for the service the notice to the ineptitude of his erstwhile attorneys Messrs Mphela Attorneys. In his affidavit, he explains precisely a month after he was released from custody in May 2019 he consulted his attorney of record Mr Sefo to institute the claim against the respondents. Mr Sefo in turn instructed Mphela Attorneys on the basis that they were experts in matters

⁴ *United Plant Hire (Pty) Ltd v Hills and Others* **1976 (1) SA 717** (A) at page 720 paras E-G quoted with approval

in *Madinda v Minister of Safety and Security* **2008 (4) SA 312** (SCA) at paras 12 and 16.

⁵ *Madinda* at para 10.

relating claims involving unlawful arrests. Following the acknowledgment of receipt of instructions by Mphela Attorneys on 7 June 2019, Mr Sefo transmitted another letter instructing Mphela Attorneys issue the section 3 notice. Then on 12 February 2021 Mr Sefo received an email from Mphela Attorneys stating that Ms Mphela was no longer with the firm as a result Mr Sefo took over the matter and on 25 February 2021 he served the section 3 notice to the respondents.

[11] According to the respondents, the explanation provided by the applicant is inadequate to enable the court to evaluate his contribution to the delay and his *bona fides*. There is an unexplained delay of eight (8) months from 7 June 2019 to February 2021 and the applicant has provided no explanation with regard to what efforts he had made to expedite his claim.

[12] I am of the view that having regard to the fact that a month after the applicant was released from custody he consulted Mr Sefo and provided instructions for the claim to be lodged on his behalf and this does not support the averment that he did nothing to prosecute his claim instead, it does appear that the delay is attributable to both his attorneys. Mr Sefo forwarded the instructions to another attorney but it turns out he was and is able to institute these proceedings on behalf of the applicant. Inexplicably, he has offered no explanation why it took him eight (8) months to do so. There is also no explanation from Mphela Attorneys as to what led to the delay. For these reasons, I am unable to fault the applicant for relying on his attorneys to act appropriately. I cannot detect any *mala fides* on the side of the applicant and I am also satisfied that the delay has been sufficiently explained.

[13] As to the prospects of succeeding with the claim, it is the applicant's case that the police had no probable cause to stop and arrest him and after he was arrested the prosecution had no valid reason to seek his continued incarceration without bail. Based on these reasons, his prospects of succeeding with his claim against the respondents are good.

[14] On the other side, it is the respondents' case that the applicant's arrest was lawful as it was carried out by the arresting officers (constables Mokoena and

Appels) in terms of section 40(1)(a) of the Criminal Procedure Act (the CPA)⁶ in that, he had committed the offence of entering and remaining in the Republic without a valid passport in the presence of the said arresting officers.

[15] The respondents state that the applicant is a Mozambican national. His arrest followed upon his failure to identify himself as provided for in section 41 of the Immigration Act (the Immigration Act)⁷ and to produce a valid passport or any other document as proof that he was legally in the Republic. After explaining that his passport was at his residence, he was escorted to the said address but no passport could be found and he ultimately admitted that he did not possess a valid passport. Pursuant to the arrest, the applicant appeared in court on the next day therefore, there is also no basis to the applicant's contention that the prosecution was malicious. His papers do not even raise any issue indicating the purported malice and/or *animus iniuriandi* on the part of the second respondent accordingly, the applicant has not satisfied the requirements for a claim of malicious prosecution.

[16] Having regard to the facts of this matter, the applicant was arrested without a warrant and charged for being an illegal immigrant. Section 40(1) (a) and 40 (1) (i) of the CPA read with section 41 (1) of the Immigration Act permits an arrest of a suspect without a warrant who is suspected of being an illegal immigrant.

[17] An arrest without a warrant is *prima facie* unlawful.⁸ The onus is on the respondents to prove the lawfulness thereof on a balance of probabilities. It is not for the applicant to set out facts which proves the unlawfulness of the arrest.

[18] With regard to the alleged malicious prosecution, the onus is indeed on the applicant to allege and prove that, the respondents acting without reasonable and probable cause but purely with malice (or *animo iniuriandi*) set the law in motion

⁶ Act No, 51 of 1977.

⁷ Act No, 13 of 2002.

⁸ *Minister of Safety & Security v Tyulu* **2009 (2) SACR 282** (SCA).

(instigated or instituted the proceedings against the applicant) and that the resultant prosecution has failed.⁹

[19] The fact that the respondents set the law in motion by arresting the applicant is indisputable. The provisions of section 41(1) of the Immigration Act places a responsibility on the arresting officer to assist the suspect in verifying his identity or status and only detain him if necessary. On the available facts, it seems that responsibility was delegated to the applicant. For all these reasons, it does appear that the applicant has good prospects of succeeding with the claim.

[20] Regarding the issue of prejudice, the applicant contends that the respondents are not prejudiced by the late notice as they have been aware of the applicant's intended action since January 2020. The contents of the docket, the record relating to the criminal case pertinent to the applicant's arrest and the details of the respondents' witnesses are known to the respondents and also readily available as such no further investigation will have to be undertaken by the respondents. It is submitted that it is the applicant who stands to be prejudiced if the late notice is not condoned. His constitutional right to access to justice would be curtailed.

[21] The respondents submit that they are prejudiced by the late notice because: "*it is general knowledge that memories fade and that police officers and State Prosecutors deal with hundreds of cases every year. Yet the police officers and the State Prosecutor will still need to testify at the trial to disprove the Applicant's averments and would still need to rely on their memories for details relating to the incident.*" It is thus argued that the application ought to fail.

[22] I find that there has been not even an attempt made by the respondents to lay a basis for unreasonable prejudice. They merely allude to generalities and speculations that: that the arresting officers and the state prosecutor will have to testify at the trial to disprove the applicant's case and due to the fact that they deal with hundreds of cases every year their memories might have faded at the time they

⁹ *The Minister for Justice and Constitutional Development and 2 Others v Sekele Michael Moleko*, Case Number 131/07, (SCA) at par. 8.

are required to testify. These facts are not pertinent to this matter. I am thus not persuaded that the respondents are unreasonably prejudiced by the late notice.

[23] In conclusion, I hold that all the factors that I have decided in favour of the applicant cumulatively, they establish good cause for the court to apply its discretion in favour of granting condonation.

[24] The applicant seeks an indulgence therefore he should be saddled with the costs of this application.

[25] The following order is granted:

(1) The application for an order to condone the late service of the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 within the period laid down in s 3(2)(a) of the Act is granted.

(2) The applicant shall pay the costs of the application.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Applicant: Adv. NM Bahlekazi

Instructed by: Sefo Attorneys

C/O Mlozana Attorneys

BLOEMFONTEIN

Counsel on behalf of Respondents Adv. D De Kok

Instructed by: State Attorney

BLOEMFONTEIN