



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5150/2021

In the matter between:

TSHEPISO JOSIAS MOFOKENG

Applicant

And

MINISTER OF POLICE

First Respondent

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Second Respondent

HEARD ON: 20 JULY 2023

JUDGMENT BY: DANISO, J

DELIVERED ON: 31 OCTOBER 2023

- [1] In this opposed application, the applicant seeks condonation for the late service of the written notices as contemplated in section 3 of Institution of the Legal

Proceedings against Certain Organs of State Act ("the Act").¹ The relevant subsections provide:

"(1) No legal proceedings for the recovery of a 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; or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(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.

[2] The application arises from the arrest of the applicant without a warrant on 2 September 2018 on a charge of murder. On 4 September 2018 he appeared in the District Court where bail was refused. He was subsequently remanded in custody until discharged on 23 July 2020 in terms of section 174 of the Criminal Procedure Act.²

[3] On 5 November 2021 the applicant issued summons against the respondents claiming damages for unlawful arrest and detention, loss of income and malicious prosecution. The respondents defended the action and apart from the Plea to the merits, they also raised a special plea of prescription and an objection against the applicant's non-compliance with the provisions of the Act

¹ Act No, 40 of 2002.

² Act No, 51 of 1977.

for failing to serve the section 3 notices on the respondents within the prescribed period of six months from the date the debt became due.

[4] The applicant has conceded that the section 3 notices are time barred as they were served respectively, on the first respondent on 29 June 2021 and on the second respondent on 21 October 2021. The applicant's concession triggered this condonation application.

[5] In terms of section 3(4)(b) of the Act, the court may condone the failure to serve a section 3 notice if it is satisfied that:

5.1. The debt which forms the basis of the creditor's claim has not prescribed;

5.2. Good cause exists for the failure to serve the notice timeously; and

5.3. The organ of state was not unreasonably prejudiced by the failure to serve the notice timeously.

[6] I now turn to consider whether these requirements elucidated above herein have been established by the applicant in the context of this matter.

[7] With regard to prescription, it is the first respondent's case that the debts which form the basis of the applicant's claims for unlawful arrest and detention including loss of income arose on 2 September 2018 when the applicant was arrested and this is due to the fact that, the applicant knew the moment he was arrested that there was a deprivation of his right to freedom and to earn an income. The summons was only served on the first respondent on 24 November 2021 more than three years from the date the debts arose consequently, the applicant's claims have prescribed.

[8] According to the applicant the claims have not prescribed in that, "*prescription was set in motion on 23 July 2020 against the respondents as it became established that I then had set of facts which supported a lawsuit against the*

*first respondent and second respondents*³ (sic) thereafter, summons was served on the first respondent on 24 November 2021 which is within three years from 23 July 2020.

- [9] I disagree with the applicant's contentions. The applicant's claims are delictual debts which in terms of sections 10 (1), 11(d) and 12 (1) of the Prescription Act,⁴ prescribe after the lapse of a period of three years from the date the debts became due. According to section 12(3):

"(a) debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

- [10] In this matter, the applicant's case is not that he did not know the identity of the first respondent but that he did not know that he was entitled to claim. It has been pointed out that knowledge of the facts from which the debt arises does not entail knowledge of the law or the availability of a remedy to establish the liability of a debtor in these circumstances.⁵

- [11] It is also important to highlight that as regards the claim premised on unlawful arrest and detention, an arrest is *prima facie* unlawful in that, the applicant only needs to allege and prove the arrest and detention and where same is undisputed (as in the present case) the onus is on the first respondent to prove justification for that reason, it cannot be said that the applicant's claim is dependent on the conclusion of the criminal proceedings. The acquittal or discharge from an offence is not a factor in determining the lawfulness of an arrest and detention.

³ Para 37 of the applicant's founding affidavit.

⁴ Act No, 68 of 1969.

⁵ *Thompson and Another v Minister of Police and Another* **1971 (1) SA 371 (E)**; *Truter & another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA); *Mtokonya v Minister of Police* **[2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC)** at para 36.

- [12] Similarly, the arrest of the applicant on 2 September 2018 is the damage causing event which resulted in the applicant allegedly sustaining a loss of income consequently, the debt which forms the basis of the applicant's claim arose on 2 September 2018. It is in this regard that I determine the prescription objection in favour of the first respondent. I hold that the claims for unlawful arrest and detention and loss of income have been extinguished by prescription, they are no longer enforceable.
- [13] Regarding the claim against the second respondent, the parties are *ad idem* that the claim has not prescribed therefore, for the applicant to succeed with this application he must show that good cause exists for the failure to serve the notice timeously and that the second respondent was not unreasonably prejudiced by the late notice.
- [14] It is indisputable that the section 3 notice was due by 23 January 2021 and that it was only served on the second respondent on 21 October 2021. The applicant's reasons for the delay in serving the notice are set out in his founding affidavit. He explains that he was in custody from the day of his arrest until he was discharged. At that time, he was legally represented but his erstwhile attorney did not advise him that he could pursue a claim against the respondents and as a lay person he did not know that he could. When he was ultimately released from custody he was ill with depression, it was also during the Covid-19 National Lockdown Restrictions and most attorneys were working from home in December 2020 as a result he could not consult. It was in June 2021 that a friend advised him that he could claim damages. He immediately instructed his attorneys of record and the section 3 notices were served on the respondents.
- [15] With regard to the merits of the claim, it is the applicant's case that there are good prospects of succeeding with the claim. His contention is premised on the grounds that the second respondent proceeded with the prosecution despite the fact that that applicant was essentially exonerated by the

Fingerprint Comparison Report⁶ which found that his “*fingerprints were already excluded as being not identical*”.⁷

- [16] The applicant contends that the second respondent is not prejudiced by the late notice because except to refuse to consent to the late service of the section 3 notice, the second respondent did not indicate any prejudice. From the time the section 3 notice was served to the condonation application the second respondent had ample time to contact the relevant role plays and consult with them to assess the claim.
- [17] The second respondent counters that no proper case has been made out for an order condoning the late section 3 notice. It is the second respondent's contention that the applicant has presented contradictory and flimsy reasons for his failure to serve the section 3 notice within the required period, he alleges that as a lay person he did not know that he could pursue a claim against the second respondent but he also states that he ultimately obtained the advised from a friend in any event, being a lay person and not being versed with the law are not valid grounds for failing to comply with the provisions of section 3.
- [18] The second respondent further points out that another reason proffered by the applicant is that he was ill though no medical evidence has been provided as proof thereof. The applicant's reliance on Covid-19 National Lockdown Restrictions as an excuse for failing to comply with section 3 is also absurd as Covid-19 restrictions could not have prevented him from obtaining legal advice.
- [19] Regarding the prosecution, the second respondent states that there was a reasonable and probable cause for prosecuting the applicant actuated by the police based on witnesses' statements including the deceased's wife in terms of which the applicant was identified as the perpetrator. The police' suspicion was also heightened when the applicant fled the scene when approached by

⁶ Annexure “TJM8” of the applicant's founding affidavit.

⁷ Para 54 of the applicant's founding affidavit.

the police. The fingerprint evidence returned unmatched simply because the specimen of the fingerprints found on the scene of the crime was too poor for comparison.

- [20] The second respondent further states that it is prejudiced by the inordinately late notice because witness's memories fade with time. The litigation carries huge legal costs which would not be met by the applicant in the event that the matter proceeds to trial and his claim is dismissed.
- [21] It is tested law that the discretion to grant condonation is exercised judicially by having regard to various factors such as the degree of lateness, the explanation of the delay, the prospects of success in the proposed action, the appellant's interest in progressing the matter and the avoidance of unnecessary delay in the administration of justice. These factors are not individually decisive but are interrelated. They are weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong or, strong merits may mitigate fault. See *United Plant Hire (Pty) Ltd v Hills and others*⁸ quoted with approval in *Madinda v Minister of Safety and Security*⁹ where it was also pointed out at paragraph 8 that the phrase "if the court is satisfied" does not require proof on a balance of probabilities "rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties."
- [22] At para 10 in *Madinda*, Heher JA explains that 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 factors 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."

⁸ 1976 (1) SA 717 (A) page 720 para E-G.

⁹ [2008] 3 All SA 143 (SCA) at paras 12 and 16

- [23] The delay of approximately fifteen (15) months from the date the debt became due on 23 July 2020 to the date on which the section 3 notice was ultimately served on 21 October 2021 is extreme while the applicant has placed the blame for his ineptitude on everything except his illness, lack of knowledge of the law and Covid-19 including on his erstwhile attorney and this is despite the fact that he is the litigant in this matter not the legal representative.
- [24] There is an unexplained delay from the date on which he was released unwell from custody on 23 July 2020 to December 2020 when he was allegedly prevented from consulting an attorney by Covid-19 lock down regulations. A further five (5) months lapsed without an explanation from December 2020 to June 2021 when he ultimately received advice from a friend. There is also no explanation of the applicant's idleness for a period of another five (5) months from the date his condonation request was refused by the second respondent on 12 September 2022 to the date this application was launched on 23 February 2023, I am thus not persuaded that good cause for the delay in serving the section 3 notice has been sufficiently explained.
- [25] Good cause for the delay is merely one of the considerations that the court takes into account when deciding whether or not to grant the applicant the order he seeks. The applicant's prospects of success in the proposed action is also a factor that the court must consider as good prospects may make up for the applicant's ineptitude. At this stage, the applicant is not expected to prove his case on a balance of probabilities that his action would undeniably enable him to the relief he will be seeking at the trial but merely to satisfy this court that he has a *prima facie* case and a *bona fide* intention in the sense of seeking an opportunity to have the matter be tried.
- [26] I am not so satisfied that the applicant has any prospect or probability of success in the action. The applicant's reliance on the Fingerprint Comparison Report as proof that the prosecution was malicious is unsound for the reason that, it is clear from the report that the reason his fingerprints were unmatched was due to "prints of scene being too poor for comparison." It does not end

there, the second respondent's contention that the prosecution also relied on witness' evidence including that of the deceased's wife implicating the applicant to the murder has been left uncontroverted as the applicant did not file his replying affidavit.

[27] With regard to the issue of prejudice, the applicant's contention that the second respondent is not unreasonably prejudiced by the late notice simply because the second respondent did not indicate prejudice is in my view, unsound because section 3(4) (b) places the onus on the applicant to bring the application within the terms of the statute and satisfy the court that the respondent has not been unreasonably prejudiced. The second respondent's responsibility is merely to lay a basis of the grounds of prejudice for receiving the notice out of time, in this matter the second respondent's allegations alluding to the prejudice have also not been countered by the applicant.

[28] In conclusion, the applicant has failed to show sufficient cause entitling it to relief he seeks herein. The application fails. I have found no reason why the costs should not follow the results.

[29] In the circumstances, the following order is made:

ORDER

- (1) The application for an order to condone the late service of the section 3 notices contemplated in s 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 dismissed.
- (2) The applicant to pay the costs.

The Honourable [REDACTED]
2023-10-31
N.S. DANISO, J
N.S. Daniso

APPEARANCES:

Counsel on behalf of Applicant:

Instructed by:

Adv. R.J. Nkahle

Maduba Attorneys

BLOEMFONTEIN

Counsel on behalf of Respondents:

Instructed by:

Adv. B.S. Mene SC

The State Attorney

BLOEMFONTEIN