



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 no: 1340/2023

In the matter between:

THABANG BERNEY MOKHEMISA

APPLICANT

and

THE MINISTER OF POLICE

RESPONDENT

CORAM: MTHIMUNYE, AJ

HEARD ON: 17 AUGUST 2023

JUDGMENT BY: MTHIMUNYE, AJ

DELIVERED ON: 09 NOVEMBER 2023

- [1] This is an application in terms of section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ("the Legal Proceedings Act"). The applicant seeks condonation for non-compliance with

Section 3(1)(a) read with section 3(2)(a) of the Legal Proceedings Act. The respondent opposes the application and prays for it to be dismissed with costs.

- [2] The applicant was arrested at his workplace on 22 March 2020 on a charge of rape. His first appearance was on 25 March 2020. The case was postponed and he was kept in custody for approximately three (3) months before he was released on bail in June 2020. The charges against him were eventually withdrawn on 9 March 2023 for lack of evidence. On or about 14 March 2023 he consulted an attorney and on 15 March 2023, served a notice in terms of section 3 of Act 40 of 2002 notifying the respondent of his intention to institute legal proceedings for compensation for unlawful arrest and loss of income. On 16th March 2023 the applicant issued summons and served same on the respondent on 17 March 2023. In its plea, the respondent raised a special plea of non-compliance by the applicant with the provisions of section 3 of Act 40 of 2002, firstly that the notice was not issued within 6 months from the date of the occurrence as required by section 3(2)(a), and secondly that it did not consent to the institution of legal proceedings against them without compliance with section 3(2)(a) of the Act.
- [3] The respondent opposes this application on the following basis: that the applicant's claim has prescribed; that there is no good cause shown by the applicant why the notice was not served within six months from the date of the occurrence; and that the non-compliance with the timeframes by the applicant has caused prejudice to the respondent.

- [4] In its opposing affidavit, the respondent firstly raised a point *in limine* that the Founding Affidavit for this application was not duly commissioned since the Commissioner of Oaths failed to state the place and date of the administration of the oath, as well as his full names and business address as required by Regulation 4(1) and (2) of the Administration of Oath Regulations. Prior to determining the application for condonation, this court must first deal with this issue. Regulation 4 provides as follows:

4. (1) *Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.*
- (2) *The commissioner of oaths shall—*
- (a) *sign the declaration and print his full name and business address below his signature; and*
- (b) *state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio."*

- [5] The stamp of the Commissioner of oaths reflects that the affidavit was commissioned at Botshabelo Police Station on 17 May 2023. Further, the respondent has argued that the commissioner of oaths chose to put his initials instead of his full names on the declaration. From the first page of the affidavit, the initials of the commissioner appear as K.E.M but on the stamp, below his signature appears what looks like a name and the surname to me. It is inconceivable that the Commissioner would have two different sets of initials, one set being consistent throughout the pages of the affidavit and a different set where his name appears. Even in the event that the name appearing below

the stamp is a shortened version of his name, I am of the view that his identity can be easily ascertained from the information contained in the affidavit. This, in my view fulfils the requirements in terms of section 4(1) of the Regulations. In **Absa Bank Ltd v Botha NO and Others 2013 (5) SA 563 (GNP)** at para 8 it was held that the court has a discretion to refuse or admit an affidavit which does not fully comply with the Regulations where there has been substantial compliance with the said Regulations. For these reasons, I am of the view that the applicant's affidavit complies substantially with the Regulations and must be admitted and the respondent's contrary averment be rejected.

[6] I now turn to deal with the condonation application. Section 3 of the Legal Proceedings Act reads as follows:

"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 legal proceedings in question; or

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

(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 6 (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.*

[7] Section 3(4)(b) of the same Act sets out the requirements for condonation of non-compliance with the timeframes set out in section 3(1) and (2) and provides that a court may grant an application for condonation if it is satisfied that:

“(i) *the debt has not been extinguished by prescription;*

(ii) *good cause exists for failure by the creditor; and*

(iii) *the organ of state was not unreasonably prejudiced by the failure.”*

[8] In **Minister of Agriculture and Land Affairs v C R Rance 2010 (4) 109 (SCA)** at 113A, it was stated that the requirements for condonation listed in section 3(4)(b) are conjunctive and must all be established by the party seeking condonation. The phrase ‘*if [the court] is satisfied*’ has long been recognised as setting a standard which is not proof on a balance of probabilities but the overall impression made on a court. This principle was clearly enunciated in **Madinda v Minister of Safety & Security [2008] 3 All SA 143 (SCA)** at para 8 as follows:

“a standard which is not proof on a balance of probabilities but rather an overall impression made on the court which brings a fair mind to the facts set up by the parties”

I now turn to deal with the three requirements individually.

Prescription

- [9] The respondent further, relying on section 5(2) and (3) of the Legal Proceedings Act argues that the applicant's claim has prescribed. Section 5(2) and (3) provides that:

"(2) No process referred to in subsection (1) may be served as contemplated in that subsection before the expiry of a period of 60 days after the notice, where applicable, has been served on the organ of state in terms of section 3(2)(a).

(3) If any process referred to in subsection (1) has been served as contemplated in that subsection before the expiry of the period referred to in subsection (2), such process must be regarded as having been served on the first day after the expiry of the said period."

- [10] Citing the above provision, the respondent submitted that the 60 days from the date on which the summons were actually served expired on 16 May 2023, and therefore the summons are deemed to have been served on 17 May 2023, at which point, the three-year period would have expired from the date of the cause of action and therefore rendering the applicant's claim to have prescribed. The respondent further submitted that the Act makes no provision for condonation of non-compliance with this particular section and as such the court cannot condone non-compliance therewith. Further that since the application of this provision renders the applicant's claim to have prescribed, there is no point in this court condoning non-compliance on a claim that has already prescribed.

- [11] The respondent submitted to this court that this provision must be applied for purposes of prescription. Section 5(3)(2) provides that a process served before

the expiry of 60 days after service of notice must be *"regarded as having been served on the first day after the expiry of the said period"*. It is my view that this provision is meant for the respondent in respect of the steps it must take in response to the process served. It is also noteworthy that the respondent appears to have attributed the same meaning to this provision as it only served its plea on 5th June 2023 although the summons was issued on 16 March 2023 and served on the respondents on 17 March 2023. Ordinarily, following the rules of court as also stipulated in the applicant's summons, the respondent should have served its plea on or about 11th May 2023.

[12] This court further noted that in its plea, the respondent did not raise the issue of prescription or invoke the provisions of section 5(2) and (3) of the Legal Proceedings Act. It is my view that this contention by the respondent is herein misplaced and has to be rejected.

[13] I do not deem it necessary to repeat the history and the chronology of events in this matter as that has been done in the introductory paragraphs hereto, save to say that when regards is had to the trite principle that the service of summons interrupts prescription, at the time of the service of the summons to the respondent, the applicant's case had not prescribed. In this regard, the respondent's assertion that the applicant's claim has prescribed is also rejected.

Good Cause

[14] The respondent averred that the applicant has shown no good cause for the delay thus falling short of meeting the second requirement for condonation. In

Madinda v Minister of Safety & Security [2008] 3 All SA 143 (SCA) at para 12, the Supreme Court of Appeal analysed the meaning and effect of the concept of 'good cause' and found it to be more about considering of all factors which bear on the fairness of granting the relief. These factors may include prospects of success, reasons for delay, sufficiency of the explanation offered and the *bona fides* of the applicant. It is not for this court to decide on the merits of the case. I however have considered the applicant's allegations that the members of SAPS failed to follow up on the evidence that the applicant was at work at the time the offence was allegedly committed despite the applicant having so advised them. They further failed to even check the applicant's version with his. I have further considered that the DNA results were negative and that they were not made available to the court timeously. In the event that these allegations are proven to be true, it appears to me that the prospects of success favour the applicant.

- [15] The applicant was, for two years eleven months and some days, hanging on tenterhooks until 9th March 2023 when charges against him were withdrawn. He further stated that he was not aware that he would be required to give notice to the respondent prior to instituting legal action, but did so as soon as he obtained legal advice. A day after he obtained legal advice he served the notice to the Respondent. That after the charges were withdrawn against him, he used the first available opportunity to investigate and assert his rights, i.e. consulted an attorney and then issued the notice literally the following day, is to me an important factor. In view hereof, I am satisfied that the applicant has shown good cause for the delay in issuing the notice.

Prejudice

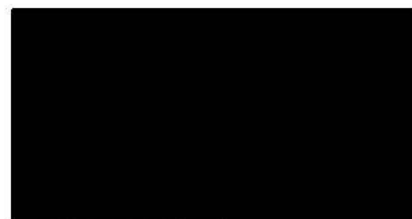
- [16] With regards to prejudice, the respondent submitted that due to summons being issued almost immediately after the notice, the respondent did not have enough time to prepare its defence. It argued that the purpose of the notice is to ensure proper investigation of the matter as the respondent litigates against many and in this case it was deprived of the time to investigate and as such were not able to locate records e.g. pocket books and occurrence books since three years had passed and these were archived. I must say that I find this odd as the case was withdrawn on 9th March 2023 and the notice served on 15 March 2023, literally six days after the withdrawal of charges.
- [17] Firstly, members of the respondent are the custodian of the records the respondent needed to investigate this matter and secondly, the said records, be it police pocket books or extracts thereof, could not have possibly been out of the respondent's reach by then as the case had been alive 6 days before. The averment about the respondent not having had sufficient time to prepare its defence is also preposterous since the respondent did file a plea, and not just a plea, but one that also encapsulated a special plea. In the **Madinda** case, the Supreme Court of Appeal cautioned the courts to "*be slow to assume prejudice for which the respondent itself does not lay a basis*". I am not persuaded that the respondent has been unreasonably prejudiced by the applicant's failure to comply with the timelines stipulated in section 3 of the Legal Proceedings Act, neither will it by this court granting this condonation application.

[18] The respondent further argued that the applicant brought this application after the respondent had raised a special plea of non-compliance however it is very clear, as the applicant avers that the applicant brought the application prior to receiving the plea as the application was served and filed on 1 June 2023 whilst the plea was served and filed on 5 June 2023. The applicant's averment that it anticipated the special plea holds true. A standard for condonation applications is the interests of justice. I am persuaded that the applicant has met all the requirements set out in section 3(4)(b) of the Legal Proceedings Act and further that it is in the interests of justice that this application must succeed.

Consequently, I make the following Order:

Order

1. The application for condonation is granted.
2. Costs shall be costs in the cause.



D. P. MTHIMUNYE, AJ

Appearances:

For the Applicant:	Adv. G. S. J. Van Rensburg
Instructed by	Berkowitz Cohen Wartski c/o McIntyre Van Der Post Bloemfontein

For the Respondent:	Adv. E. B. Yawa
Instructed by:	State Attorney Bloemfontein