



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

CASE NO. 499/2021

In the matter between:

MOFFAT CHAZA YAPI

APPLICANT/PLAINTIFF

and

MINISTER OF POLICE

RESPONDENT/DEFENDANT

JUDGMENT

Rugunanan J

[1] This is an opposed application in which the applicant seeks condonation for his non-compliance with the notice provisions of section 3(2) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act).

[2] The application follows a special plea raised by the respondent to the applicant's claim for damages based on a wrongful arrest and detention. In its special plea the respondent adopts the stance that the applicant is debarred from bringing his action because he has not complied with section 3(2) for failure to have served such notice within the prescribed period.

[3] Section 3 of the Act provides:

3. Notice of intended legal proceedings to be given to organ of state

- (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.
- (3) For purposes of subsection (2)(a)-
 - (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and
 - (b) a debt referred to in section 2(2)(a), must be regarded as having become due on the fixed date.

- (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.

[4] For purposes of the Act, the word 'debt' is defined in section 1 as:

[A]ny cause of action-

- (a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any –
 - (i) act performed under or in terms of any law; or
 - (ii) omission to do anything which should have been done under or in terms of any law; and
- (b) for which an organ of state is liable for payment of damages ...'

[5] The requirements in section 3(4)(b) are conjunctive and must be established by an applicant seeking condonation.¹ Before attempting to deal with the requirements, it is considered convenient to turn to the founding affidavit.

[6] The crux of the applicant's case is set out in the following material averments (all sic):

'12. On or about the 14th day of June 2018 at King Williams Town, within the jurisdiction of this Honourable Court I was unlawfully and wrongfully arrested by members of the South African police service stationed at King Williams Town police station.

...

¹ *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* [2010] ZASCA 27 para 11.

14. After the aforementioned unlawful and wrongful arrest I was detained at King William's Town for 4 days and I was transferred to Mdantsane Correctional Centre up until I was released on the 25th of October 2019.'

[7] Elsewhere the applicant states:

'15. I submit that section 3 statutory notice was sent to the National Commissioner by registered mail on the 20th of January 2020...

16. I submit that the cause of action arose on the 14th day of June 2018 and I was discharged by the court on the 25th of October 2019 for lack of evidence implicating me to the offence.

...

18. I submit further that I only became aware of the identity of the creditor and facts giving rise to the debt after I was acquitted by King Williams Town Magistrates Court on the 25th of October 2019.

19. It is my submission that the statutory notice was sent to the National Commissioner on the 20th of January 2020 within 6 Months after I was acquitted...'

[8] In a supplementary affidavit the applicant makes the averment:

'10. It is my respectful submission that the debt against the respondent has not been extinguished by prescription. I submit further that I acquired a complete cause of action for the recovery of my debt against the respondent after I was acquitted by King Williams Town Magistrates Court on the 25th of October 2019.'

[9] Relating to what the applicant states in paragraph 18 above, this is presumably a reference to section 3(3)(a) of the Act wherein it is stated that a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt. The subsection incorporates a rider to the effect that a creditor must be regarded as having acquired such knowledge as soon as he could have acquired it by exercising reasonable care unless the organ of state wilfully prevented him from doing so.

[10] There are two observations to be made from all the above:

(a) The applicant clearly identifies his ‘cause of action’ as a wrongful arrest and detention; and

(b) His debt only became due on 25 October 2019 once he acquired knowledge of the identity of the organ of state and the facts giving rise to the debt.

[11] In the light of the foregoing the question before this Court concerns the date on which the debt became due.

[12] Evident from the definition of the word ‘debt’ in the Act, is that it includes a cause arising from delictual liability. As to when a debt becomes due the Supreme Court of Appeal in *Truter and Another v Deyssel*² held that:

‘[It is] due when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.’

[13] The expression ‘cause of action’ has been held to mean:

‘[E]very fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise of every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’³

[14] The meaning given to the expression is expatiated as follows:

‘The proper legal meaning of the expression “cause of action” is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not “arise” or “accrue” until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.’⁴

² 2006 (4) SA 168 (SCA) para 16.

³ *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838E.

⁴ *Ibid* at 838G.

[15] In *Thompson & Another v Minister of Police and Another*⁵ – in dealing with the question as to when a cause of action arises in a claim for wrongful arrest and detention – the court stated:

‘In [a] claim based on a wrongful arrest... the delict is committed by the illegal arrest of the plaintiff without the due process of the law. Improper motive or want of reasonable and probable cause required for malicious arrest have no legal relevance to this cause of action. It is also irrelevant whether any prosecution ensues subsequent to the arrest; and, even if it does, what the outcome of the prosecution is. The injury lies in the arrest without legal justification, and the cause of action arises as soon as that illegal arrest has been made.’

[16] Exactly when did the applicant acquire a complete cause of action for the recovery of the debt is the question that now arises i.e. when did he have the entire set of facts which he must prove to prosecute his claim against the respondent. The question, put another way, is when did everything happen which would have obliged the applicant to have given notice within the period stipulated by the Act?

[17] The question is answered with reference to the *dicta* quoted above – and self-evidently in the founding affidavit at paragraph 16 where, on his own version, the applicant declares his cause of action to have arisen on 14 June 2018.

[18] The power of the court to grant condonation is circumscribed by the requirements in section 3(4)(b) of the Act. In what follows hereafter, I turn to address these.

[19] In dealing with the requirement of prescription (in a supplementary affidavit), the applicant avers that he acquired a complete cause of action for the recovery of the debt after his acquittal on 25 October 2019, and that the complete cause of action was only established after consulting with his attorneys on

⁵ 1971 (1) SA 371 (ECD) at 375F-G.

17 January 2020. It bears noting that the respondent has not raised a special plea alleging that the applicant's claim, and by implication the debt, has been extinguished by prescription. For this reason I make no factual finding on the issue of extinctive prescription. It bears emphasising that on his own version the applicant acquired a cause of action on 14 June 2018. This much was properly conceded by his counsel in argument. What emerges on the facts is that as of 14 June 2018 the clock started ticking for the purposes of the requirement in section 3(2)(a) that notice be served within six months of that date.

[20] This brings me to the next part of the enquiry: What then is the applicant's explanation for the delay in failing to comply with section 3(2)(a) of the Act?

[21] It is a well-known principle that an applicant for condonation must give a full and satisfactory explanation for delays and furthermore that when condonation is required it must be sought as soon as the party concerned realises that it is so required.⁶ This goes to the requirement to show good cause and the reason/s for the delay.

[22] In *Madinda v Minister of Safety and Security*⁷ good cause was held to entail:

‘[A] consideration of all of those factors which had a bearing on the fairness of granting condonation and affecting the proper administration of justice. Relevant factors might include (i) the prospects of success in the proposed action, (ii) the reasons for the delay, (iii) the sufficiency of the explanation offered, (iv) the bona fides of the applicant, and (v) any contribution by other persons or parties to the delay and the applicant's responsibility therefor.’

[23] The finding in this judgment is that the notice was served out of the prescribed time period stipulated in the Act. The applicant's explanation is this:

⁶ *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (AD) at 449G.

⁷ 2008 (4) SA 312 (SCA).

‘12. [I] was legally represented by Legal Aid South Africa during criminal trial and it was impossible for me to seek legal advice on the civil claim whilst the criminal trial had not been disposed of... [E]ven if I was legally represented by Legal Aid in the criminal trial, it was impossible for me to instruct Legal Aid to pursue a civil claim whilst the criminal trial was still being litigated and had not reached conclusion.’

[24] To the contrary the deponent to the respondent’s answering affidavit avers:

‘40. A person in detention is not deprived of exercising his rights to institute legal proceedings against another person, including the respondent. I submit that the applicant has not taken the honourable court into his confidence by setting out how it was not practically possible for him to send the statutory notice to the respondent while he was incarcerated. I challenge the applicant to explain this impossibility in his replying affidavit should there be such an explanation.’

[25] Indeed, the applicant does not take this Court into his confidence by laying a sufficiently candid basis for his assertion that it was impossible for him to seek legal advice, nor for that matter is there any indication that he was wilfully prevented from exercising his rights as an arrested, detained or accused person.

[26] An aggravating feature of the applicant’s misguided approach is that he dragged his feet for almost two years after the special plea was taken in September 2020 by launching this application in July 2022. No explanation is put up for this delay.

[27] To sum it all up, he somewhat offhandedly he states:

‘10. I find it very strange that the respondent herein avers that I have failed to show good cause for my failure to send statutory notice within 6 months. I submit that I have furnished this Honourable Court with an explanation of my default and it is sufficiently full to enable the court to understand how it really came about.’

[28] Adverting to the requirement of the absence of unreasonable prejudice. The applicant’s approach (that the notice period commenced on 25 October 2019)

would defeat the whole purpose of section 3(2)(a) of the Act. Time limits play a vital role in bringing certainty and stability to social and legal affairs and in maintaining the quality of adjudication. Without prescriptive periods, the propensity for legal disputes being drawn out for indefinite periods of time would be great thereby bringing about prolonged uncertainty to the parties to the dispute. Moreover, as time passes, the quality of adjudication by the courts is likely to be affected because evidence may have become lost, or witnesses may no longer be available to testify, or the recollection of events may have faded.⁸ These considerations assume relevance in the context of the purpose served by timeous notification, and that is to afford an organ of state the opportunity to investigate and consider a claim laid against it. In argument and in laying a basis for being prejudiced the respondent adverted to the foregone opportunity to have considered mediation as part of the investigative process.

[29] As if oblivious of the purposes highlighted above the applicant contents himself by making the vacant assertion:

‘26. The defendants will not suffer any unreasonable prejudice if application for condonation is granted in that the statutory notice was sent within six months after my acquittal by the court.’

[30] For these reasons I make the following order:

1. The application for condonation is dismissed.
2. The applicant is ordered to pay the costs of the application.

⁸ *Mtokonya v Minister of Police* [2017] ZACC 33 para 84.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: *P Toni*, Instructed by M T Klaas Attorneys c/o Mgangatho Attorneys, Makhanda (Ref: *A Mgangatho*)

For the Respondent: *D Pitt*, Instructed by The State Attorney c/o Lulama Prince Inc., Makhanda (Ref: *L Prince*)

Date heard: 03 August 2023

Date delivered: 24 October 2023