



**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.: 600/2021

In the matter between: -

SIZWE CALVIN PUMLANI MPHATI
KARABO JACOB TAU

First Applicant/Plaintiff
Second Applicant/Plaintiff

and

THE MINISTER OF POLICE

Respondent/Defendant

CORAM: N. M. MBHELE, DJP

HEARD ON: 18 NOVEMBER 2021

DELIVERED ON: 07 MARCH 2022

- [1] The applicants, Messrs Sizwe Calvin Pumlani Mphati (Mphati) and Karabo Jacob Tau (Tau) instituted a damages claim against the respondent, the Minister of Police, (the Minister) in which they alleged that they were unlawfully arrested by the members of the South African Police Service (the SAPS). They failed to give the Minister notice of the claim within the prescribed period, as prescribed in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). The Minister filed a special plea in which this point was taken and, in response, the applicants brought an application for condonation of the late filing of the notice.

[2] The applicants sent their section 3 notice on 30 June 2020, about 22 months after the cause of action arose. The reasons advanced by the applicants for failure to file their notice on time is that they were ignorant of the requirement of the Act that provides that the relevant notice must be filed within 6 months from the date on which the debt became due. They only became aware of this requirement when they consulted with counsel in their matter on 17 March 2020.

[3] Section 3 of the Act sets out the requirements for giving notice of the intention to institute proceedings before issuing a summons against an organ of the state for the recovery of a debt 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 the 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 subs (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 s 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."

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

- (i) the debt has not been extinguished by prescription;
- (ii) good cause exists for failure by the creditor;

(iii) the organ of state was not unreasonably prejudiced by the failure.¹

- [5] All these 3 requirements must be satisfied for a court to exercise its discretion to grant condonation.²
- [6] Since the summons was served on the Respondents within 3 years after the cause of action arose, the question of prescription does not arise. What I have to decide is whether there is good cause shown for the applicants' failure to timeously file their notice of intention to launch their claim against the respondent and whether the respondent was unreasonably prejudiced by failure to give timeous notice.
- [7] It is a well-established principle that in all cases, whether statutory or in terms of the rules of courts, the High Court has an inherent right to grant condonation where principles of justice and fair play demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court.³
- [8] The applicants' Attorneys posted the notice 3 months after the applicants became aware of the requirement to file the notice, it was, however, only received by the respondent 5 months after it was posted. Mr. Mene, on behalf of the respondent contended that ignorance of the law is no excuse. He, further, submitted that the applicants failed to bring the application for condonation as soon it was required to do so. The applicants brought this application 3 months after the respondent took issue with the late filing of the application. He, further, contended that the fact that the applicants proffered no reason for the delay, firstly in the time period between the date of knowledge and the date of issuing

¹ Section 3: "(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."

² Minister of Safety and Security v De Witt 2009 (1) SA 457 (SCA) at par. 13

³ Erasmus; Superior Court Practice B1; 359 – 360.

the notice, secondly from the date of plea and the date when the application for condonation was issued.

- [9] In **Dengetenge Holdings Pty (Ltd) v Southern Sphere Mining and Development Company Ltd and Others**⁴ Ponnann JA said the following when dealing with factors to be considered in exercising the discretion to refuse or grant condonation:

"[11] Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in *Federated Employers Fire & General Insurance Co Ltd & another v McKenzie* **1969 (3) SA 360** (A) at 362F-G)."

- [10] In **Darries v Sheriff Magistrate Court, Wynberg and Another**⁵ the following remarks were made:

"Condonation of the non-observance of the rules of this court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting the appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a rule of court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellants' attorney that condonation will be granted. In applications of this sort the applicants' prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be."

⁴ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & Others* (619/12) 2013 (2) All SA 251 (SCA).

⁵ *Darries v Sheriff Magistrate's Court, Wynberg and Another* [1998] ZASCA 18; 1998 (3) SA 34 (SCA) at 40H-41E.

- [11] In **Saloojee and Another NNO v Minister of Community Development**⁶ the following was said:

“I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such relationship, no matter what the circumstances of the failure are.”

- [12] It is well established that condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.⁷

- [13] Mr. Bomela, on behalf of the applicants contended that failure to give a detailed account of delay is off set by the prospects of success that the applicants’ case enjoy. The applicants did not deal with the prospects of success of their action against the respondent in the founding affidavit. They dealt with it in the replying affidavit. It is the respondent who shed some light on what happened on both dates of arrest. I learned for the first time in the respondent’s answering affidavit that the arrest of the first applicant on 6 December 2018 was as a result of a warrant of arrest issued by a peace officer. The validity of that warrant of arrest

⁶ *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A).

⁷ *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6.

has not been successfully challenged. In **Bowman N.O v De Sousa Roldao**⁸ the court set out the approach to be followed when dealing with the question of the applicant who failed to make out its case in the founding affidavit. The following was said:

"In limine Mr Zeiss, who appears for the respondent, argued that the applicant has not made out a case in the founding affidavit to entitle him to any relief in terms of the notice of motion; he submits that there is a material and fatal lacuna in the founding affidavit which cannot be cured. Generally speaking, an applicant must stand or fall by his founding affidavit; he is not allowed to make out his case or rely upon new grounds in the replying affidavit. See, for example, *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635 in fin - 636 where Diemont JA said the following:

'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases

"... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged.

"it is not permissible to make out new grounds for the application in the replying affidavit".'

What should be set out in the founding affidavit and the particularity required has been dealt with in a number of cases; see, for example, *Joseph and Jeans v Spitz and Others* 1931 WLD 48; *Victor v Victor* 1938 WLD 16 at 17 and *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 369B. Each case will depend on its own facts. The correct approach is set out in the *Titty's Bar* case supra as follows:

'It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton

⁸ *Bowman N.O. v De Souza Roldao* 1988 (4) SA 326 T at 327.

of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit.'

This type of objection must be considered on the basis of an exception to a declaration or a combined summons.

The relevant considerations are:

- (a) the founding affidavit alone is to be taken into account;
- (b) the allegations in the founding affidavit must be accepted as established facts;
- (c) are these allegations, if proved, sufficient to warrant a finding in favour of the applicant?"

[14] The applicants must stand or fall by their pleaded cause of action.⁹ The information in the applicants' founding affidavit is scanty on circumstances surrounding their arrest. The applicants, in their founding affidavit, refrained from setting out facts on the merits of their claim to enable me to determine whether there are any prospects of success.

[15] The applicants submitted that the respondent has not shown any prejudice to his ability to properly investigate this case. The applicants showed that the criminal trial is ongoing and the relevant witnesses are still testifying in the criminal trial. The argument that the respondent will find it difficult to properly investigate the matter because memories of the relevant witnesses fade with time is unsubstantiated regard being had that they are available to testify in the criminal trial.

[16] Good cause denotes the obligation on the applicant to place before me facts which are reasonable and plausible to enable me exercise my discretion. Such facts were absent in the founding affidavit. As a result of the applicants' failure to explain the delay and existence of prospects of success, I am unable to find that good cause exists for condonation to be granted. As regards to costs, there is no reason to depart from the general rule that costs must follow the result. The matter is not complicated, it does not justify the employment of two counsel by the respondent.

⁹ Khumalo and Another v Member of the Executive Council for Education: Kwazulu Natal 2014 (5) SA 579 (CC) at par. 90.

[17] I make the following order:

1. The application for condonation is dismissed with costs.
2. Costs to include those occasioned by the employment of one counsel.



N.M. MBHELE, AJP

Appearances:

For the Plaintiff/Respondent: Adv. L. Bomela
Instructed by MDP Attorneys
Bloemfontein

For the Defendant/Applicant: Adv. B. S. Mene SC with
Adv. M. T. Lebuso
Instructed by State Attorney
Bloemfontein