



**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
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Case number: 446/2019

In the matter between:

SELLO JOHN MALEBO

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second Defendant

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Third Defendant

JUDGMENT BY: REINDERS ADJP

HEARD ON: 12 MAY 2022

DELIVERED ON: 26 JULY 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand-down are deemed to be 16:00 on 26 July 2022.

- [1] This is an opposed application for condonation in terms of Sec 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 ("the Act"). The applicant is the plaintiff in the main action ("the main action") under case number 446/2019 and the respondents are the defendants in the main action. For sake of clarity I will refer to the parties as in the main action.
- [2] The plaintiff instituted action against the defendants in January 2019, claiming damages for his alleged unlawful arrest and detention, and malicious prosecution. In his particulars of claim plaintiff avers that, prior to the institution of the proceedings, he duly complied with the provisions of the Act.
- [3] At the commencement of hearing the application, plaintiff indicated that he had withdrawn his action against the first defendant. Although first defendant requested costs of the day, in my discretion I do not intend to grant such costs. Reference to second and third defendants would hereafter be collectively "the defendants".
- [4] On 6 June 2019 the defendants delivered their plea. A special plea was raised denying that plaintiff complied with the provisions of s 3(1) of the Act in that plaintiff failed to give written notice of his claim within six months from date on which the cause of action arose as required by the Act, alternatively (regarding the third defendant) a notice that was served (if any) was not served within six months from date of which the cause of action arose.
- [5] The defendants by way of an affidavit of the state attorney oppose the application on the basis that the plaintiff has failed to establish a good cause

for his non-compliance with the Act and has failed to prove that the defendants will not suffer unreasonable prejudice due to the delay in serving them with the required notice. Reliance in particular is placed thereon that plaintiff does not deal with good prospects of success on the merits of his claim and a lack on particularity in explaining the delay in filing the required notice.

[6] Sec 3 (4) of the Act provides for condonation and reads as follow:

(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.

(c) ...

[7] It was held in ***Madinda v Minister of Safety and Security*** 2008 (4) SA 312 (SCA) that the court may grant an application for condonation if satisfied that the three requirements have been met. The test in doing so are not proof on a balance of probabilities, but "the overall impression made on a court which brings a fair mind to the facts set up by the parties." [at para 8]

7.1 The requirement of 'good cause' involves an examination of 'all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice', and may include, depending on the circumstances, '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'[at para 10]

- 7.2 At para [12] Heher JA held that good cause for delay is not 'simply a mechanical matter of cause and effect' but involves the court in deciding 'whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously'; and in this process, '[s]trong merits may mitigate fault; no merits may render mitigation pointless'."

See also: **Minister of Agriculture and Land Affairs v CJ Ranch (Pty) Ltd** 2010 (4) SA 109 (SCA) at para [37].

- [8] Applying the above principles to the merits of the application I am inclined to grant such condonation. It is not contested that the plaintiff's claims against the second and third defendants had not prescribed at the time when the action was instituted. The plaintiff's claim was only completed on his acquittal on appeal. It is uncontested that thereafter he consulted an attorney who, on the plaintiff's version, agreed to assist him on a contingency basis. Although there might be criticism levelled against the plaintiff's lack of setting out with particularity the dates of requests to his attorney for assistance in instituting possible legal action, I have been satisfied that he did not display a flagrant disregard for the provisions of the Act, nor are any of his actions indicative of him not having an interest in proceeding with his intended legal action against the defendants.
- [9] The notice in terms of s 3(2) was sent to the second and third defendants at a time when the delivery thereof was late for a period of approximately two months. The pleadings have been closed and second and third defendants have filed their plea on the merits. On a reading of the judgment (leading to plaintiff's acquittal on appeal) the merits in the main claim seems to be uncomplicated, it being common cause therein that the plaintiff and the complainant on the rape charge had intercourse – the dispute ostensibly whether she gave permission thereto and/or was in a state of sobriety to do so. Whether the Director of Public Prosecutions could have been malicious in those circumstances to prosecute is a question for the trial court to adjudicate and I will refrain from expressing any prima facie views thereon.

- [10] In its opposing affidavit third respondent avers that some of its witnesses might not be available any more wherefore it would suffer prejudice. Not only were no names furnished of such witnesses, but it is difficult to imagine how the giving of the notice two months earlier (and therefore the need for condonation) would have changed the availability or otherwise of such witnesses now. The contention of the possibility of the unavailability of witnesses on the evidence adduced, appears to me not to be based on solid facts. Taking into account all relevant considerations, I am satisfied that the plaintiff has shown good cause for his failure to timeously give the notice as prescribed by the Act.
- [11] Although the plaintiff moves for an indulgence which would normally result in liability for payment of the costs of the application, I am of the view that in proceedings of this nature where a litigant is not vexatious but approaches the court to vindicate his alleged claims for damages, such a cost order would not be warranted. The defendants however in my view was not unreasonable in opposing the application. I deem an appropriate cost order to be that each party be liable for its own costs.
- [12] I therefore make the following orders:
1. The application succeeds.
 2. Condonation is granted for the applicant's failure to serve 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 section 3(2) of the Act.
 3. Each party to pay its own costs.


C. REINDERS, ADJP

For the plaintiff:

Adv ND Khoko

Instructed by:

Mlozana Attorneys

BLOEMFONTEIN

For the first defendant:

Adv Z Nyezi

Instructed by:

State Attorney

BLOEMFONTEIN

For the second and third

defendants:

Adv NM Phakama

Instructed by:

State Attorney

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