

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

Case number: 3994/2020

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

PAKISO INNOCENTIA MOFOLO

Applicant

and

MINISTER OF POLICE

Respondent

HEARD ON: 28 JULY 2022

CORAM: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 21 SEPTEMBER 2022. The date and time for hand-down is deemed to be 21 SEPTEMBER 2022 at 16H00.

[1] These are opposed motion proceedings. In the instant application, the order sought is couched in the following terms: -

- “1. Condonation for failing to adhere to time frames and/or form of service be granted in terms of Schedule 3 and/or 4 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002;
2. Alternatively, that the respondent be given 30 days within which to investigate the matter and decide whether it wishes to accept, reject or settle the applicant’s main claim;
3. Costs in the event of opposition; and
4. Further and/or alternative relief.”

[2] The factual basis of the application drawn from the papers is as follows. The applicant is a registered law student at the University of the Free State. Around 20 October 2017, she was studying for the upcoming examination in one of the study rooms near the Sasol Library. She was interrupted by a group of student protesters who forced her to abandon her mission and she left campus for her residence.

[3] There was more than one group of protesters and general commotion ensued. The police and campus control intervened and fired shots to disperse the protesters. Together with others she took refuge in the nearby buildings. It is common cause that at the end of the day she was arrested and kept in custody at Bainsvlei Police Station. At the time she was five (5) months pregnant and this seems to be the reason why she was released on her own recognizance.

[4] Sometime in May 2020, she approached her attorneys of record and instructed them to institute a claim for damages against the respondent. The only reason why she did not act earlier is simply that she was unaware that she had a potential claim. The notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (Act 40 of 2002) was sent by her attorneys on 4 May 2020. In a nutshell these are the facts that underpins her application.

[5] In response to the allegations in the founding affidavit, the sworn affidavit on behalf of the respondent sets out in detail the events leading to the granting of the interdict. Having set out this summary of facts, the respondent disputes any allegation that members of the police service acted in an unlawful manner when they effected the arrests including the one of the applicant. On the issue of the required notice, it was pointed out that it is more than two (2) years and six (6) months late. Therefore, such an inordinate delay requires a cogent and full explanation. In this matter such clarification is lacking.

[6] The deponent also canvassed the point that there were no prospects of success. The allegations made are that the applicant was contravening the court order and the invocation of police powers was justified in the circumstances. He took issue with the fact that although the applicant went to great lengths pointing an accusing finger at the university security officers, the university was not joined as a party to the proceedings.

[7] Both counsel made compelling submissions which are worth repeating here. Mr Naidoo based his contentions on the fact that the applicant was arrested without a warrant. Therefore, the onus shifts to the respondent to show that the arrest was lawful. The respondent must then rebut the presumption that the arrest was unlawful. Another point to fortify his submission was that there were good prospects of success. On this one he pointed out that the final court orders did not apply to the applicant. As such they could not be used as a justification for the arrest of the applicant.

[8] Perhaps on realisation that this argument may be unsustainable, he submitted that the court orders did not give authorisation to the police to effect arrests. There was no reasonable suspicion that the applicant had committed any crime.

[9] He argued that the reason for the delay is that the applicant was preoccupied with the criminal trial which took a long time. She was unaware that she could institute a claim for damages against the respondent. Conceding rather vaguely that the reasons advanced on this aspect might be inadequate, he argued rather

forcefully that strong merits may mitigate fault. This has been considered favourable by the courts in a number of decided matters.

[10] The most important contention he made, whilst accepting the facts as they are, is that he referred to the proper approach that must be adopted by the court in matters of this nature. The purpose of the notice, he argued, was to give a department of State sufficient time to null over various possibilities when confronted with impending litigation. The key decision being whether to defend or settle the *lis*. In the present matter, he submitted that the facts favoured the applicant. He beseeched the court to adopt a purposive approach and penalize the applicant with costs for mounting an unreasonable opposition to the application.

[11] Mr Masihleho, who appeared on behalf of the respondent, submitted that the applicant had failed to make out a case for the relief sought. He argued that the applicant does not give reasons why the notice was not issued within six (6) months starting from the date of the incident on 20 October 2017. He too, referred to the underlying reasons why litigants must file the notice to a department of State as required by law.

[12] He pointed out that a lackadaisical approach to this issue would undoubtedly result in unreasonable prejudice to the respondent. The reality is that the respondent is beset with many peculiar circumstances like high staff turnover and penchant for chance takers to initiate frivolous litigation. In this matter, the respondent is faced with a real problem that the personnel who were involved have either retired or resigned. They are no longer within the service of the respondent.

[13] He submitted that the delay in this matter was inordinately long. The conundrum is compounded by the lack of explanation on the part of the applicant. He specifically pointed out that the applicant does not explain what she did in 2017 to 2019 in order to give effect to her rights. His contention was that the explanation that her main focus was on the matter which was withdrawn in 2018 equates to non-explanation. She did not even attempt to explain how that inhibited her from setting the wheels of justice in motion.

[14] He added that the assertion by the applicant that she was unaware that she could enforce her rights is a non-explanation. If this is somehow elevated to the status of an explanation, it will mean that no one will be on the wrong side of compliance. Therefore, in cases where there is no explanation, like the instant one, the court should not even bother to look at the prospects of success.

[15] Another argument was that the prospects of success were not on the side of the applicant. Her focus was only on the conduct of the police and no reference to other criminal acts alleged against her *viz* malicious damage to property and public violence. Importantly, she placed herself on the scene, ran away with the protesters as well as hid herself away with them. This association meant that she was a party to criminality on the day in question.

[16] A court considering an application of this nature must be satisfied that all the requirements have been met. The founding affidavit must contain adequate information necessary to grant the appropriate relief. The dates are important and it is incumbent on the applicant to deal with them in a manner that leaves no doubt at all. Primarily in an application for condonation, the applicant is seeking an indulgence from the court. It is expected that the applicant must take the court in her confidence and make a frank disclosure. The courts have over the years held that an application for condonation is not there for the taking by merely requesting for it.¹

[17] There is no doubt that the delay under discussion is inordinately long. The applicant carries the responsibility to explain the delay before and after the summons were issued. What is required of an applicant is to give a full, detailed and accurate account of the delay. This means that there must be cogent reasons which nullify any culpability on the part of the applicant for the delay.² In particular where non-compliance is time-related, the courts have reiterated that clear explanation on the date, duration and extent must be spelled out.

¹ Minister of Defence and Military Veterans and Others v Public Servants Association and Others (2022) 43 ILJ 633 (LAC) at para 39.

² Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) at 297H-J.

[18] The case for the applicant is weak on this aspect. The paucity of the information in the papers is startling. The applicant does not give a detailed or plausible explanation why a long period of two (2) years went by without any action on her part. Where she proffers some kind of an explanation, it is a general statement with no focus on any date or time. There are gaps in the papers to an extent that a full year remains unexplained. It is unclear to what extent her focus on the criminal matter that was postponed several times literally inhibited her from giving effect to her rights.

[19] This application is as though the applicant genuinely believed that by merely requesting, it will be granted. The argument that she did not know that she was wronged stands to be rejected because it is far-fetched and untenable. It is a doctrine of law that ignorance of the law is not an excuse. I agree with counsel for the respondent that if this argument was to pass muster, then the floodgates for any person escaping accountability relying on it will be open.

[20] Confronted with such non-existent explanation, it is enough to deny the application.³ However, it has been held that strong merits may mitigate fault. In the instant matter the prospects of success are equally weak. The argument that the court order obtained by the university did not apply to the applicant is bereft of any merit. The court order prohibited everyone on the university grounds from disturbing the peace there.

[21] The alternative argument is that there was no reasonable suspicion that the applicant has committed any wrong. In her founding papers the applicant places herself on the scene of crime. She was in the company of the so-called protesters who either maliciously damaged property or engaged in acts of public violence. She actively associated herself with them. In the circumstances described in her papers, it is preposterous to expect the police to arrest a person committing a crime in-front of their eyes with a warrant. Again the applicant explained the effect the arrest had on her without explaining the grounds that render it unlawful. The conclusion is that there are no good prospects of success.

³ Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC) at para 51.

[22] The gist of the argument on behalf of the applicant is thinly based on the purposive approach adopted by the Supreme Court of Appeal in the case of **Minister of Police and Others v Molokwane**.⁴ In that matter, the nub of the appeal was whether the omission by the respondent to serve a copy of a summons properly issued rendered the summons a nullity. The issue was the non-compliance of the respondent with section 2(2) of the State Liability Act 20 of 1957. The court concluded that interpretation of similar provisions by our courts must not be mechanical and favoured a purposive approach which is in sync with our constitutional values.

[23] Reliance on the Molokwane judgment as authority that condonation in this matter should be granted is misplaced. There the court was saddled with a narrow issue as stated in paragraph 22 *supra*. The court did not in any way jettison the requirements in an application for condonation that must be complied with to entitle the applicant the relief sought. This argument is not meritorious.

[24] What remains is a question of costs. There is no reason advanced as to why the losing party should not pay the costs. Therefore, the court shall not depart from the principle that costs follow the result.

[25] The following order is made: -

25.1. The application is dismissed and the applicant must pay the costs.

M.A. MATHEBULA, J

On behalf of the applicant:

Adv. K. Naidoo

Instructed by:

Makubalo Attorneys

⁴ (730/2021) [2022] ZASCA 111 (15 July 2022).

BLOEMFONTEIN

On behalf of the respondent:

Adv. P.T. Masihleho

Instructed by:

State Attorney

BLOEMFONTEIN