



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No:	2124/2014
Date Heard:	11/02/2022
Date Delivered:	18/03/2022

In the matter between:

PHEMELO MOENG

Applicant

and

MINISTER OF POLICE

Respondent

APPLICATION FOR LEAVE TO APPEAL: RULING

DAUDS AJ

- [1] This matter was characterised by several instances of lack of care. The matter revolved almost entirely around the provisions of section 3

of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

- [2] To provide the briefest of background for context. The matter involves an application for leave to appeal the Court's decision made by way of an order dated 06 December 2019 to dismiss the Applicant's application for condonation. The order was made after extensive argument was heard on behalf of both the Applicant and Respondent on 08 November 2019. The Applicant sought condonation for his failure to comply with the provisions of section 3(1) read with (2) of Act 40 of 2002. These two subsections require a potential Plaintiff to give an organ of State notice of his/her intention to commence civil action, and to give such notice within six (6) months of the date on which the cause of action for the civil claim arose, or any debt relevant to the civil action became due.
- [3] It was common cause that the requisite notice was not served on the Ministry of Police, an organ of State, within the six months as required by section 3(2)(a). On 07 May 2013, the Applicant – together with a group of other individuals – was, according to the Applicant, arrested by members of the South African Police Service (SAPS), and detained for two days at the Jan Kempdorp Police Station, Northern Cape. The Applicant was released after making an appearance in Court. The matter was adjourned for further investigation. At the time of the arrest the Applicant was a police officer serving in the South African Police Service. The Applicant's case is that the arrest and detention were unlawful. He accordingly sought to claim civil damages from the Respondent, the Minister of Police. To all intents and purposes therefore, the cause of action or "debt" for purposes of Act 40 of 2002 arose on 07 May 2013.

- [4] The requisite 6-month notice was written and dispatched to the Respondent on 10 November 2014 (and received by the Respondent's attorneys, the office of the State Attorney, on 14 November 2014). That was 18 months after the Applicant's arrest and detention, i.e. after the cause of action arose or debt became due. The very next month though – on 02 December 2014 – summons was issued and served on the Respondent on behalf of the Applicant commencing legal proceedings for civil damages.
- [5] It is worth noting again that this matter was characterised by a number of instances of lack of care. According to the Applicant, he consulted with an attorney, one Mr Ikaneng, on 13 or 17 May 2013. (It was not clear which date precisely – in his affidavit in support of the condonation application, the Applicant wrote it was 13 May, but in his affidavit in support of the application to permit the filing of a supplementary affidavit he said it was 17 May). The purpose of the consultation with the attorney was to explore bringing a civil claim in respect of the Applicant's alleged unlawful arrest and detention.
- [6] Section 3(2)(b) sets the bar for the contents of the 6-month notice low. All that is required is that a potential Plaintiff sets out – in brief form - in the notice:
- (a) the facts giving rise to the "debt"; and
 - (b) such particulars of such debt as are within the knowledge of the "creditor".
- [7] The facts giving rise to the debt were – in brief – the Applicant's alleged unlawful arrest and detention. And some of the obvious particulars which were within the Applicant's knowledge were the date

of arrest, the place of arrest, the place of detention, the identity of the police officer or officers who carried out the arrest. (If the identity of the arresting officer or officers were not known at the time of arrest, such information could have been established relatively easily and almost immediately by the Applicant, who was a police officer.)

[8] In other words, by 13 or 17 May 2013, when the Applicant consulted with his attorney, Mr Ikaneng, enough information was available for purposes of the contents of the 6-month notice. Yet, according to the Applicant, instead of preparing the 6-month notice and dispatching it the attorney informed him that before he could properly advise him on the prospects of success of his claim, he (the attorney) needed access to the contents of the police docket. Seemingly, because the Applicant was at the time a police officer, the attorney apparently suggested that he approach the investigating officer on the matter and request copies of the contents of the police docket.

[9] In paragraph 4.8 of his affidavit, in support of the application for leave to permit the filing of a supplementary affidavit, the Applicant acknowledged that he *"should have been aware of the fact that criminal proceedings were still pending and that notwithstanding the contemplated civil action I would not have been entitled to a full copy of the police docket, inclusive of all the parts thereof, at least until the criminal matters have reached disclosure stage"*. I dare say even more so, since the Applicant was (and presumably still is) a police officer and he would have been familiar with these processes. Yet, in spite of this, the Applicant involved himself in what the Court believes was an exercise in absolute futility, which was very time-consuming. In paragraphs 12 and 13 of his affidavit in support of the condonation application, the Applicant wrote that he *"went to the Jan Kemp Police Station on countless number of occasions with a view to request same*

[contents of the police docket]. *On each occasion I would be advised that the investigations are still continuing and as a result I cannot be furnished with a copy of the contents of the docket*". In paragraph 4.9 of his affidavit, in support of the application for leave to permit the filing of the supplementary affidavit, the Applicant wrote "*The only way in which I could have obtained a portion of the docket at that stage was when the criminal proceedings proceeded to the phase where the State had to disclose to an accused as per the Criminal Procedure Act. Even at that stage my attorney would not have been in a position to obtain the full docket and would have received [only] the portion of the docket that contains all the statements. My attorney would not have been placed in possession of the investigative diary and various documents which is [are] quintessential in considering the merits of an unlawful arrest*". As far as the Court is concerned, it is not far-fetched to conclude that the Applicant would have known all this by virtue of his position and experience as a police officer. Yet, he undertook a time-consuming and futile exercise to obtain something which he himself must have been fully aware was not possible at that stage.

- [10] Presumably because he was not happy with his first attorney, Mr Ikaneng, the Applicant then approached a second attorney, Mr Isang Nakale, of Isang Nakale Incorporated. It was Mr Nakale who wrote the requisite 6-month notice - on 10 November 2014 - and dispatched it to the Respondent's lawyers at the office of the State Attorney, who acknowledged receipt thereof on 14 November 2014. The very next month, on 02 December 2014, Mr Nakale issued summons and had it served on the Respondent through the office of the State Attorney. And therein lies the problem. Section 3(1) of Act 40 of 2002 is very clear:

"No legal proceedings for the recovery of a debt may be instituted against an organ of state unless:

- (a) *the creditor [the person who intends to institute legal proceedings against an organ of state] 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..."*

And according to section 3(2):

"A notice must-

- (a) *within six months from the date on which the debt became due, be served on the organ of state ...; 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"*

[11] It is common cause that when legal proceedings were commenced with against the Respondent, notice of the Applicant's intention to institute the legal proceedings had not been served within the requisite 6 months of the date that the cause of action arose, or the debt had become due. The Applicant was arrested and detained on 07 May 2013. His notice was only written and dispatched to the Respondent's attorneys on 10 November 2014 – 18 months later. Summons was issued and served on 02 December 2014. An application to condone the Applicant's failure to comply with the 6-month notice requirement set forth in section 3(2)(a) was only brought on 23 July 2015 by Isang Nakale Incorporated. Legal proceedings had by then already been commenced with against the Respondent. This raises the question whether the summons issued and served on the Respondent was defective, and therefore to all intents and purposes non-existent – at least until the defect was cured by way of a successful condonation application.

[12] The Applicant parted ways with his second firm of attorneys, Isang Nakale Incorporated, and ended up with a third firm, Gildenhuis Malatji Incorporated. This is also the firm that brought the application on behalf of the Applicant for leave to permit the filing of a supplementary affidavit in the condonation application which was brought by the second firm, Isang Nakale Incorporated. The third firm also brought the application for leave to appeal on behalf of the Applicant after the Court, while granting the Applicant leave to file the supplementary affidavit, had dismissed the condonation application.

[13] According to 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;*
- (a) 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”*

[14] When the Applicant instituted legal proceedings by issuing and serving summons on the Respondent, the latter resisted the action by filing a special plea on 23 March 2015 wherein the Respondent took issue with the fact that the Applicant had not complied with the provisions of section 3 of Act 40 of 2002 in that the Applicant had failed to serve notice within the requisite 6 months before instituting legal proceedings against the Respondent. When the special plea was filed, there was no condonation application before the Court – such application was only brought on 23 July 2015.

- [15] One of the issues that arises from the Applicant's non-compliance with the provisions of section 3(2) is whether the debt might have been extinguished by prescription. More so, considering the summons issued and served on the Respondent may well, as explained above, have been defective and was accordingly to all intents and purposes non-existent (until a successful condonation application). During the hearing of the application for leave to appeal, it was argued on behalf of the Applicant that the debt had not in fact prescribed. The question remains open.
- [16] The other issue worth exploring is whether *good cause* existed for the Applicant's failure to comply with the provisions of section 3(2), i.e. to comply with the 6-month notice requirement. The Applicant's failure to comply with this requirement has been dealt with extensively above. At the hearing it was strenuously argued on behalf of the Applicant that good cause did exist. The Court was not swayed, and remains unconvinced. The question whether or not the Respondent was unreasonably prejudiced by the Applicant's failure to comply with the 6-month notice requirement thus becomes academic.
- [17] The appeal has, in the Court's view, no reasonable prospect of success. Nor is there any compelling reason why the appeal should be heard.

Conclusion

In the circumstances, the following order is made:

THE APPLICATION FOR LEAVE TO APPEAL IS DISMISSED WITH COSTS.



Dauds AJ

For the Applicant:	Adv. C.G.V.O Sevenster
Applicant's Attorneys:	Gildenhuys Malatji Incorporated, Pretoria
For the Respondent:	Adv. A.G. van Tonder
Respondent's Attorneys:	State Attorney, Kimberley