



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: ✓
7/5/19	
DATE	SIGNATURE

Case No: A858/2015

In the matter between:

SABELO MISELO

Appellant

and

**MINISTER OF SAFETY AND SECURITY
MINISTER OF JUSTICE
DEON ACKERMAN**

First Respondent
Second Respondent
Third Respondent

JUDGMENT

D S FOURIE, J:

[1] This is an appeal against an order of the Court *a quo* granted by Hughes J on 20 February 2015 in terms whereof the appellant's application for condonation in terms of s 3(4)(b) of the Institution of Legal Proceedings Against Certain Organs of State Act No 40 of 2002 was dismissed. That Court granted leave to appeal to the Full Court of this Division on 23 October 2015.

BACKGROUND

[2] On 14 July 2014 the appellant issued an application in terms whereof he applied for condonation for the late filing of the written notice provided for in s 3(1)(a) of the Act. According to the founding affidavit it appears that on 19 February 2012 the appellant was arrested on a charge of rape. After a few days of his arrest his bail application was refused and he was detained for a period of approximately 16 (sixteen) months. On 29 July 2013 he was acquitted. Notice to the respondents was only given on 12 June 2014.

[3] The relief sought in the notice of motion reads as follows:

"That the late filing of the written notice provided for in section 3(1)(a) of Act 40 of 2002 addressed to the respondents, be condoned."

[4] The respondents are the Minister of Safety and Security, the Minister of Justice and Deon Ackerman. It appears not to be in dispute that the appellant was arrested by the third respondent, a member of the South African Police Service. This explains why the first and third respondents have been joined. It is not clear why the second respondent has been joined. In his heads of argument counsel for the appellant has pointed out that summons was issued *"to the correct parties"*, who are now the Minister of Police, the National Director of Public Prosecutions and Deon Ackerman.

[5] The statutory notice was addressed to the Minister of Safety and Security, the Minister of Justice and Deon Ackerman. The reason why the

citation of the first respondent has been changed, so it appears, is to rectify a mistake as far as the designation of the first respondent is concerned. The same cannot be said as far as the second respondent is concerned. According to counsel for the appellant the second respondent has in the meantime been replaced with another party in the action, being the National Director of Public Prosecutions.

[6] In the papers before us there is no allegation that the statutory notice was also served on the National Director of Public Prosecutions, nor has a copy of such a notice been attached to the founding affidavit. The relief sought in the notice of motion can therefore not apply to the National Director of Public Prosecutions as that office is not a party to the proceedings before us. I shall therefore accept that this appeal relates only to the first and third respondents and not also to the second respondent (Minister of Justice) as he has been replaced in the action by another party.

THE AFFIDAVITS

[7] The appellant pleaded his case for condonation as follows:

"3.3 On or about 19 February 2012 and at Mamelodi East, I was arrested wrongfully by a member ... on a charge of rape ...

3.4 On or about twelve days after my arrest, I applied formally for bail but (it was) turned down by the second respondent and I was further detained until the date of my acquittal on 29 July 2013 ...

- 3.5 *As from the outset I pleaded not guilty on the alleged charges and did my utmost best to prove ... that I was innocent on the allegations made against me.*
- 3.6 *The DNA samples taken was already forensically analysed and the outcome thereof in the possession of the first and third respondent as early as 21 May 2012 which supported my innocence and still they elected to continue with the deprivation of my constitutional right to freedom of person and I was detained as such. I attach hereto a letter dated 21 May 2012 as proof thereof ...*
- 3.7 *Due to the gross infringements of my constitutional rights at the hand of the respondents I decided to institute a claim for damages due to the obvious unlawful arrest and further impairment suffered by me.*
- 3.8 *As a layman I was not aware of the time limits as required by the Act and due to the long period detained I was also out of pocket to consult a lawyer immediately."*

[8] There is also an explanation to indicate that his claim had at that stage not yet become prescribed and that the respondents *"were not unreasonably prejudiced by the delay in sending of my written notice."* A copy of this notice is attached to the founding affidavit.

[9] The substance of the defence raised on behalf of the first and third respondents is that the appellant had to show *"good cause"* for condonation and that he has failed to do so. It is also pointed out that no sufficient and acceptable explanation covering the entire period of the delay has been given and that the appellant has failed to deal properly with the prospects of success as required by

the relevant legislation. The appellant's allegation that the respondents would not unreasonably be prejudiced is denied and it has been alleged that the first respondent *"is prejudiced by the failure to give notice setting out briefly the facts giving rise to the debt and such particulars of such debt as are within his knowledge"*.

[10] In refusing the application, the Court *a quo* was of the view that the appellant's explanation for the delay was lacking in substance as he has failed to set out in detail acceptable reasons for the entire period of the delay. Turning to the prospects of success, it was pointed out by the Court that *"as soon as the applicant became aware of the DNA results he had strong merit on his side against the respondents"*, but later in the judgment the learned Judge indicated that *"I have not been provided with the entire docket to examine and consider this aspect"*.

DISCUSSION

[11] Section 3(1) of the Act provides that no legal proceedings for the recovery of a debt may be instituted against an organ of State unless the creditor has given the organ of State notice in writing of his or her intention to institute the legal proceedings in question. In terms of ss (2) a notice must be served on the organ of State within six months from the date on which the debt became due.

[12] Sub-section (4) makes provision for condonation of a creditor's failure to give proper notice as required. It provides as follows:

"(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."

[13] According to the affidavits filed in the Court *a quo* it appears to be common cause between the appellant and the first and third respondents that the claim has not been extinguished by prescription. This was also accepted by the Court *a quo*. The issues before us are therefore first, whether "good cause" has been shown by the appellant and second, whether the first and third respondents as organs of State would not unreasonably be prejudiced by the appellant's failure to give notice in time.

[14] Our Courts have in the past refrained from attempting to formulate a definition of what constitutes "good cause", because to do so would hamper unnecessarily the exercise of the Court's discretion (Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A and Ford v Groenewald 1977 (4) SA 224 (T) at 225E-G). In Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) at 316E-G the following was said in this regard:

"'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These

may include prospects of success in the proposed action, the reasons for the delay, 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 therefore."

[15] In Bertie van Zyl (Pty) Ltd & Another v Minister for Safety and Security & Others 2010 (2) SA 181 (CC) at par 14 the Constitutional Court held that lateness is not the only consideration in determining whether condonation may be granted. It pointed out that the test for condonation is whether it is in the interests of justice to grant it. This principle was further explained by the Constitutional Court in Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC) par 20 where it was stated:

"This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[16] It was pointed out in the same judgment (par 22) that an applicant for condonation must give a full explanation covering the entire period of the delay and the explanation given, must be reasonable. However, the interests of justice also require that all issues pertaining to a matter be ventilated fully and for all parties to be given the opportunity to state their case as comprehensively as

possible (F v Minister of Safety and Security & Others 2012 (1) SA 536 (CC) par 34).

[17] The factors that a Court should take into account must not be considered in isolation. The weight to be given to any factor depends on the particular circumstances of each case. These factors are not individually decisive but must be weighed the one against the other (Harms, Civil Procedure in the Superior Courts, B27.7, B-182 and the authorities cited by the learned author). For instance, good prospects of success on the merits might tip the scale in an applicant's favour, notwithstanding a weak explanation for the delay. In these circumstances the strength of an applicant's case on the merits becomes crucial (Smith v Saambou Bank Ltd 2002 (6) SA 346 (SECLD) at 349C-D and Creative Car Sound v Automobile Radio Dealers Association 2007 (4) SA 546 (D&CLD) at 555C-D).

[18] According to the founding affidavit it appears that the appellant's cause of action against the first and third respondents is that of unlawful arrest and detention. The first and third respondents have admitted the arrest and detention. This constituted a deprivation of the appellant's liberty and therefore the arrest and detention is *prima facie* wrongful. It is now for the first and third respondents to prove the lawfulness of the arrest and detention (Lombo v African National Congress 2002 (5) SA 668 (SCA) at 680 par 32). However, if the arrest was performed in terms of a warrant, the onus of proving that the warrant was irregular and therefore the arrest unlawful, rests on the plaintiff or the appellant in this case (Cresto Machines v Die Afdeling Speuroffisier Noord-Transvaal 1972 (1) SA 376 (A) at 394G). It has not been pleaded by the first or third respondent

that the arrest took place with a warrant. It therefore appears to me, on the papers before us (and I say no more in this regard), that *prima facie* the appellant has demonstrated a strong case on the merits for the purpose of condonation.

[19] However, "*good cause*" also looks at other factors which bear on the fairness of granting the relief sought. In this regard it appears that the statutory notice was late by approximately one year calculated from the date he was acquitted. The appellant's explanation is that he was not aware of the time limits as required by the Act and, as he was incarcerated for a period of approximately 16 months, he was also "*out of pocket to consult a lawyer immediately*". As I understand this explanation it is intended to apply to the entire period of the delay. Although the explanation is very brief, I have no reason to doubt his *bona fides*. The appellant appears to be a layman and one should be careful not to penalise a person in his position unnecessarily because he was unaware of a statutory provision. Subject to what I say below, his lack of knowledge appears to be a reasonable explanation.

[20] His failure to give notice in time, and to provide a more detailed explanation for the long delay, must now also be weighed against possible prejudice which the first and third respondents may suffer. In this regard I assume that some prejudice with regard to the administration of justice or other parties to the litigation may be inevitable. That is why, it seems to me, "*prejudice*" is qualified in s 3(4)(b)(iii) of the Act. It states that the Court may grant condonation if it is satisfied that, *inter alia*, the organ of State was not "*unreasonably prejudiced*" by the failure.

[21] The only prejudice raised by the first and third respondents is the failure to give notice "*setting out briefly the facts giving rise to the debt and such particulars of such debt as are within his knowledge*". The statutory notice dated 10 June 2014 indicates the opposite. It refers to:

- (a) the name of the appellant and the date of his arrest;
- (b) a charge of rape;
- (c) the name and number of the arresting officer, i.e. the third respondent;
- (d) the case number and police MAS reference number;
- (e) the fact that the appellant was acquitted on 29 July 2013;
- (f) an allegation that he was unlawfully arrested and detained;
- (g) a claim for damages in the amount of R12 480 000.00 consisting of R150 000.00 for loss of income and R12 330 000.00 for general damages;
- (h) a reference to s 3 of the Act and a request to condone the late notification.

[22] In my view the notice speaks for itself. All the necessary particulars to identify this case and to investigate it properly were given to the first and third respondents. It therefore appears to be a proper notice, save for it being out of

time. Furthermore, it also appears that the arresting officer (third respondent) was still available at the time when the answering affidavit was filed as that affidavit was prepared also on his behalf. In short, it does not appear that the long delay had resulted in any unreasonable prejudice for the first or third respondent.

[23] Taking into account all these considerations and having weighed the one factor against the other, it appears to me, on the papers before us, that the appellant has demonstrated, not only that the first and third respondents were not unreasonably prejudiced, but also that he has good prospects of success on the merits. Both these factors taken together should tip the scale in the appellant's favour, notwithstanding a very brief and perhaps incomplete explanation for the long delay. Having considered all these factors, it seems to me that it will be in the interests of justice to grant condonation. In the result I am of the view that the appeal should succeed only insofar as it relates to the first and third respondents. No order for costs was granted by the Court *a quo*. I have no reason to interfere with that part of the order.

ORDER

I propose the following order:

- (1) The appeal insofar as it relates to the first and third respondents, is upheld;
- (2) The order of the Court *a quo* is set aside and replaced with the following:

"(a) The applicant's late filing of the written notice provided for in s 3(1)(a) of Act 40 of 2002 is condoned insofar as it relates to the first and third respondents.

(b) There shall be no order for costs."

(3) Costs of the appeal shall be paid by the first respondent.



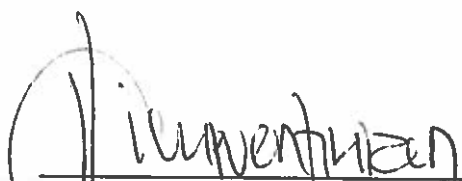
D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

I agree, and it is so ordered.



S BAQWA
JUDGE OF THE HIGH COURT
PRETORIA

I agree.



N JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT
PRETORIA